



STATE OF WISCONSIN – JUDICIAL COUNCIL

AMENDED AGENDA

WISCONSIN JUDICIAL COUNCIL
NOVEMBER 18, 2022 – 9:30 A.M.
WISCONSIN STATE CAPITOL
ROOM 328NW
MADISON, WISCONSIN

**Members wishing to call in should call
(339) 209-6255 at 9:30 a.m. on 11/18/22. There is no Access Code.**

This Amendment has become necessary because of a probable lengthy discussion concerning funding. The nature of that discussion is set forth below in new Section III below.

- I. Roll Call and approval of the Minutes from October 21, 2022.
- II. Recognition of Judge VanDeHey for his many years of service. We will begin our 11/18/22 meeting with some melancholy news. Our friend and long-time member of the Council, Judge Robert VanDeHey, is leaving the Council. His many years as a member of the Council Executive Committee and Chair of the Council's standing committee on Criminal Procedure did much to further the work of the Council. His services and hard work will be greatly missed.
- III. Council funding. We had planned on an initial discussion of funding, but in view of recent communications from the State Bar, the meeting on November 18, 2022 will be largely devoted to a lengthy discussion about the prospect of funding by the State Bar of Wisconsin. That discussion will be driven by an exchange which I had with the State Bar concerning an ethical issue the State Bar's representatives raised. The exchange is set forth below.

But first, I note with interest that the Rotunda article is entitled "State Bar Supports Judicial Council Funding" and I believe that it is written to strongly suggest that there is strong support in the State Bar for funding the Council. In the original edition of this Agenda, I suggested that we address the following proposition at our November 18th meeting.

The State Bar should explore providing direct funding to the Council. I believe that it is long past time for the State Bar

to find a way to provide funding to the Council. A number of present and past Council members I know strongly agree, and I know that a number of State Bar members outside the Council also strongly agree that the State Bar should act. Since the Council benefits the State Bar at large (both the Bench and Bar), I propose that the State Bar seriously initiate a committee study to explore ways in which the State Bar can provide direct funding of the Council. One possible solution that comes to mind is to include with the solicitation for dues each year a request for voluntary contributions for the support of the Council. In my nearly 50 years as a member of the State Bar I have always found the Bar members to be generous if the cause is just, and the last Rotunda article makes the justice of funding the Council abundantly clear.

EXCHANGE BETWEEN THE STATE BAR AND GLEISNER

The following is an exchange I had with the State Bar on Monday, the 14th of November, and it is this exchange which will be debated at the November 18, 2022 meeting. Representatives of the State Bar have been invited to attend the November 18th meeting and notice has been given consistent with the Open Meeting Law of Wisconsin.

EMAIL FROM THE STATE BAR

From: Lisa Roys <lroys@wisbar.org>
Sent: Friday, November 11, 2022 1:46 PM
To: 'kirchnerwjc@gmail.com' <kirchnerwjc@gmail.com>; 'zales1958@yahoo.com' <zales1958@yahoo.com>; John Orton <JOrton@curranlawoffice.com>; 'szylstra@boardmanclark.com' <szylstra@boardmanclark.com>
Cc: 'Margaret Hickey' <Margaret@beckerhickey.com>; ddietrich@weldriley.com; Cheryl Daniels (cheryldanielswisbar@gmail.com) <cheryldanielswisbar@gmail.com>; Larry Martin <lmartin@wisbar.org>; Lynne Davis <ldavis@wisbar.org>; Cale Battles <cbattles@wisbar.org>
Subject: Judicial Council

Good Afternoon State Bar of WI representatives to the Judicial Council:

It has come to my attention that next week's council meeting includes an agenda item related to the State Bar and funding of the Council. As representatives of the State Bar, I wanted to make sure you were aware of the prohibitions on such a proposal.

While the State Bar does and will continue to support state funding for the council, the suggestion that "there is strong support in the State Bar for funding the Council[1]" is inaccurate. Providing any financial support would

be a violation of the state's ethics laws. The State Bar is a licensed lobbying principal and therefore, under the state's ethics laws, cannot provide anything of value to the Council. That would include staffing, research requested by the council or council member expenses. When this matter was raised in 2018, the State Bar sought an opinion from the State Ethics Commission. For your review, I have attached the original request and the Ethics Commission opinion. The Commission was very clear that financial support of the Council by the State Bar would be a violation of the state's ethics code.

