View from the Bench: A Conversation with Dane County Judges Richard G. Niess and Stephen E. Ehlke

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Recently, I had a conversation with Dane County Circuit Court Judges Richard G. Niess and Stephen E. Ehlke. They provided interesting insight on what they have seen work and not work in their courtrooms. Their candid and insightful comments share the common themes of respect and preparedness. Our community is lucky to have these gentlemen presiding over our cases.

Thank you very much for sitting down with me today. Can you please introduce yourselves?

Judge Niess: I'm Rick Niess. I've been a Dane County Circuit Court Judge since 2004. I've been on the civil rotation since 2005 – which includes family law – and will be on the civil rotation for the next two years, or at least Branch 9 will. Before that, I did a year or so of criminal rotation.

Judge Ehlke: I'm Steve Ehlke. I've been a judge for just over nine years. For the first eight years, I was on the criminal rotation. I've been on the civil rotation for the last year and a half, coming up on two years.

What did you do before becoming a Judge?

Judge Ehlke: I was in the District Attorney's Office here in Dane County for three years. Then I was at the Bell Metzner firm for about ten years doing insurance defense work. And then ten years in the U.S. Attorneys Office. Five of that was on the criminal side and then on the civil side the last five years.

Judge Niess: I was in civil trial practice at a private firm in Madison from 1978 to when I took the bench.

How do you see the role of a trial judge in a civil case?

Judge Ehlke: At trial, I would say the main role is to make sure that Wis. Stat. § 906.11 ["Mode and order of interrogation and presentation"] is enforced, meaning don't waste time, don't be cumulative. If anyone wonders what that statute is, I would look at it. Rule 611 in federal court. And then just in general, I think the role of a civil trial judge is to keep cases moving along so that the litigants can get resolution of their disputes. My clerk is very good at scheduling status conferences to keep cases moving.

In Dane County, is there a general timeframe for how long a civil case should take to resolve?

Judge Niess: Well, it depends upon the case. There are statewide guidelines that are in place. I try to move things along as quickly as possible, and I don't think that the end result of any particular case is well-served by just dealing with deadlines. You've got to take each case individually and formulate a plan with the lawyers that works for the case, rather than strictly adhering to guidelines. Having said that, I usually get personal injury cases done in less than a year. Certainly less than 15 months. Start to finish. I'm talking about from filing until we get a stipulation and order for dismissal or a jury verdict and judgment. Trials to the court are much quicker because you can eliminate a lot of steps that you

would otherwise have with a jury, such as motions *in limine* hearings and summary judgment motions.

Are you finding there are more trials to the court than there are jury trials?

Judge Niess: Many more. The jury trial is an imperiled and endangered species. It's very unfortunate. I look forward to jury trials. So does Steve. It is the pinnacle of what we do here, but we're not getting the opportunity to do it. I think the system suffers as a result. Number one, we have fewer published appellate decisions dealing with jury issues. We don't have development of the law. Number two, I think twelve people from the community are much better at determining factual situations than a single judge. Number three, judges and trial lawyers are getting rusty at trial skills.

Why do you think there are fewer civil jury trials?

Judge Niess: It's a complicated thing. When I started out in 1978, we were just coming out of the golden years for civil trials. People tried a lot more cases. I think there were a lot of factors that changed that. Number one, a change in the Rules of Civil Procedure encouraged the parties to develop the facts so that decisions could be made about settlement. Number two, we had a judiciary that was pushing mediation. Some because they didn't want to do jury trials; others because they didn't know how to do jury trials. We had a number of trial judges come from areas that they've never been in a civil jury trial and frankly, they're not comfortable doing that and they were pushing settlement. Oftentimes, time and time again, the judge would push settlement, pre-try the case to death and just never get to a jury. I think we've also evolved to where the civil jury trial is getting less emphasis at law schools. I don't see many law students come through the courthouse. There should be a concerted effort in the law schools to have students sit through jury trials, especially those who are in the trial advocacy courses. The only students we see are in the internship program or the clinical programs.

I think cost is also a big factor.

Judge Ehlke: The cost factor is huge. There is outside pressure from insurance companies. They just look at the dollars, and it's a chicken and egg thing.

How can trial lawyers help the court do its job?

Judge Ehlke: Well, obviously, be prepared. Also, when you file a motion, don't throw every argument under the sun into your brief. Pick the two or three best arguments. It makes our job a lot easier. I think sometimes people forget that the case might be really important to you, but we've got 200 cases pending. The more succinct you are, the easier it is for us to focus on and understand the case. Also, keep us apprised of what's going on. And I don't mean inundate us with status updates every day. But a call to our clerk before a two week trial letting us know the lawyers are talking and the case might settle will help our calendaring.

