A Rhinoceros in the Room?
Power, Authority and the Wisconsin Supreme Court

American Inns of Court, James E. Doyle Chapter
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I. ON POWER, AUTHORITY, AND WILDLIFE.

A. Two Pithy Quotations.

> If a rhinoceros were to enter this restaurant now, there is no denying he would have great power here. But I would be the first to rise and assure him that he had no authority whatever.

--G. K. Chesterton (1874 - 1936), English writer and political commentator

> Authority and power are two different things: power is the force by means of which you can oblige others to obey you. Authority is the right to direct and command, to be listened to or obeyed by others. Authority requests power. Power without authority is tyranny.

--Jacques Maritain, "The Democratic Charter," Man and the State (French philosopher, written in 1951)

B. Every Day Illustrations

1. Attorneys as agents, *See 1 Restatement, Law of Agency, sec. 8*.

a. dismissing a lawsuit.

b. settling a lawsuit.

2. Judges.

> We are not final because we are infallible, but we are infallible only because we are final.

Brown v. Allen, 344 U.S. 443, 540 (1953) (Justice Robert Jackson, concurring)

II. WISCONSIN SUPREME COURT POWER AND AUTHORITY

A. Source of Authority.

(1) The supreme court shall have superintending and administrative authority over all courts.

(2) The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction.

(3) The supreme court may review judgments and orders of the court of appeals, may remove cases from the court of appeals and may accept cases on certification by the court of appeals.

Article VII, Section 3, Wisconsin Constitution (as amended in 1977 with court reorganization adding the Court of Appeals)

The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine same.

Article VII, Section 3, Wisconsin Constitution (as originally adopted).

B. Article VII, Section 3 is a Restriction of Power.

The purpose of the appellate jurisdiction language in Article VII, Section 3:

was to repel the normal inference from the designation of the Supreme Court as a court that its powers extended beyond appellate jurisdiction. [This] clause, therefore, restricts the court to appellate jurisdiction, defines the geographical extent of that jurisdiction, and creates an exception for cases later to be provided in which it is to be vested with a jurisdiction original in character.

John D. Wickhem, *The Power of Superintending Control of the Wisconsin Supreme Court*, 1941 Wis. L. Rev. 153, 155 (1941).

Justice Wickhem summarized the Court's constitutional authority to be comprised of "three distinct mandates:"

> First, the restriction of the court to appellate jurisdiction except as otherwise provided; second, the grant of superintending jurisdiction over inferior courts; third, the grant of original jurisdiction to protect the sovereignty of the state and the liberties of the people, to be exercised by specified prerogative or quasi-prerogative writs."

Id. at 159.

C. Appellate Authority, Wis. Stat. §§808.10 and 808.05

D. Supervisory Authority, Wis. Stat. §809.71.

1. an "extraordinary and drastic remedy."

A Supervisory Writ is an "extraordinary and drastic remedy," to be issued "only upon some grievous exigency." It is not a substitute for an appeal. *State ex rel. Dressler*, 163 Wis. 2d at 630; *see also State ex rel. Kalal,* 2004 WI 58, ¶17.

A petitioner seeking a Supervisory Writ must establish the following:

1. an appeal is an inadequate remedy;
2. grave hardship or irreparable harm will result;
3. the duty of the trial court is plain and it must have acted or intends to act in violation of that duty;
4. the request for relief is made promptly and speedily.

State ex rel. Kalal, 2004 WI 58, ¶17, 271 Wis. 2d 633, 681 N.W.2d 110; *see also State ex rel. Prentice v. Milwaukee County Court*, 70 Wis. 2d 230, 234-35, 234 N.W.2d 283 (1975); *State ex rel. Dressler v. Racine County Circuit Court*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991).

> The first and principal purpose of the constitutional grant [of superintending control] is to insure protection of the rights of persons as litigants. Since the ordinary processes of the courts will normally take care of these rights, the other aspect of the constitutional grant and the principle behind the court's administration of this power is that the field of superintendence be not lightly entered for the obvious reason that *too*

> *ready exercise of the power, when other adequate means of protecting the litigant exist, will interfere with the trial of cases in the lower court, tend to undermine the morale and confidence of trial courts, disrupt the administration of justice,* and cast disproportionate burdens upon the appellate [i.e., Supreme] court.

John D. Wickhem, *The Power of Superintending Control of the Wisconsin Supreme Court*, 1941 Wis. L. Rev. 153, 162 (1941) (emphasis added).

2. available only to parties to the lower court action.

> "(1) Petitioner [Heil] is not a party to the action in the circuit court and it is a well established rule that superintending control will be exercised only at the behest of a party to a proceeding in an inferior court . . ."
>
> *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 43-44 (1939).
>
> The purpose of this jurisdiction is to protect the legal rights of a litigant when the ordinary processes of action, appeal and review are inadequate to meet the situation, and where there is need for such intervention to avoid grave hardship or complete denial of these rights. Thus, it is held that before the court will intervene, it must appear that there is no adequate remedy by appeal or writ of error. For example, the order of the inferior court or its inaction, if that is the thing objected to, may be of such character as not to be appealable, or appeal from the judgment may come too late for effective redress. It is variously stated in the cases that to warrant exercise of the power there must be a clear legal right on the part of the applicant; a plain duty on the part of the inferior court; the remedy by appeal or writ of error must be inadequate; there must be an exigency calling for prompt action; the power is not to be used to perform the office of appeal or writ of error and the result of a refusal to act and to exercise superintending control must result in grave hardship to the litigant.

