



STATE OF WISCONSIN – JUDICIAL COUNCIL

AMENDED MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN OCTOBER 16, 2020

The Judicial Council met at 9:00 a.m. on October 16, 2020 via Zoom.

MEMBERS PRESENT: Chair William Gleisner; Judge Eugene Gasiorkiewicz; Judge Thomas Hruz; Margo Kirchner; Dennis Myers; John R. Orton; Adam Plotkin; Thomas L. Shriner; Adam Stevenson; Senator Van Wanggaard (by phone); and Sarah Zylstra.

MEMBERS EXCUSED: Judge Scott Needham; Judge Robert VanDeHey; Representative Ott; Sarah Walkenhorst Barber; Diane Fremgen; Christian Gossett; Steven Kilpatrick and Ben Pliskie.

SPECIAL GUESTS: Supreme Court Justice Rebecca Dallet; Supreme Court Justice Jill Karofsky; Lynne Davis (State Bar); Michaela Paukner (Wisconsin Law Journal, by phone); and Hamilton Consulting.

We were all very pleased to welcome to our October 16th meeting both Justice Rebecca Dallet and Justice Jill Karofsky from the Wisconsin Supreme Court, who joined our meeting as guests.

I. Roll Call and approval of the September 18, 2020 Minutes.

Roll call was taken and September 18, 2020 Minutes were approved.

II. Report from Gleisner regarding a technical delay in filing the Petition and Supporting Memorandum from the Appellate Procedure Committee, approved at the last meeting.

Gleisner stated that work had been completed on the APC Petition and Supporting Memorandum and they had both been filed with the Clerk of the Supreme Court.

III. Further discussion regarding a meeting with the Chief Justice.

Gleisner noted that there was a plan in place for a delegation from the Council to visit with the Chief Justice. That delegation would consist of Senator Wanggaard, Sarah Zylstra and Gleisner. After discussion about the timing of such a visit, it was decided that the idea of a meeting with the Chief should be postponed until a later date.

IV. Further discussion regarding the issue of pattern jury instructions.

Judge VanDeHey has learned that it would take approximately \$100,000 to \$300,000 to staff and support the production of the jury instruction work performed up until now by the UW Law School Professor Stevenson confirmed this amount.

Justice Dallet addressed this issue, based on her long work on the criminal pattern jury instructions. She pointed out that she has been working with the Director of State Courts to figure out how to move forward with the pattern jury instruction project. While she doesn't have details right now, Justice Dallet stated that she has some confidence that the pattern jury instruction project may fall within the budget of the Supreme Court. She assured the Council that the "ball will not be dropped" here because pattern jury instructions are important to both the bench and bar.

Justice Karofsky stated that she was actually an ad hoc member of the Council a number of years ago and she is very well versed in what the Council can do. She stated that she and Justice Dallet wanted to show how much they support the Council by being at the Council meeting.

Gleisner noted that the Council is proceeding with important work. For example, Judge Hruz's APC committee just finished work on a petition and supporting memorandum to the Supreme Court regarding a proposed amendment to the Rules of Appellate Procedure, and the Evidence and Civil Procedure Committee is working on a major revision to the rules governing injunction practice in Wisconsin.

Be that all as it may, the consensus of the Council is that the issue of pattern jury instructions is for some other organization and not for the Council.

NEW BUSINESS

V. Gleisner suggests that an appropriate new topic for study by the Judicial Council is the ongoing difficulties created for courts and counsel by the Covid 19 pandemic.

Gleisner began the discussion by reviewing his involvement with e-discovery for the past twenty years and suggesting that changes to discovery rules and practices might be a good place to begin a discussion as to how the Council might recommend changes to deal with the reality of the pandemic. Gleisner made reference to the recent Supreme Court Orders and its Task Force work concerning covid-19 and he noted that the work of the Supreme Court is an excellent start concerning the problems the courts face. But Gleisner also noted that there is a good deal which could be done to help the practitioners deal with day to day problems the pandemic has introduced into the discovery practices of litigators. Mentioned the new Chapter 18 in the treatise he wrote with Professor Grenig regarding Covid-19.

Gleisner then suggested that the Council tackle Covid-19's effect on the practice of litigation, particularly discovery practice. This is particularly relevant because now that people have discovered working from home and conducting all types of activities (like discovery) remotely. Gleisner suggested an excellent person to chair a special committee on the subject would be Sarah Zylstra. Gleisner then asked for input from the Committee.

Zylstra demurred, stating that she was not sure she was in favor of such an approach. Her main concern centered around the perception that we would be invading the province of the Supreme Court and its task force. Gleisner said that the Council is made up of a number of folks from a number of practice areas and that he envisioned our efforts as a means of augmenting the work of the Supreme Court. Sarah agreed that we are in a unique position to offer perspectives from a number of practice areas, but her concern remains.

Justice Dallet agreed, stating that she liked the idea of the Council offering proposed rules or guidance. However, to the extent the Council's efforts would be seen as duplicative of the Supreme Court's efforts might lead to our ideas being seen as unwelcome.

Tom Shriner agreed with Sarah and Justice Dallet. Shriner went on to note that really we are dealing with the same issue as the Court. What do you do when you can't travel; what do you do when you can't be in the personal space of witnesses and things like that.

Shriner agreed with Gleisner that there are long term implications for the practice; just trying to get lawyers back to the office is met with resistance, and who knows how long this will continue. Maybe it should be on our radar screen, maybe even have a committee to monitor it. But it is too early to say we have role to play.

