



STATE OF WISCONSIN – JUDICIAL COUNCIL

AMENDED MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MARCH 15, 2024 WISCONSIN

The Judicial Council met at 9:30 a.m. on March 15, 2024 in Room 328NW.

MEMBERS PRESENT: Chair William Gleisner; Justice Brian Hagedorn; Judge Thomas Hruz (by phone); Judge Hannah Dugan; Judge Eugene Gasiorkiewicz; Judge Kristine Snow; Judge Needham (by phone); Sarah Barber; Ryan Billings; Saveon Grenell (by phone); Professor Lanny Glinberg; Steven Kilpatrick; Margo Kirchner (by phone); Molly McNab; Adam Plotkin; Tom Shriner; Sarah Zylstra; and Senator Wanggaard (by phone).

EXCUSED MEMBERS: Judge Audrey Skwierawski; Rebecca Maki-Wallandar; and Representative Ron Tusler.

SPECIAL GUEST: Ron Tusler's representative, Nick Schultz.

Roll Call was taken.

February 16, 2024 Minutes approved.

Chair Gleisner began by recognizing Judge Hruz for the purposes of providing a report from the Appellate Procedure Committee (APC) concerning the venue selection work of the APC. This Report focused on what the APC has done to date regarding Assistant Attorney General Kilpatrick's August 30, 2023 letter discussing the possible creation of a proposed rule dealing with civil appellate venue.

Tom Shriner noted that the issue is about venue, and Judge Hruz agreed. Shriner opined that like jurisdictional issues venue decisions should be sorted out quickly. Judge Hruz noted that past practice was to have issues regarding which Court will hear an appeal was typically done by the Chief Judge, but this is not written anywhere. As to the proposed rule, there is always a possibility that after a petition is filed the Supreme Court will want us to go further, but it is important to agree on a petition and get it filed.

Judge Hruz asked to hear from Assistant Attorney General Kilpatrick. Mr. Kilpatrick began by noting that DOJ did not include anything about the powers of the Chief Judge in its petition because it was felt that might be seen as an intrusion on the power of the Court of

Appeals to craft and enforce the Court's Internal Operating Procedures. DOJ further thought that the Internal Operating Procedures would be the place where the ultimate decision maker would be identified.

Justice Hagedorn observed that a number of letters received from stakeholders were really just seeking clarity. The Justice then asked why this entire matter could not be resolved by just adopting a rule in the Court of Appeals' Internal Operating Procedures. This would provide written guidance to litigants and would put litigants on notice how the Court of Appeals will handle such venue issues going forward.

Judge Hruz responded that should be considered but there is a colorable argument that maybe the Chief Judge should not be making venue decisions, and until we have direction from the Supreme Court we should not settle for placing language just in the Court of Appeals' Internal Operating Procedures.

Sarah Zylstra asked how this would work going forward. Zylstra asked Kilpatrick why do we think that an appellant or pro se will know to go to a statute to read the rule which is being proposed. She thinks that such an appellant would be more likely to read an order from the Court of Appeals stating you have to act within 14 days. Without an order from the Court like orders which issue when you don't file a docketing statement, how are appellants and especially pro se appellants supposed to know that they have 14 days within which to seek a different venue. Zylstra does not have strong feelings about whether the rule should be in a petition to the Supreme Court or in the Internal Operating Procedures of the Court of Appeals; but there has to be surefire way to let appellants know about the venue rule we are now discussing.

Kilpatrick responded that appellants are on notice about the 14-day limit, etc. because of the Notice of Appeal and the Circuit Court Record. Under DOJ's plan, the selection of venue will occur in the Notice of Appeal, and that is what triggers the 14-day time limit. Judge Hruz also noted that consideration is being given to adopting the mandate in Wis. Stat. §801.50(1) which provides: "A defect in venue shall not affect the validity of any order or judgment." This will remove the potential prejudice of a mistake in selecting which District to venue an appeal.