Judge Niess: We've got so many cases. I don't remember a case from one week to the next. If you give me a little bit of a hint as to who you are, who your client is, and what your role is, it may trigger a synapse in my head and I might very well remember the case. Otherwise, I'll just go to the computer and figure out where I left off the last time.

Judge Ehlke: And the other thing, just a practical tip, it's really important that you check in with the bailiff. The bailiff doesn't necessarily know who you are or who you represent, and I think it's just a polite thing to do too. You'd be surprised how much of what happens in the courthouse is run by the bailiffs and the clerks and the secretaries.

Judge Niess: I've always said that the clerks hold the keys to the kingdom. They are in charge of scheduling. They can solve a lot of problems. Both of us have outstanding clerks. They are problems solvers. They cannot give you legal advice, but they can tell you about all the procedural stuff. They can tell you about practices of the court that need to be followed in order to move things along. And

they can intercede and get you to the right person if they're not the right person to talk to. They are invaluable and it pains me when I see them abused. It does not happen often, but it happens. Railing at a clerk is counterproductive and usually gets my attention, and you don't want that kind of attention from the judge.

What advice would you give to less experienced lawyers?

Judge Ehlke: I think less experienced lawyers ought to connect with more experienced lawyers. Newer lawyers should get involved in mentoring organizations like the Melli Mentorship Program through the Dane County Bar and Inns of Court. If you're spinning your wheels, call up an experienced lawyer. Also, newer lawyers need to think about what you want to accomplish before a scheduling conference. Experienced lawyers will have thought about what they want to accomplish; the newer lawyers don't think about it. Newer lawyers also need to pick up the phone and talk to the other side before bringing an issue to the court's attention. There is so much that can be dealt with by a phone call. Another thing I do, I still do, is once a year sit down and read the Rules of Evidence from beginning to end. You'd be surprised what's in there.

What advice would you give to more experienced lawyers?

Judge Niess: The difference between an experienced lawyer and an inexperienced lawyer is night and day. It makes our job so much more fun to have really good counsel on both sides of the case. I have very little to say to older lawyers, they're a joy to have around.

Judge Ehlke: They should spend a little bit of time learning about CCAP. One of the frustrations I've heard from my clerk and secretary is that more experienced lawyers don't understand the CCAP world. For example, if you file something electronically, the Rules say don't send a duplicate copy by fax. Don't be inundating us with faxes.

How would you gauge the state of professionalism amongst lawyers today?

Judge Niess: I think more experienced lawyers have learned that it's no fun constantly going to war with the other side. Being in a negative state is a drain and a waste of energy. You can be a worthy and aggressive advocate without being a jerk about it, and I think the more experienced lawyers learn that lesson, either because they realize it hasn't helped them in the past, or they've been on the receiving end and they realized that it's just uncomfortable. I think the more experienced lawyers have also learned that it's really not helpful to the judges. It just gets in the way. More experienced lawyers have also learned the lesson that when you have your opponent down, and you've got your foot on their throat, figuratively speaking, don't stomp down because your throat may be under their foot a year later.

When I started to practice, I was told I needed to be dressed and ready for court every day. I have observed lawyers becoming more and more casual in their appearance. Is that your observation, as well?

Judge Ehlke: I noticed that when I was in the criminal rotation. After about two years, I put into place a dress code in my courtroom that men have to wear a coat and tie. No tennis shoes. No jeans.

Judge Niess: I have had very few offenses. When I do, I call them up to the bench afterward, quietly, with some exceptions, and just say, you know, I really would like you to wear a tie. I also think it's counterproductive to what a lawyer wants to accomplish to show up looking like you just left a party or something, for several reasons. Number one, dressing up is not that big of a hassle and it shows respect for the court system, respect for the jurors, and respect for the process. Number two, it sets you apart from your client usually. Many of them show up in extremely casual attire and it sets a tone that you are in control.

Are there other keys to success?

Judge Niess: Don't interrupt the judge.

Judge Ehlke: After the Court has ruled, don't keep arguing. Sometimes, lawyers will keep arguing and arguing, and it is very disrespectful. We understand you don't agree with us all the time, and that's part of the job. We have to make a decision. You can appeal. You can ask us to reconsider. But when we're at the hearing or at trial, once we've made our decision, you've got to just accept it and move on.

How can trial lawyers improve their motion practice?

