hallows lecture
of chief justice shirley s. abrahamson

On November 3, 2003, Chief Justice Shirley S. Abrahamson visited Marquette University Law School as the Hallows Judicial Fellow. It was scarcely her first visit to the Law School. Indeed, as the Chief Justice noted near the beginning of her remarks, her extensive association with Marquette Law School since she became a member of the Wisconsin Supreme Court more than 25 years ago has included even service as an adjunct professor. But it was an opportunity for the students in particular to observe, converse with, and learn from the head of Wisconsin's judicial system.

The highlight of the visit was the Hallows Lecture, which Chief Justice Abrahamson delivered in the Weasler Auditorium at the Alumni Memorial Union and which was attended by students, faculty, alumni, and various members of the bench and bar. What follows is an excerpt from the Hallows Lecture.

Again in keeping with the Hallows tradition, I have visited trial courts all over the State. However, I had never sat as a trial judge until July 2002 when I appointed myself to sit as a circuit court judge in Milwaukee County small claims court.

Because I cannot be replaced on the Supreme Court, I can sit only in a court in which there is little likelihood that an appeal will arise. A few small claims cases have come to the Court of Appeals or the Supreme Court, but the number is very small indeed. This was a relatively safe court for me. Besides, if there were an appeal from one of my small claims court cases to the Court of Appeals or Supreme Court, and I were reversed, I need not be embarrassed, I told myself. I would be following in illustrious footsteps: Chief Justice Rehnquist was overturned on appeal when he appointed himself to sit as a district judge!

One of those few appeals marks a useful place to start. Justice Hallows himself wrote a Supreme Court opinion on a small claims case in 1964. An employee had brought an action for $1,297.46 for wages and traveling expenses against an employer. Rather than filing an answer, the defendant employer entered a demurrer and a plea of abatement, explaining that another small claims cause of action was pending and that the maximum jurisdiction was limited to $1,000. The statute governing small claims court pleadings allowed only a demurrer and an answer and provided that any new matter constituting a defense must be so pleaded or would be waived. The small claims court refused to allow the employer to file an answer and viewed the defenses as having been waived. The small claims court granted the employee summary judgment. The Wisconsin Supreme Court affirmed the summary judgment of the small claims court on these technical pleading grounds.

Compare my experience sitting on a small claims court with Chief Justice Hallows's experience in the Supreme Court almost 40 years earlier reviewing a small claims court dispute.

I am on vacation but my robe is on. I've been sitting in chambers hidden from view for about 10 minutes, reading a newspaper. I'm ready to enter the courtroom of the Milwaukee County Circuit Court, Small Claims Division. I'm scheduled to hear and decide cases every 15 minutes. No one showed up for the last case. Several times a day, one or both parties do not show up. So I'm relaxing.

"Match set!" cries the bailiff. I can hear the bailiff through the open door of the judge's chambers.

Match set? Match set? What is the bailiff talking about? Tennis? No case involves tennis. What aspect of popular culture have I missed now? When my son (now a 39-year-old lawyer) was a youngster at home, I was able to keep fairly current. Now I'm hopelessly "not cool."

"Match set," the bailiff explains as he enters

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>
> *—Chief Justice Abrahamson*

Chief Justice Abrahamson and Dean Kearney in the Weasler Auditorium on the occasion of the Hallows Lecture

the chambers wondering why I did not respond, means both parties are here for the case. The parties are seated in the courtroom, and the bailiff has given them general instructions about the procedure to be followed. The parties will be sworn in; they are to give the judge the documents they brought—generally carried in a supermarket plastic bag. Each will have the opportunity to tell his or her side of the story and can call witnesses. Each will be subject to questioning and can question the other side. One speaks at a time—they are not to interrupt each other. They are not to get into an argument. They are to listen to the judge and do what she says.

I enter the courtroom climbing the three stairs to the bench, trying not to trip on my robe. No one is asked to rise and no one stands. Mocking my expectations of courtroom formality, I say to myself, "Please be seated," and I sit.

Match set it is. The plaintiff sits in one row (marked "plaintiff") and the defendant in the row behind (marked "defendant"). I get ready to call the first case and wonder just what possessed me to sit here. I am lonely on the bench as a solo judge. A clerk is in front of me to the left, and a court reporter is to my right. The bailiff is seated below, to the right of the parties. But I am alone.