Shriner said that this whole thing is also tied into how terribly expensive discovery has gotten. Clients are upset; there has to be something which can be done to curb the expense of pretrial discovery. Shriner said that it would be a good idea to have a committee to keep track of all of this. But whatever we did would only make sense if we worked in consultation with the Task Force and the Court. “We can’t just jump in on this.” We need to make sure that we are not getting ahead of ourselves.

Zylstra added that we could focus on very narrow areas. For example, Zoom depositions. Our rules never anticipated Zoom depositions. We’re typing in language and making up procedures on the fly, and this leads to ambiguities. An additional concern deals with recordings. You can record a Zoom deposition, but that is not official. Will Zoom replace videographers? It’s all a little unclear. Also, what about exhibits? Are we providing them ahead of time to the other side? Are we providing them to the court reporters? What about the deponents? Is it fair that they are only allowed to see an exhibit on the screen? Should the deponent be able to flip through an exhibit?

John Orton then asked Gleisner if he is aware of any efforts on the federal level to improve the federal rules in order to deal with the pandemic. Obviously, we have always tried to mimic the federal rules where possible. And the concern would be to avoid getting too far out in front of what is happening at the federal level. Gleisner said yes, but learning what the feds are doing could be one of the goals of the committee.

Judge Gasiorkiewicz stated that he had reviewed the 140 page handout that I had circulated. All of the orders and such in that handout dealt with court specific issues and did not make any suggestions about changing the rules. Judge Gasiorkiewicz also stated that Zylstra had an excellent point. He would be concerned that the Chief Justice might not appreciate any efforts on our part that address Covid-19 related issues.

Margo Kirchner stated that she sat in on one meeting of a Court task force. She said the task force was very focused on court hearings but not on the practice before court hearings, and maybe that’s our role. She said that the focus of the task force is not on discovery; it is focused on what do we do with regard to court hearings and Zoom or similar technologies.

Adam Plotkin then weighed in and suggested that there are two different task forces. There is the Supreme Court’s task force. Plotkin thought that the task force which Kirchner was referencing was a task force dealing with Zoom and what to do after the pandemic finally ends. He believes that a petition will be filed with the Supreme Court in the next few weeks to look at videoconferencing after the pandemic. This petition will look at changes to

Chapter 885 and Chapter 757, along with some practice guides on the role of videoconferencing post-pandemic.

Justice Karofsky agreed with Plotkin. She said that the Chief Justice's committee on covid had practitioners as well as judges and also a world renowned infectious disease doctor. Justice Karofsky stated that the people on the task force are the best of the best. But she does think that the focus of the Task Force was how to keep courtrooms and courthouses safe from the pandemic.

Judge Hruz said that even if a Council committee's focus is narrowed down, what is the output that is expected from the committee. Shriner asked Judge Hruz if the availability of Zoom has increased the number of oral arguments in District III. Judge Hruz answered that the availability of Zoom arguments may actually militate in favor of oral arguments because Zoom arguments will be much less expensive to parties and counsel. Shriner expressed the view that the availability of Zoom oral arguments will increase the likelihood of oral arguments in the future.

Margo Kirchner stated that we need to get more familiar with who is doing what in the State regarding Covid-19 and the law so that we aren't duplicating work that has already been done.

Gleisner said he agreed with much of what was said. He said that he thinks limiting a committee to issues related to the practice is a very good one. We also should have a committee to determine the "lay of the land" by determining what others have done or are doing. Gleisner raised the possibility that the delegation of three which will visit with the Chief Justice couldn't raise the Council's interest in this area with the Chief. Gleisner said that we should start an exploratory committee and focus on getting ad hoc members who can provide us with additional insights.

Shriner said we should put this item on the agenda for the next Council meeting with some more focused ideas about what we should be doing with this committee.

VI. Committee Reports.

(a) Evidence & Civil Procedure Committee.

Tom started his report by pointing out that we have not only had difficulty conversing with the Supreme Court, we have also not had a lot of luck conversing with the Legislature. For example, it has been over two years since we recommended to the Legislature that they consider a rule

allowing the use of unsworn declarations in lieu of affidavits. Nothing has been done.

Senator Wanggaard said that he will look into this. The Senator was very kind in his comments. He said that the Council is important to the taxpayers of Wisconsin because it is a think tank that accomplishes a great deal for next to nothing. Justice Dallet said that any eventual discussion with the Chief Justice should only be about the future. Senator Wanggaard agreed and reminded us that there has been talk about bringing the Council under the Legislative Council, but that has been sidelined for now by the pandemic.

Returning to the Evidence & Civil Procedure Committee Report, Shriner stated that Chapter 813 is a problem. There are provisions from a century ago and yet basic due process components are missing. We need to revise the law in this area and the Committee is leaning toward adopting something similar to Federal Rule 65.

(b) Criminal Procedure Committee.

As stated earlier, Judge VanDeHey is on medical leave and so there is no report from this Committee today.

(c) Appellate Procedure Committee.

Judge Hruz updated the Council regarding the Petition and Memorandum recently submitted to the Supreme Court. The Committee had a meeting in late September which focused on a draft rule regarding appeals from orders determining a defendant's competency and appeals from orders requiring involuntary commitments or medication under 971.14. The Committee has a draft of a proposed section to Chapter 809. The consideration of all of this will take place in stages.

VII. Adjournment.

The Council adjourned at 10:45 a.m.