Shriner made a motion to approve the APC's recommendation that the Council join the DOJ in submitting the DOJ's proposed petition to the Supreme Court, which was seconded by Ryan Billings. Molly McNab asked to be heard and stated that any party to an appeal should be allowed to move to change venue, and Kilpatrick agreed. Judge Hruz added that the new rule would very probably be in Chapter 809 near the provisions that govern Notices of Appeal. The hope is that pro se or inexperienced appellants would have plenty of clues about their rights concerning venue.

McNab raised another issue; what about more complicated appeals, such as those involving cross-appeals. In those instances, a "race to file a Notice of Appeal" may result.

Simply put, the one who is quickest to click on a computer button should not be what determines venue. McNab states that such a circumstance might be resolved if the ultimate venue decision is left to a chief judge.

The question was called on Shriner's motion to approve the APC Committee Report and Recommendation that the Council join the DOJ in submitting the DOJ's proposed petition to the Supreme Court. Adam Plotkin, Sarah Zylstra and Judge Snow are opposed. Justice Hagedorn, Sarah Barber and Senator Wanggaard abstain. The Motion passes.

The Council turned next to the issue of DAR recordings.

Gleisner began the discussion by remarking that there was a disagreement between the DAR Committee Co-Chairs. Judge Gasiorkiewicz disagreed and stated that there had not been a disagreement. According to Gasiorkiewicz, there were different viewpoints expressed by the two Co-Chairs. Judge Dugan agreed.

Gleisner reported that he had taken this all up with the Judicial Council's Executive Committee, consisting of Judge Hruz, Judge Gasiorkiewicz, Margo Kirchner, Tom Shriner and Gleisner [Judge Gasiorkiewicz did not participate in the discussion by the Executive Committee]. Without dissent, the Executive Committee supported the following approach for the discussion of DAR in this meeting:

- A) At our 3/15/24 Meeting, there will not be competing reports by co-chairs, Dugan and Gasiorkiewicz. What has been submitted by either Judge may be addressed on March 15, 2024, but as "talking points" instead of as "Reports."
- B) There will be a short discussion of what should be done with DAR recordings by both Judge Dugan and Judge Gasiorkiewicz. Judge Dugan will speak first and have ten minutes to provide her thoughts, making reference to any of her talking points. Judge Gasiorkiewicz will then speak and have ten minutes to provide his thoughts, making reference to any of his talking points.
- C) There will then be a short discussion by the entire Council concerning the presentations made by both Judge Dugan and Judge Gasiorkiewicz. Thereafter, the entire issue of DAR recordings will be laid over until the May meeting of the Judicial Council. In the meantime, the DAR issue will be remanded to the Ad Hoc DAR Subcommittee for further study.

Before commencing the DAR discussion, Shriner stated he wanted to know what it is the DAR Subcommittee wants the Council to do. Shriner stated that as far as he is concerned it is fine if there are 2 or more proposals from the Subcommittee.

Judge Dugan spoke first: Dugan began by emphasizing that there was not a disagreement between Co-Chairs. There were just different points of view. There has been a meeting of

the DAR Subcommittee and Dugan began with a summary of what occurred at that meeting. The Chief Judges met to consider a second draft of their proposed rules. Dugan reported that she is on the Trial Judges Association (to which Dugan belongs), which is also considering the second draft.

According to Dugan, the consideration of DAR reporting by the Chief Judges and the Trial Judges Association is moving very quickly. Dugan stated that she believes that the Council is only in a position to shape any proposed DAR rules before those rules are submitted to the Supreme Court. The Council has the capacity to comment on the work of those two organizations and thus shape the rules of the Chief Judges and Trial Judges Assn.

In addition to the Chief Judges and Trial Judges, Dugan reports that she also conferred with the Planning and Policy Advisory Committee (PPAC), which advises the Supreme Court and the Director of State Courts.

