



**STATE OF WISCONSIN – JUDICIAL COUNCIL**

---

AMENDED MINUTES OF THE MEETING OF THE  
WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
October 21, 2022

The Judicial Council met at 9:30 a.m. on October 21, 2022 in Room 328NW.

MEMBERS PRESENT: Chair William Gleisner; Justice Brian Hagedorn; Judge Eugene Gasiorkiewicz; Judge Thomas Hruz; Judge Hannah Dugan; Sarah Walkenhorst Barber; Karley Downing; Lanny Glinberg; Margo Kirchner; Molly McNab; John Orton; Adam Plotkin (by phone); Tom Shriner; Adam Stevenson (by phone); Judge VanDeHey; Senator Van Wanggaard; Nick Zales (by phone); and Sarah Zylstra.

EXCUSED MEMBERS: Judge Scott Needham; and Representative Ron Tusler.

SPECIAL GUESTS. Lynne Davis (by phone) on behalf of the State Bar; Cale Battles (by phone), also on behalf of the State Bar.

The Roll was taken and the September 16, 2022 Minutes were approved.

Before proceeding with the meeting's Agenda, Professor Lanny Glinberg from UW introduced himself and proceeded to provide the Council with his background.

The discussion next turned to main topic of the 10-21-22 Agenda, wherein Gleisner suggested use of the general meetings of the Judicial Council as a "committee of the whole." As noted in the Agenda for this meeting, as long as the Council continues without funding it was Gleisner's suggestion that the Council from time to time serve as a committee as a whole and, in that capacity, address issues of importance without referral of same to a standing committee. Gleisner explained that this approach was necessary because the Council's standing committees have a number of pending projects. Gleisner argued that when the Council meets in general session why not make full use of the Council's time and address special projects which the full Council can address over one or more full Council meetings? As long as the Council continues without funding, this will ensure that the full resources of the Council are being put to work for the benefit of the

Bench and Bar.

Tom Shriner expressed support in concept for using the Council as a committee of the whole. He then went on to discuss the topic suggested in this meeting's Agenda concerning problems with overseas service of process. According to Shriner, back in early 2018 Shriner pointed out a serious flaw in our service of process rules as they relate to litigation against foreign defendants.

Based on *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017) (a decision which accompanied the agenda), Tom Shriner wrote an excellent Blog in Foley & Lardner's Wisconsin Appellate Law discussing the foregoing problem (that blog also accompanies this Agenda). 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 recalled that he did raise the problem he identified in his Blog. However, the Council lost its funding. Chair Gleisner submits 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 defendants engaged in third party practice. The Council's Evidence and Civil Procedure Committee cannot now address such an issue because it lacks both funding and staff.

Gleisner pointed out that we don't have provisions in our Code of Civil Procedure which address circumstances where it becomes necessary to serve a party overseas. Gleisner suggested that we add a provision to our Code of Civil Procedure which would have two provisions. One provision would as Shriner suggests allow for service by mailing, as allowed by Section 10(a) of the Hague Convention on service overseas. Gleisner noted however that a number of countries do not adhere to that Convention. Shriner noted that a

country that does not want service by mail within its borders can simply send a notice to the UN that they don't agree with the idea of service by mail. Gleisner then stated that in situations where service by mail was barred, a rule could allow for a motion to amend the 90 day limit on service to allow for service in say 180 days.

Judge Gasiorkiewicz stated that he was not comfortable extending service beyond 90 days because that provision will lead to attempts to extend the statute of limitations. Sarah Zylstra agreed with the Judge. John Orton weighed in and stated that forcing a party to effect service within 90 days forces a party to start over if service is not effected within 90 days. Gleisner stated that folks were missing the point. The possible extension of 90 days would only apply in the case of international service where a country prevented service by mail. The limit on service within 90 days would remain in effect regarding complaints filed in Wisconsin or in one of the other states of the union.

John Orton stated that everyone is missing the point. When you extend the 90 days you are not extending the statute of limitations. The statute is tolled when an action is started, not when it is served. Orton expressed concern that folks were putting form over substance. And Orton also agreed that it is important to remember that a 90 day extension would only apply to actions where service beyond the United States is necessary.

Both Sarah and Judge Gasiorkiewicz stated that they don't have any problem with mailing a summons and complaint overseas as a basis for acquiring jurisdiction. Judge Dugan asked why couldn't we change the current rule to provide that service must be made within 120 days, to which Orton replied there is no reason we could not do that. Orton stated that he preferred leaving the limit on service at 90 days but vesting a Circuit Judge with discretion to extend the 90 days when circumstances warranted such an extension.

Gleisner then stated that "half a loaf is better than none," and so he suggested that we just amend the current rule to allow mailing of a summons and complaint overseas, consistent with the Hague Convention on Service. That alone would be a major accomplishment.

It was suggested that maybe we should adopt the federal method of serving overseas. Tom Shriner said that raised an interesting point because the federal rule on service is just generally more generous than the Wisconsin Rule. Even in cases where service does not entail service on a foreign defendant, Rule 4 provides that if a party is not served within 90 days a federal judge can extend the time for service.

Gleisner concluded this discussion by appointing a committee consisting of Judge Gasiorkiewicz, Sarah Zylstra and Gleisner to study how other states within the United States handle overseas service.

Gleisner asked if there was a consensus that we continue to use the Council as a whole as a committee of a whole. No one offered disagreement, but Judge Hruz did suggest that for

so long as we proceeded as a committee of a whole Committee Reports should precede committee of the whole proceedings so that the Committees can be heard. Reports from the Committees were then solicited. No reports were necessary according to the Chairs of the Evidence and Civil Procedure Committee, the Appellate Procedure Committee or the Criminal Procedure Committee.

Adjournment at approximately 11:00 a.m.

Minutes prepared by Attorney Gleisner