We were pleased to be able to highlight the Judicial Council's tremendous work in the recent Rotunda Report. And, the State Bar will continue to include state funding for the council as one of its legislative "asks" during the state budget process.

I'm happy to answer any questions you may have on this matter.

Lisa Roys, J.D.
Director
Advocacy and Access to Justice
State Bar of Wisconsin

GLEISNER'S EMAIL IN RESPONSE TO STATE BAR EMAIL

From: William Gleisner <gleisnerwilliam@gmail.com>
Sent: Monday, November 14, 2022 10:01 AM
To: 'John Orton' <JOrton@curranlawoffice.com>; 'Lisa Roys' <lroys@wisbar.org>; 'kirchnerwjc@gmail.com' <kirchnerwjc@gmail.com>; 'zales1958@yahoo.com' <zales1958@yahoo.com>; 'szylstra@boardmanclark.com' <szylstra@boardmanclark.com>
Cc: 'Margaret Hickey' <Margaret@beckerhickey.com>; 'ddietrich@weldriley.com' <ddietrich@weldriley.com>; 'Cheryl Daniels (cheryldanielswisbar@gmail.com)' <cheryldanielswisbar@gmail.com>; 'Larry Martin' <lmartin@wisbar.org>; 'Lynne Davis' <ldavis@wisbar.org>; 'Cale Battles' <cbattles@wisbar.org>; 'Thomas L. Shriner, Jr. - Foley & Lardner LLP (tshriner@foley.com)' <tshriner@foley.com>; Adam Plotkin (plotkina@opd.wi.gov) <plotkina@opd.wi.gov>; Amy Crowder (amy.crowder@wicourts.gov) <amy.crowder@wicourts.gov>; Bill Gleisner <wgleisner@sbcglobal.net>; Brian K. Hagedorn <Brian.Hagedorn@WICOURTS.GOV>; eugene.gasiorkiewicz@wicourts.gov; hannah.dugan@wicourts.gov; john.schroeder@wiseye.org; jorton@curranlawoffice.com; 'Karley Downing (Karley.Downing@Wicourts.gov)' <Karley.Downing@Wicourts.gov>; Kilpatrick, Steven C. <kilpatricksc@doj.state.wi.us>; 'Kristine Snow' <Kristine.Snow@Wicourts.gov>; 'Lanny Glinberg

(lanny.glinberg@wisc.edu)' <lanny.glinberg@wisc.edu>; Lynne Davis (ldavis@wisbar.org) <ldavis@wisbar.org>; Margo Kirchner (kirchnerwjc@gmail.com) <kirchnerwjc@gmail.com>; molly.mcenab@wisconsin.gov; robert.vandehay@wicourts.gov; Ron Tusler (rtusler@tuslerlaw.com) <rtusler@tuslerlaw.com>; 'Sarah Zylstra (szylstra@boardmanclark.com)' <szylstra@boardmanclark.com>; sarah.walkenhorstbarber@legis.wisconsin.gov; scott.needham@wicourts.gov; sen.wanggaard@legis.wisconsin.gov; Thomas Hruz (Thomas.Hruz@wicourts.gov) <Thomas.Hruz@wicourts.gov>; tshriner@foley.com; zales1958@yahoo.com
Subject: REPLY FROM GLEISNER

Good morning,

Our Council is a nonpartisan organization, and the State Bar has no problem electing members to the Council and allowing the President-Elect to appoint a member to the Council. Moreover, asking State Bar members to make voluntary contributions to the funding of the Council is not asking the Bar to take any position. It is up to the Bar members as to whether they wish to make a contribution.

Both the Bench and Bar will suffer if the Council ceases to exist. In view of what was written in the last issue of the Rotunda, the Bar is well aware of the fact the Council is *in extremis* and will most certainly cease to exist if funding is not found soon. I think the best and most appropriate course of action is to put the issue of asking State Bar members to make voluntary contributions to a vote by and through a referendum of the State Bar membership. Because this is an issue of the utmost importance to the Council, I am copying the entire Council on this message and the exchange of messages below.