Judge Niess: You'd be surprised how many motions I get where I don't have any idea what they want me to do. Motions are the way to get orders. Orders are for specific relief and you just need to tell me what you want and then explain to me what you want, why you want it, what my authority is, and what standard I have to apply in order to decide whether I can give you the relief or not. And then follow it up either simultaneously or subsequently with the order that you want me to enter. Also, if a motion is unopposed, all you have to do is put in a letter, "I spoke with opposing counsel, they don't oppose it." I'll sign the order immediately. I also disagree with the philosophy that you have to file a default judgment motion just because there are grounds for it. I absolutely disagree with that, especially since default judgments are discretionary anyway. You have a right to decide how you want to practice law. The Rules of Ethics allow lawyers a lot of leeway when it comes to following the commands of their clients. If you don't think it's a good idea, you don't have to file the motion, and then the client can decide whether he or she wants to continue with you or not.

Does using bold type and underlining in briefs really get your attention?

Judge Niess: The screaming briefs? No. It gets our attention, but maybe not the kind of attention you want. We're looking for what are the facts, what is the law, and what is my authority? All of the adjectives and adverbs and screaming at us gets in the way. It's static noise.

Do you want full deposition transcripts attached to motions?

Judge Ehlke: No, I don't want the full transcript. It's the job of the other side to point out conflicting testimony and submit those pages.

What about the affidavit? Sometimes I see affidavits signed "upon information and belief."

Judge Niess: It is not an evidentiary fact if it's just on information and belief. That is improper. Legal argument is improper in an affidavit. It's just a factual, evidentiary document and it should be treated as such.

Judge Ehlke: That's another tip for the younger attorneys. The Rules require that it be admissible. A good lawyer on the other side could shoot down an otherwise valid motion for summary judgment because your affidavits aren't right.

When do you hold a motion hearing?

Judge Niess: The default is to not hold a hearing. If a lawyer asks for a hearing, I will always hold it, regardless of what their reason is. But I expect that there is going to be something new said at the hearing that isn't in the briefing. If I call for a hearing and the lawyers have not, then the hearing is for my purposes, not yours. It's usually to address specific questions that I have based on the briefing, and you better come prepared to joust with me, because we do a lot of back and forth in my oral arguments, and I will push an attorney until I get them to either say, "I don't know the answer to the question" or "this is the answer to the question." And do not evade the question. Don't do a song and dance. Answer it and then say, "but judge, let me tell you why this isn't really relevant or why this should not be a concern of yours." I want to get it right every bit as much as you want me to get it right.

Do you want argument at an oral ruling?

Judge Niess: You've got to know your judge. If you trust that the judge has read your briefing, then you don't have to say anything. I will usually ask if anyone has anything to add. The reason I say that is just to give one more chance. Who knows what came up in the reply brief, or they've been talking to their colleagues and there's something additional they want to bring to your attention. But you're not expected to say anything. What's not helpful is just repeating what you've already said in the briefs.

Judge Ehlke: When I come out there, if it says oral decision, I've read everything. I guarantee you, I've got it roughed out and I know what I'm going to do. Unless I had a colossal misunderstanding of something, I know what I'm going to say, so you don't need to say anything, unless you want to emphasize something to make sure the record is clean to preserve an issue.

When you ask counsel to draft an order, what information do you actually want in it?

Judge Niess: It's the appearances, the date, heard oral argument in open court on the record, and for the reasons stated, the court ruled as follows, and just exactly what was ordered. You don't need to go beyond that.

Judge Ehlke: I agree. And then once it's drafted, just make sure other counsel agree those were the things that were ordered before you submit it. It is much smoother to run it by everybody and say everyone's already signed off on this and we'll sign it immediately.

Judge Niess: Literally, you don't have to have them sign off. Just say everybody approves this and we'll sign it immediately. We'll accept your word as an officer of the court. Otherwise we've got to wait seven business days [under Dane County Local Rule 318] and that's just wasted time.

Since we're talking about motions, I know Judge Niess has a very strict standing order governing summary judgment motions. Why do you have that in place and how does it help you?

Judge Niess: Judge Paul Lundsten was the prime author of the standing order. He involved a number of trial judges and trial lawyers. The whole point was to make sure that a trial judge is given the best chance of success identifying any material facts in dispute on summary judgment. Because if I grant summary judgment and there are disputed material facts, the Court of Appeals will kick it back on that basis. So the standing order puts it all in one document and one fact at a time with a citation for the record so that the other side can either say, "yes that is an undisputed fact" or "no and here is the contrary evidence." My biggest role in summary judgment is to get an undisputed factual record up to the Court of Appeals, because if I don't it just gets kicked back to me. And I'm happy to say that since using this order, I have never had a summary judgment reversed because the factual record was defective in any way.