At the recent meeting of the DAR Subcommittee on February 28, 2024, each member of the Subcommittee was asked to name their priorities. One priority is whether or not DAR recordings should be made available upon a proper motion. And because of the Open Records Law, another priority is to give proper notice to interested parties so that those parties can challenge distribution or require redaction. Judge Snow indicated that she very often listened to DAR recordings following hearings. Judge Snow asked if that was proper. Judge Dugan responded that she cannot tell other Judges what to do, but Dugan does not believe that she should be required to listen to DAR recordings.

Judge Gasiorkiewicz stated that there was some concern that if a matter is still pending or is going up on appeal, the trial judge should not be the one reviewing the DAR recordings for possible redactions, etc. Gasiorkiewicz stated that what Judge Snow does is the correct approach, especially in view of the fact that trial judges look at materials *in camera* all of the time. Judge Snow stated that she often needs to consult the DAR recordings when she is writing a decision since she will need to see what she said on the Record. Gasiorkiewicz stated the concern here is not what the trial judge said, the concern here are matters which should not be disclosed, such as communications between counsel and client. That is the real crux of the problem here. Dugan stated in response that the issue is whether Judges should be required to listen to DAR recordings. Dugan continued and identified another priority which is to determine how DAR reporters should be paid for their time and at what rate of compensation.

Dugan also noted that the present proposed rule has exceptions for DAR recordings which are needed by the OLR and Judicial Commission. Dugan believes that the OLR and Judicial Commission should be required to go through the same procedures as other DAR requesters, since the same issues are involved even if the goal is to benefit OLR or the Judicial Commission. The Chief Judges' proposed rules do not reference or discuss AG Opinions regarding Court Reporters and Reporting. Those proposed rules also do not reference or discuss other costs which may be involved in producing DAR recordings.

Another issue which is not addressed in the Chief Judges proposed rules relates to who is responsible for archival retention of DAR recordings and the length of time archives should be maintained. And this points to another concern, namely who is supposed to be the custodian of DAR recordings.

Dugan also referenced a concern raised by Judge Needham, and that is the issue that DAR recordings constitute 24-hour surveillance of courtrooms in Wisconsin. This raises a whole series of other questions like a) why is 24-hour surveillance necessary; b) who maintains those 24-hour surveillance records, etc. If a Judge is there at 7 p.m. working, why is it necessary for DAR to be recording what is done.

Judge Gasiorkiewicz commented that if the DAR is not on it is not recording. However, there is a concern that DAR is recording, but we just don't know right now.

Judge Dugan stated that in terms of the DAR Subcommittee, when the Subcommittee convenes again committee members should bring their redline suggestions to the meeting for discussion. Dugan noted that she had already done a redline herself, and that is really for the Wisconsin Trial Judges Association. Dugan expressed the concern that the Council does not have the capacity or time to provide redline suggestions to either the Chief Judges or the Trial Judges.

Gleisner asked if the Council's DAR Subcommittee voted on any of the items she has discussed, and Judge Dugan said "no, the Subcommittee met to identify and prioritize issues for future action."

Then Judge Gasiorkiewicz addressed the Council: Gasiorkiewicz began by thanking Judge Dugan for bringing the DAR issue to the attention of the Council. The Council agreed with Judge Dugan and thus the Council voted to study the issue. However, Judge Gasiorkiewicz then noted that once the Council takes up an issue it is no longer the issue of an individual member of the Council; it becomes the issue of the Council and the Council will decide by vote on how to deal with that issue.

Justice Hagedorn has said let's not reinvent the wheel here and suggested that we approach former Director of State Courts, Judge Koschnick, to learn what he learned about DAR during his tenure as Director of State Courts. Gasiorkiewicz reached out to Judge Koschnick, but he never responded. Gasiorkiewicz then reached out to the current Director of State Courts, Judge Audrey Skwierawski, who also did not respond. Gasiorkiewicz did his own research and has collected DAR rules from around the country.