If representatives of the State Bar wish to address the Council on this point on November 18, 2022, they are most welcome to do so. However, this issue will be debated at the Council meeting on the 18th of November. **The Council has gone without funding for five years and this must end, or the Council must end.**

Bill Gleisner

William C. Gleisner, III
Chair, Judicial Council

IV. Reports by the Chairs of each Council Committee:

In view of our decision to temporarily use the Full Council as a “Committee of

the Whole,” it was suggested at the last meeting that we begin our general meetings with Reports from each of the ad hoc and standing Council Committees. I have gone one step further and will only convene the Council as a “Committee of the Whole” after all our other business has been concluded.

- A. With that in mind, we will begin our November 18, 2022 Council meeting with the reports of the Council’s Standing Committees as follows:
- B. Ms. Margo Kirchner, Chair of the ad hoc Committee on the “Council Corner” (a monthly report to the State Bar on the work of the Council) will report on work performed to date, as well as the recent Rotunda article (another copy of that article accompanies this Agenda).
- C. Mr. Thomas Shriner, Chair of the Council’s Standing Committee on Evidence and Civil Procedure, will report on the following:
 - 1. Work completed to date on revisions of Wisconsin’s rules concerning injunctions.
 - 2. Work on his committee’s ongoing work on revisions to Wisconsin’s Rules of Evidence.
- D. Judge Thomas Hruz, Chair of the Council’s Standing Committee on Appellate Procedure, will report on the work completed by his committee to date.

Because Judge Robert VanDeHey is no longer a member of the Council, there will not be a Report of the Committee on Criminal Procedure at the 11/18/22 meeting.

- V. Uniform Unsworn Declarations Act. Review status of Council’s 2018 recommendation to the Legislature to adopt the Uniform Unsworn Declarations Act as amendment to current Wis. Stat. § 887.015 (Uniform Unsworn Foreign Declarations Act) and confirm recommendation with respect to current proposed version of the UUDA.

AT THIS POINT, WE WILL CONVENE
THE JUDICIAL COUNCIL AS A “COMMITTEE OF THE WHOLE.”

- VI. The new approach to Council Meetings proposed by Chair Gleisner. At our last meeting we discussed the wisdom of convening the entire Judicial Council as a “committee of a whole” from time to time to address some projects. At this time and because this is an unusual suggestion, I am going to review again the first project that we discussed at our last meeting.

As noted at the last meeting, for as long as the Council continues without

funding, Gleisner submitted that the Council is missing an opportunity to serve as a “committee as a whole” and, in that capacity, address issues of importance without referral of same to a standing committee. There was consensus that it would be a good idea to make full use of the Council’s general meeting time by addressing special projects which the full Council can address as a “Committee of the Whole.” This approach may continue until Council funding is restored, thus ensuring that the full resources of the Council are being put to work for the benefit of the Bench and Bar.

REVIEW OF THE “COMMITTEE OF THE WHOLE’S” FIRST PROJECT

Gleisner suggested as a first project a point made by Tom Shriner back in early 2018. At that time, Tom Shriner identified a serious flaw in our service of process rules as they relate to litigation against foreign defendants. At the last meeting I related a personal story that highlighted one aspect of the problem. According to Gleisner:

I was asked to help a plaintiff’s counsel secure service of a summons and complaint on a German company. The plaintiff’s counsel had started a state action four days before the statute of limitations (SOL) ran on a Wisconsin claim. The plaintiff’s lawyer assumed that by starting the action before the SOL had run, the SOL was tolled and he thus had plenty of time to perfect service in Germany. That is not the case given the way our rules of civil procedure now read. Wis. Stat. §801.02(1) provides that a civil action is commenced as to any defendant when a summons and complaint are filed with the court, providing service is made upon the defendant within 90 days of filing. But Wis. Stat. §801.15(2) states “The 90-day period under §801.02 may not be enlarged.” *See also* Wis. Stat. §893.02. Worse, since this case involved an action against a sophisticated corporate defendant in Germany, service by mail was not a viable option because Wis. Stat. §801.11 does not provide for service by mail and substituted service under §801.11 was of very doubtful benefit. In fact, there is no reference to cases involving international service in our Rules. I hired two international process servers who promised to complete the service by different means, and we did accomplish timely service. The Plaintiff then survived a Motion to Dismiss for lack of personal jurisdiction. However, it was difficult, and very expensive.