Judge Ehlke, have you adopted Judge Niess's standing order?

Judge Ehlke: No, I follow his advice on many, many things but not on this one. I don't require it. And not because I necessarily think it's a terrible idea. I don't. But I find that the briefs point out what the material factual dispute is and to me, it just seems like making more work for all the lawyers, so I don't require it.

Are you seeing a lot of *Daubert* motions?

Judge Niess: I've seen a lot of *Daubert* motions. Personally, I think *Daubert* was ill-advised. I never thought it was a good idea. During 26 years in private practice, I never had a problem with experts. Frankly, if they're so bad that they fail *Daubert*, you would want them testifying at trial because you can make some tremendous trial headway by making an expert look to be the fool. I've had two and three day hearings on *Daubert* experts. I bring them both

in, I swear them in and I say debate the point; tell me which one of you is right and which one of you is wrong and why. And even after that, I wasn't able to figure it out. And I don't think I'm any better to figure it out than a jury is. I think a jury of twelve people with common sense can figure it out better than I can.

Judge Ehlke: I haven't had too many *Daubert* motions yet, but it's got to be a really obvious case for me to strike an expert. Unless they're reading tarot cards and trying to predict the future, I'm going to leave it to cross-examination. I'm not saying I would never grant a *Daubert* motion, but most of the time, it's sort of self-policing. A good lawyer who's got a decent case is going to want to have a good expert, right? And so they're not going to put up somebody who's going to be, you know, falling beneath what the *Daubert* rules require, in my opinion. And so, your motion will be considered but it's going to be pretty rare when I grant one of those motions.

Judge Niess: When the *Daubert* rule was adopted in the State of Wisconsin, many judges were absolutely terrified that they were going to get buried with *Daubert* motions. And it just hasn't come to pass.

Judge Ehlke: It was a tempest in a teapot. It hasn't become a huge deal.

How have you seen the discovery practice, if at all, in your courtroom?

Judge Niess: Over the years, I have not had a real great deal of difficulty with discovery disputes. Again, the experienced lawyers know how to figure it out and they know what the law is and they'll deal with it. And eventually, the inexperienced lawyers learn that they have got to turn things over. I saw no need for the recent changes to the discovery rules. I think there are going to be all kinds of unintended consequences. For example, you are limited to 25 interrogatories. By the time you get name, address, telephone number, and have you given a statement, you're already through almost 20% of the interrogatories. If you've got a complex personal injury case, medical malpractice case, trade secret case, unless you get an agreement from counsel, then you've got to come to the court. I'm expecting that there's going to be a lot more litigation in the courts over discovery disputes because of these amendments, which were enacted without any input as far as I can tell from either the Bar or the court system. They are just ill advised, up and down the line.

Judge Ehlke: I totally agree. In my judgment, the new changes were a solution in search of a problem. It just really wasn't a problem. And the irony is I predict that they will create more discovery battles and disputes. And I hope that the Bar doesn't start playing games with filing motions to dismiss to get the automatic stay on discovery. That will not be well received by the bench.

Is there anything else you'd like to share with our members?

Judge Ehlke: Judges like keeping in touch with the Bar. Most of us liked being in practice and liked going to depositions. So don't be afraid if you see us standing in line at Starbucks or walking around at the farmers market to come up and talk to us. We like to talk to lawyers.

Judge Niess: Yeah, it is an isolating job. There's no doubt about it. But one thing they should know is judges talk to each other a lot. Just as you sit around on a Friday afternoon exhausted from the week, judges are over here sitting around on a Friday afternoon, talking about some lawyer or another.

I would like to end with a few personal questions. First, if you could have any job other than judge, what would it be?

Judge Ehlke: Major League Baseball umpire.

Judge Niess: I'd be a small forward in the NBA.

Who was your mentor?

Judge Ehlke: John Markson.

Judge Niess: If you're talking mentor, Frank Coyne. If you're talking the person I looked up to most as a judge, James Fiedler. He is the gold standard as far as I'm concerned.

What team are you going to take to win the NCAA Basketball tournament?

Judge Ehlke: I have to say the Badgers.

Judge Niess: The Duke Blue Devils.

Author Biography:

Amy F. Scholl has been practicing with Coyne, Schultz, Becker & Bauer, S.C. in Madison, Wisconsin since 1997. She was recently inducted as a Fellow in the American College of Trial Lawyers. She enjoys representing individuals, insurers, businesses, healthcare providers and long-term care providers throughout Wisconsin.