This is the smallest courtroom in the building, the least ornate, and it is almost dingy—especially in comparison with the marble, mural-decorated Supreme Court courtroom in the State Capitol in Madison, Wisconsin. The Wisconsin Supreme Court sits in one of the most beautiful courtrooms in the nation. Our court proceedings begin with a marshal crying, "All rise. Hear ye, hear ye, hear ye. The Supreme Court of the State of Wisconsin is now in session. Your silence is commanded." Today I say, "Please be seated."

Many lawyers are disdainful about small claims court. I and most of you have succumbed to what Jerome Frank termed the "upper-court myth." We are fascinated with the Constitution and the U.S. Supreme Court. But Chief Justice Charles Evans Hughes admonished California judges that the security of the republic will be found in the treatment of the poor and ignorant. Hughes was right.

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I shuffle the papers and look over the two-page file on the first case. I read the file last night. Not much in it. When I asked to take home the files, the clerk seemed puzzled. Apparently I'm the only judge in Milwaukee County that ever felt the need to study these meager small claims files overnight.

Frankly, I am somewhat intimidated. One trial judge told me as I entered the court building that sitting in small claims court is known as "A Day of Humility." A second judge took me aside and said that half the cases would present bar exam questions to which I would not know the answer. A third judge told me privately that a lawyer, whom the judge was not going to name, predicted that: "The chief will not know how to run a trial court, but she's damn smart." What a ringing endorsement! A fourth judge looked me in the eyes, took my hand, and quietly advised: "Just don't let them see you sweat."

I was sweating. I was worried about my state of preparedness. Training is definitely needed for all judges—and especially small claims judges. The range of cases is huge and you get no help from pleadings or trial briefs.

First, I needed practical hints from experienced judges, but I had had only half a day of mentoring by another judge. The judge's benchbook on small claims courts proved not very helpful. Second, the basic materials are voluminous and were

not familiar. There's a chapter in the statutes on small claims court (including evictions) and another chapter on landlord-tenant relations. There are umpteen pages of regulations issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection on residential rental practices, including how and when to award double damages (which I assumed everyone would try to get). I didn't even know these regulations existed before I came to small claims court. I read a 62-page booklet entitled "The Wisconsin Way—A Guide for Landlords and Tenants," which was designed to assist litigants. Housing issues are really complex and are a large part of the docket. Replevin and UCC cases come to small claims court, as do tort and contract cases. I could not put these materials to memory, and with 15 minutes for each case I would have little time on the bench to look things up—even though I had indexed the materials.

Over the portal of the small claims courtroom, the word *Justice* is carved in the wood. The Latin word *lex*, meaning "law," is chiseled in the stone over the door in the Wisconsin Supreme Court. Small claims court is both a court of justice and a court of law. Justice and law are why I was in the Milwaukee courthouse.

I called the first case. I hoped no one heard the hesitancy in my voice. Each day, the first set of cases consists of motions to reopen a dismissal if one or both parties failed to appear for the trial. The motions were relatively easy. As a rule, they are granted. Justice does not favor a default. Yet default and motions caused numerous appearances before the matter was finally resolved. Not good.

The second group of cases were trials, numerous trials. Some cases were strange, some legally challenging, all interesting, and all serious to the parties. There were fender-benders, evictions (many evictions), car replevins, money damage claims, debts, and much more.

My favorite case was the fender-bender. The plaintiff, a self-represented, soft-spoken, very nervous, near-to-tears woman, told her story from the stand. She asserted that the defendant's car was speeding in the parking lot and hit her car as she was pulling out of a parking space. The defendant was represented by the insurance company's lawyer, who gently cross-examined the plaintiff and put the defendant on the stand. The plaintiff was given the opportunity to ask questions but could muster very few. I asked questions of the defendant. I was in a precarious position. I must take care not to be the plaintiff's advocate. In several cases I gave impartial, equitable assistance to both parties. But here the defendant had counsel.

Small claims court enhances the role of judge in the adjudicative process. The judge becomes an active participant rather than a passive observer.

I was given no slide rule or computer to calculate negligence and contributory negligence but easily found the plaintiff 30 percent negligent and the defendant 70 percent negligent. We were off to determine damages. The plaintiff brought out her folded bill from the hospital. The defendant did not challenge the accuracy of the bill but asserted it was prohibited hearsay. I quickly went to the statutes, which provided that the proceedings shall not be governed by the common law or statutory rules of evidence and shall admit all evidence having a reasonable probative value. The statute went on to say that "an essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence." I ruled that the medical bill was admissible because there was a writing. Thus a finding of damages was not based solely on oral hearsay. The lawyer looked at me askance. I sweated but not visibly and stuck to my ruling. The lawyer didn't say the dreaded words, "I am going to appeal." The medical bill was about $800. I did not allow anything for pain and suffering. I had to do the math for the judgment by hand. Would a more experienced judge have ruled 25 percent, 75 percent for ease of calculations?