Gasiorkiewicz then reached out to the Chief Judge of the Wisconsin Committee of Chief Judges, who is Judge Jason Rossell. Judge Rosell told Gasiorkiewicz that the Chief Judges have been working on the DAR issue, and he shared the Chief Judges' work product and told Gasiorkiewicz "get on board with this." To which Gasiorkiewicz stated he replied as follows: "I'm not prepared to say that the Council is going to get 'on board' with the Chief

Judges' proposal, the Council is investigating the issue of DAR and will reach our own conclusions independently." However, Gasiorkiewicz did commit that he would get back to Judge Rossell once the Council's DAR subcommittee had met."

Judge Gasiorkiewicz had to leave the February 28, 2024 Subcommittee meeting early because of another obligation. Gasiorkiewicz argued at that meeting that the DAR recordings are not open records and should not be construed as open records. While Gasiorkiewicz was under Novocaine, he stated that it came to him that the DOJ was right; the DAR recordings are technically open records.

That presents a challenge because public policy in Wisconsin requires that the public should have the broadest right of access to public records. So, Gasiorkiewicz has been struggling with do we deal with privileged information which inevitably will be contained in DAR recordings (like privileged conversations between counsel and client). That is when Gasiorkiewicz reached back into his long experience as a litigator and concluded "there is a process for dealing with a DAR recording." For example, where privileged information is inadvertently disclosed during discovery there is a method known as "claw back" whereby privileged information can be removed from a public record and restored to a confidential status. We also have a "privilege log" process where confidential information is identified in a log, but the privileged material itself is protected as confidential until and unless a Judge orders disclosure.

If you look at the Chief Judges' proposal, it puts the onus on Circuit Court Judges to identify privileged material. That has never been the case. A party can claim a privilege; an attorney can claim a privilege on behalf of a party. So why should the burden be on the Circuit Judges to identify and protect privileged information which finds its way into a DAR recording? Open Records enjoy the broadest possible protection; but that protection runs directly contrary to the rights of parties or counsel to protect privileged information. This is something new and a new solution is needed.

The Chief Judges and others may suggest that the open record law can be avoided by claiming that a court reporters' output is the private property of a court reporter. The inescapable fact is that there is no one who can tell us what is confidential better than a party who is seeking to protect confidentiality.

It is true that CCAP has developed a sign which can be posted inside and outside a courtroom announcing, "the proceedings in this court are being digitally recorded." So that places counsel and client on notice that confidentiality may be at risk during court proceedings.

This points to an obvious solution. Those who want to maintain confidentiality need to act to protect the confidentiality of what is recorded by DAR. Using the DAR recording, counsel for a party should be required to go by hour, minute, second and specify what has been inadvertently recorded and then made the subject of a privilege log or a claw back

motion which a Court can then adjudicate. The Court should not have to dig through a DAR recording; those who wish to maintain the confidentiality of something which inadvertently made its way into a DAR recording should bear the burden of protecting confidentiality the same way they would if a privilege log had been prepared or a claw back motion is made. This puts the burden on litigants and their counsel. In this situation, Courts are not required to review an entire DAR recording; it only has to concern itself with the comparatively small part of a DAR recording where confidentiality has been breached. The foregoing suggestion is one which I passed on to my co-chair hoping that she would pass it on the members of the DAR Subcommittee, and I do not think that she did. The suggestions made by the Chief Judges is in my opinion a veiled attempt to alter the Open Records law; that is unnecessary and dangerous; and it will increase exponentially the workload of Wisconsin trial judges. In fact, what the Trial Judges are proposing is contrary to Wisconsin Court precedent. In the case of *Chvala v. Bubolz*, 204 Wis. 2d 82 (Ct. App. 1996), the Court stated:

When an administrative agency purports to create an exception to §§ 19.31 and 19.35(1)(a), STATS., it is adopting a rule inconsistent with an unambiguous statute. It cannot do this. . . **[N]o statute specifically [grants] the Patients Compensation Fund or the Office of the Commissioner of Insurance the power to adopt exceptions to the Wisconsin open records law.** The attorney general has considered this question. The chair of the Department of Industry, Labor and Human Relations asked whether a proposed rule prohibiting DILHR's employees from making public certain information obtained by DILHR would be valid. The attorney general replied in pertinent part: 'While the Department has rule-making authority under ch. 227, sec. 101.10(7), Stats., and, with respect to this area, sec. 111.33, Stats., its rules cannot be contrary to the provisions of secs. 19.21 [Emphasis supplied].

Id. at 91.

Thus, what the Chief Judges are considering is clearly against established precedent. I do not fault the Chief Judges for what they are attempting, but that does not mean it is proper. What I have attempted to do in my separate report to the Council is to point out that there is a better way to do what they seek to accomplish without doing harm to the Open Records Law. I further do not believe that my concerns were adequately shared with either the Council's DAR Subcommittee or with the Chief Judges.

The elephant in the room is this: As judges we don't get to claim privilege. The lawyers and their clients are the only ones who can claim privilege, and if they don't they may well waive confidentiality. This is not something Trial Judges want to be a party to, and it is definitely something which should concern the DOJ. *See Chvala v. Bubolz, supra* at p. 91. The rules suggested by the Chief Judges put the burden on Trial Judges to review the entirety of a DAR recording, instead of just a small portion of the Record where parties or counsel have identified confidential material which can then be redacted. One further point;

we cannot be placing the burden of determining confidentiality on DAR Reporters either. First, they are not trained to do this and, even if trained, by what power do they get to limit a public record?

Shriner responded by stating that generally he agrees with Judge Gasiorkiewicz. However, he is troubled that every time he goes to Court he must be concerned that something he says may be picked by a DAR mike, even if he has pushed a button an Counsel's table. Judge Snow pointed out that it all depends on how a courtroom is set up. In her courtroom, the defense table is right next to the GAL table, and she is concerned that the mikes on each table can pickup what is going on at the adjoining table.

Justice Hagedorn offered some thoughts on how the Council could most appropriately direct its energies. In terms of solutions, there are three areas of concern. First, the Director of State Courts is supposed to promulgate relevant rules and procedures. That is Judge Skwierawski. The Council should direct its efforts to work with her to find solutions. The seven Justices on the Court do not have the time to explore solutions; that is the job of the Director of State Courts. Second, Justice Hagedorn is familiar with the proposals of Judge Rossell and the Council needs to study the rule changes which are already being developed. Third, Justice Hagedorn pointed out that public records are a statutory issue, and the Council should assume that the Public Records Law applies to all DAR records. To the extent that statutory rules need to be clarified, there is a unique role for the Council to assist in providing relevant clarification. Justice Hagedorn addressed Judge Gasiorkiewicz and observed that if the case he cited is the law, then there is not much which can be done via policy, via manual or even via rule. Justice Hagedorn made it clear that any of the three areas he has referenced would be appropriate ways for the Council to channel its efforts.

Judge Gasiorkiewicz agreed with the Justice and added that he feels we are not yet in a position to sign off on the rules being offered by the Chief Judges precisely because of issues raised by cases like *Chvala v. Bubolz*. Sarah Zylstra stated that upon reflection perhaps the Council should be considering a petition to the Legislature.

Judge Gasiorkiewicz noted that this entire matter needs to be remanded to the DAR Subcommittee because at this point we do not have a proposal upon which the Council can vote. More work needs to be done at the Committee level. Tom Shriner stated that he believes that this has been "an incredibly helpful discussion."

Gleisner remanded this matter to the DAR Subcommittee and will look forward to a further discussion at our May Council meeting.

The business meeting concluded at 11:00 a.m. on March 15, 2024.

Minutes prepared by Attorney Gleisner