Based on *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017) (decision accompanies this agenda), Tom Shriner wrote an excellent Blog in Foley & Lardner’s Wisconsin Appellate Law discussing the foregoing problem. That Blog states as follows:

[The unanimous *Water Splash*] decision... points out a glaring omission in Wisconsin's service-of-process rules that ought to be fixed, so that Wisconsin plaintiffs are not unnecessarily put at a disadvantage when suing overseas defendants in state court. Justice Alito's decision [in *Water Splash*]... held that Article 10(a) of the [Hague Service Convention]... authorizes service of process, including summons, by mail in any country that is party to the Hague Service Convention and does not object to mail service. Canada, where respondent Tara Menon lives, does not object, so the Supreme Court upheld the judgment against... Menon. Wisconsin's state law clearly precludes service by mail in this situation... The problem is especially excruciating for Wisconsin plaintiffs because service in state court has to be accomplished within 90 days of the filing of the summons and complaint [and] ... §801.15(2)(a) expressly forbids a court to enlarge the 90-day period for service. And, to make matters worse, the statute of limitations is not tolled by filing of the action unless service of authenticated copies of the summons and complaint is made within 90 days...

Tom Shriner did endeavor to raise the problem he identified in his Blog. See the Council's October 19, 2018 Agenda. However, the Council lost its funding shortly thereafter. Chair Gleisner stated at the last meeting that this is precisely the type of very specific issue which the Council can take up as a committee of the whole and in short order make a recommendation to the Supreme Court (or the Legislature) to improve the position of plaintiffs (including defense cross-claimants) in Wisconsin. The Council's Evidence and Civil Procedure Committee could not address this issue because it lacks both funding and staff.

The Council expressed interest in this project and at the October 21, 2022 meeting Chair Gleisner appointed a "study committee" consisting of Judge Gasiorkiewicz, Laura Zylstra and Gleisner to study this issue. That Committee has discovered that a number of other states specifically address international service by rules that in a number of cases states have established provisions which specifically address the service of process outside the borders of the United States and in fact incorporate references to the Hague Convention on International Service. Two items accompany this Agenda which concern the work of the study committee concerning the foregoing issue. 1) A Memo prepared by Gasiorkiewicz, Zylstra and Gleisner containing references to how other states deal with international service, including the reproduction of rules from those states; and 2) A copy of the Hague on the Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965). Both of these documents will be discussed at the 11/18/22 meeting.

The Research Memorandum which accompanies this Agenda was

prepared by Judge Gasiorkiewicz, Sarah Zylstra and Bill Gleisner. Sarah Zylstra did a great deal of work on the Memorandum, which is a comparative analysis of how overseas service is handled in the following States: Alabama, Arizona, California, District of Columbia, Florida, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Utah and Wyoming. Service rules from Wisconsin are included in the Memorandum so that the reader can see how the absence of international service rules in the Wisconsin Rules of Civil Procedure compare with international service rules in the other states. The yellow highlighting in the attached is intended to underscore the international service rules in the other states discussed in the Research Memorandum.

VII. Adjournment.

PUBLIC NOTICE

All meetings of the Judicial Council and its committees are open to the public. The Council's November 18, 2022 meeting will only take place in person in Room 328NW of the Capitol Building. There will be no Zoom access to this meeting. Subject to limits imposed by the size of Room 328NW, members of the public are welcome. However, if any member of the public disrupts the meeting in any way, security will be called, and the disrupting member will be asked to leave. For more information, please contact the Chair of the Judicial Council, Mr. Gleisner, at 414-651-3182 or gleisnerwilliam@gmail.com.