The studies show that in most cases the plaintiff wins in small claims court, but that more than half the plaintiffs cannot recover on their judgments. This plaintiff would recover because the defendant was insured. Case finished. I breathed a sigh of relief. When I later asked several small claims judges whether they would have admitted the medical bill, they all said, "Of course. What's the sweat?"

In two cases, lawyers exercised their right to knock me off their cases. The statutes allow a party to request substitution of a judge at the time of trial if the party has not been given notice of a change in judge. No reason need be given. Because

no one had been advised I would be sitting, the request was timely and I granted it. I explained to the disappointed unrepresented party that I had no choice but to put the matter over.

Evictions were hard. The stereotype is the rich slum landlord and the poor downtrodden tenant. Often both the landlord and tenant were poor and downtrodden. The landlord had put all his spare cash into a down payment and would lose the property if the tenants did not pay rent. Some tenants seemed to be perpetual non-payers; others were down on their luck.

Small claims court judges are told not to mediate the case; try it. But the temptation is too great, and I heard myself brokering deals between tenant and landlord. Some tenants came with hundred of dollars in cash, ready to pay up, and stay on the premises. I had a mere $20 in my purse. The landlords made out receipts on the spot.

The five-day, fourteen-day, and twenty-eight-day notices were tricky. If the tenant came under the Emergency Assistance Act (I have no idea what that law is), the eviction had to be stayed. One legal aid lawyer representing such a tenant quietly and gently advised me what Judge Kitty Brennan, the small claims court judge, would do under the circumstances he presented. Could I trust this lawyer or was I being sold a bill of goods? I glanced at the bailiff, the most experienced jurist in the room. The bailiff gave me the high sign that the lawyer was right. I did as I was instructed.

A judge's best friends are the staff. Often the staff are the most experienced people in the courtroom, having broken in many a judge. My relationship with the bailiff reminded me of the TV program *Judging Amy*, in which the clerk signals the judge to take a recess whenever he thinks the judge is going astray. I had no time to take recesses. I had to get my information by hand signals, eye-rolling, and head maneuvers. At one point when I ruled on a matter, I heard the clerk mutter to herself, "Well, that's a first for me." In light of that comment, chances are high that I said the wrong thing. I might have been sweating, but the staff was sweating with me and for me.

Milwaukee County trial judges and counsel stopped by periodically and sat in the back of the courtroom to watch me. Generally they were poker-faced; sometimes they showed amusement—not a confidence-builder. Apparently I was the best show in the courthouse. But not quite *Judge Judy*.

At about 3:30 on Friday afternoon, a judge came by and asked if he could take over the last two evictions so I could drive home and beat the summer traffic out of the city. I quickly and gratefully accepted the offer. I was exhausted. Part of judicial concern about sitting in small claims court is that it is exhausting work, given the volume of cases, the mental activity of trying to get the stories out of the parties, trying to adopt a different non-conventional judicial manner playing judge and lawyer, and at the same time trying to adhere to the rules of law and ethical conduct.

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So what are the lessons I bring to this audience composed of faculty, students, judges, and non-lawyers? My hope is that students and faculty will participate in the various clinical programs at Marquette University, including the one run by Professor Geske in small claims court, to aid the people of the state.

My hope is that students, faculty, lawyers, and non-lawyers will participate in mediation programs in small claims courts run by volunteer, trained mediators who are not necessarily lawyers. These programs are very successful in several Wisconsin counties.

Pro se litigants, who are a fast-growing percentage of litigants in small claims and family court, present a significant challenge. Milwaukee has a Legal Resource Center in the courthouse, giving forms for self-represented litigants as well as providing reference assistance. Waukesha has a Family Court Self-Help Center. In many counties, including Milwaukee and Dane counties, lawyers take turns coaching family court litigants.

I hope lawyers will volunteer to help assist unrepresented litigants directly or help the courts in establishing forms and procedures for unrepresented persons. I hope every lawyer in this county has a copy of a booklet entitled *Pro Bono Opportunities* published by the Legal Services for the Indigent Committee of the Milwaukee Bar Association. I hope you volunteer for one of the more than 15 programs listed.

The small efforts of each of us will reap large rewards in making our legal system work better for people who desperately need access to justice. •