John D. Wickhem, *The Power of Superintending Control of the Wisconsin Supreme Court,* 1941 Wis. L. Rev. 153 at 161–62 (citations omitted), *as quoted in In re Jerrell C.J.*, 2005 WI 105, ¶145, 283 Wis. 2d 145, 699 N.W.2d 110 (Prosser, J., concurring in part and dissenting in part).

3. superintending control through policies

The Court's power of superintending control has been used in more recent years to develop policies governing the lower courts, judges, the legal profession, and the

administration of justice, *see In the Matter of the Promulgation of a Code of Judicial Ethics*, 36 Wis. 2d 252, 153 N.W.2d 873 (1967) and *In re Kading*, 70 Wis. 2d 508, 235 N.W.2d 409 (1975) (Code of Judicial Ethics); *In re Integration of the Bar,* 249 Wis. 523, 25 N.W.2d 500 (1946) (the requirement of a unified bar); and *In re Jerrell C.J.*, 2005 WI 105, ¶¶3, 41, 283 Wis. 2d 145, 699 N.W.2d 110) (requiring the recording of certain custodial interrogations of juveniles).

E. Original Action Jurisdiction

When asked to exercise its original action jurisdiction, the Court reviews the request against three criteria:

> (1) whether the matter is *publici juris*;
>
> (2) whether there is an adequate remedy available in the lower courts;
>
> (3) whether there are disputes of material fact and/or a factual record that needs to be developed for proper resolution of the legal issues.

See Petition of Heil, 230 Wis. 428, 284 N.W. 42 (1939); *In re Exercise of Original Jurisdiction of the Supreme Court*, 201 Wis. 123, 229 N.W. 643, 645 (1930); *Green for Wisconsin v. State Elections Board*, 2006 WI 120, 297 Wis. 2d 300, 302, 723 N.W.2d 418.

As rare as original actions in the Supreme Court are, even more rarely the Supreme Court will use its superintending control over the lower courts as an aid to its exclusive jurisdiction over the dispute before it as an original action. *See State ex rel. Barber v. Circuit Court,* 178 Wis. 468, 190 N.W. 563 (1922); *State of Wisconsin ex rel. Ralph Nader and Peter Camejo v. Circuit Court for Dane County, et al.*, No. 04-2559-W (9/30/04).

III. STATE EX REL. OZANNE V. FITZGERALD, et al. and STATE OF WISCONSIN et al. v. CIRCUIT COURT FOR DANE COUNTY

A. Procedural History

3/16/11 Ozanne filed in Dane County Circuit Court an open meetings suit and motion for TRO to prevent publication of Act 10. *State ex rel. Ozanne v. Fitzgerald, et al., 2011-CV-1244.*

3/18/11 Circuit Court granted TRO.

3/21/11 Secretary of State sought interlocutory appeal of interim order to court of appeals. *State ex rel. Ozanne v. Fitzgerald, et al., Appeal No. 2011AP613-LV (Dane County 2011-CV-1244).*

3/24/11 Court of Appeals certified the interlocutory appeal (Appeal No. 2011AP613-LV) to the Supreme Court.

4/7/11 "State of Wisconsin" and Secretary of the DOA filed with the Supreme Court a Petition for Supervisory Writ, to be directed to the circuit court handling the Ozanne open meetings case. *State of Wisconsin, et al. v. Circuit Court of Dane County, et al., 2011AP765-W.*

5/4/11 Supreme Court ordered Response to Petition for Supervisory Writ (2011AP765-W).

5/26/11 Dane County Circuit Court issued a final decision on the merits of Ozanne's Open Meetings suit (State ex rel. Ozanne v. Fitzgerald, et al., 2011-CV-1244). No appeal is filed.

6/2/11 Supreme Court ordered the parties in the certified interlocutory appeal (Appeal No. 2011AP613-LV) and those in the Petition for Supervisory Writ (2011AP765-W) to address the effect of the circuit court's final decision on those two actions, and related questions regarding Supreme Court jurisdiction.

6/6/11 Oral Arguments held in both cases, together.

6/14/11 Supreme Court entered Order in both cases (excerpts in materials).

B. Denied Certification in Interlocutory Appeal.

C. Accepted the Petition.

1. implicitly ruled that it had no superintending control jurisdiction

2. converted the petition into one for original action

3. did not address the fact that there was already a final decision on the merits—other than to vacate and declare void *ab initio* all orders and judgments of the circuit court

4. did not address the availability of an appeal

5. accepted the petition for original action/jurisdiction and decided the merits—sort of.

D. By What Authority??

1. the Order does not say.

2. Justice Prosser: We would get it one way or another anyway, and this is important.

3. Justice Crooks: We generally could but we should not.

He said, at paragraph 149:

> These cases exemplify the importance of compliance with procedural rules and the rule of law in maintaining the legitimacy of our government. Just as there is a right way and a wrong way to proceed with the legislative process, there is a right way and a wrong way to accept these issues for review. I dissent in part because, in taking these matters as an original action and swiftly vacating the circuit court's orders without sufficient examination the majority has proceeded in the wrong way.

4. Chief Justice Abrahamson: There is no authority.

She suggested at paragraph 77 that the "legitimacy of the judicial process" was at stake, and explained at paragraph 84 that:

> [I]n a case turning on separation of powers and whether the legislature must abide by the Open Meetings Law and the Wisconsin Constitution in adopting the Budget Repair Bill, it is imperative that this court carefully

> abide by its authority under the Constitution and follow its own rules and procedures.
>
> Summing it up:
>
> The order today departs from fundamental principles. It fails to abide by the court's Constitutional authority and its own rules and procedures and harms the rights of the people from whom our authority derives. The legitimate and constitutional route to decide the issues presented is through an appeal.

Id. at ¶127.

IV. A COURT OF RHINOCEROS?

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious.
>
> If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.... Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).