



STATE OF WISCONSIN – JUDICIAL COUNCIL

AMENDED MINUTES OF THE MEETING OF THE
WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
SEPTEMBER 15, 2023

Corrections made by Judge Hruz and Vice Chair Kirchner are highlighted in red below.

The Judicial Council met at 9:30 a.m. on September 15, 2023 in Room 328NW.

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

EXCUSED MEMBERS: Judge Audrey Skwierawski; Ron Tusler.

DISTINGUISHED GUESTS: Justice Janet Protasiewicz; Christina Plum.

Roll Call was taken and the June 23, 2023 Minutes were approved.

Before the commencement of today’s meeting, Council Member and Assistant Attorney General Steve Kilpatrick asked that important business from the Department of Justice be considered before proceeding with other Council business. Kilpatrick’s request was contained in an August 30, 2023 official letter on behalf of the Justice Department. That letter read in part as following.

“Wis. Stat. §752.21(2) provides that applicable appeals shall be heard in a court of appeals district ‘selected by the appellant’ but ‘not be the court of appeals district that contains the court from which the judgment or order is appealed.’” Assistant AG Kilpatrick stated that there is a lack of clarity as to when or how Wis. Stat. §752.21(2) is to be implemented. So in his August 30, 2023 letter Assistant AG Kilpatrick offered the following proposed rule for Chapter 809 for the Judicial Council’s consideration:

If the judgment or order appealed is from an action venued in a county designated by the plaintiff to the action as provided under [Wis. Stat.

§] 801.50(3)(a), the appellant should select a court of appeals district for hearing the appeal pursuant to [Wis. Stat. §] 752.21(2). The appellant should select the court of appeals district in the notice of appeal filed pursuant to [Wis. Stat. §] 809.10(1) or by filing a notice with the court of appeals selecting the court of appeals district pursuant to [Wis. Stat. §] 752.21(2) within 14 days of the filing of the notice of appeal. A respondent's challenge to the court of appeals hearing the appeal, if any, should be made within 28 days of the appellant's filing of the notice of appeal.

Based on his August 30, 2023 letter, Assistant Attorney General Steve Kilpatrick then stated as follows to the Council during the September 15th meeting.

Kilpatrick first confirmed that the proposed rule would only apply to cases where the State of Wisconsin is a party. He further stated that he is the Deputy Director of the Justice Department's Special Litigation Appeals Unit, which deals with civil appeals. Based on observations made by this Unit, **it was decided that the points** made in the August 30, 2023 **letter** should be brought to the attention of the Council.

Kilpatrick began his presentation by stating that he hoped that the proposal addressed in his August 30, 2023 letter could be referred to the Appellate Procedure Committee for study. In cases where the State is a defendant, the statute requires that appeals go to an appellate court which does not contain the circuit court from which the appeal originated. An appellant is supposed to select the District, but there is no statute which explains how that selection process is to occur. Kilpatrick stated that as a result DOJ thus sees a lot of improper selections.

What DOJ is proposing in the August 30th letter is that a rule should be created which will govern how the selection process is to work. In fact, many appellants don't even know **about Wis. Stat. §752.21(2)**. What DOJ is proposing in the rule suggested in the August 30th letter is the creation of a rule which will shine a light on the Wis. Stat. §752.21(2). And the proposed rule also provides the State with time to file objections to any appellant's filing which the DOJ deems to be improper. We hope the proposed rule can be referred to the Council's Appellate Procedure Committee with the hope that a rule can be created which will ensure a proper selection by an appellant under Wis. Stat. §752.21(2) and will give proper notice to all parties to an appeal, while providing for an opportunity to object to an appellant's selection.

Gleisner then asked Judge Hruz, Appellate Procedure Committee Chair, for comments on Assistant AG Kilpatrick's August 30, 2023 letter and his presentation at today's meeting. Judge Hruz responded by stating that his committee would welcome the assignment of **studying** the DOJ's proposed rule. Judge Hruz then introduced Christina Plum, who is the Chief Staff Attorney for the Court of Appeals.

Judge Hruz reported that the Appellate Procedure Committee has often talked about Wis. Stat. §752.21(2), its lack of clarity and the need to provide additional guidance to appellate practitioners. Cases involving this statute often arise in cases in which there is a lot of early motion practice, injunctive relief requests, etc. In other words, cases where there is a lot of action going on. If the decision under Wis. Stat. §752.21(2) is not carefully made a lot of havoc can result. In fact, there was a case this past winter where Judge Brash was involved and a question arose as to proper venue. Judge Hruz noted that this is a rule that has occasioned a lot of discussion among Court of Appeals judges. So Judge Hruz thinks that it is very appropriate for the Appellate Procedure Committee to study the DOJ's proposal and formulate some recommendations for the Council to consider. In fact, Judge Hruz noted that his Committee would have gotten to this earlier if there had been staff support available to assist with his Committee's work load.

Gleisner then asked for further comments from the Council. Tom Shriner said that Wis. Stat. §752.21(2) represents a glitch in the statutes. Tom's main concern is whether this rule should be referred to the Legislature or to the Supreme Court. In other words, does this rule come within the purview of Wis. Stat. §751.12. Tom also raised the issue of whether a statute providing for an appeal to go to a District Court of Appeals different from the District where a case originated may be unconstitutional under the provision originally creating the Court of Appeal. However, Tom concluded that is an issue for another day.

Sarah Zylstra made several observations. First, she views venue as a mechanism for deciding where a case should be heard. Sarah stated that she believes that Wis. Stat. §752.21(2) is appropriate for a Supreme Court rule, but it is appropriate for the Council to determine whether the Legislature or the Supreme Court should craft a rule clarifying Wis. Stat. §752.21(2). Sarah is also concerned that the proposed DOJ rule in the August 30th letter does not address one other possible scenario, to wit, what if no selection is made? Perhaps if no selection is made, what is the default rule? And this could become a problem where there is a pro se plaintiff. Sarah says a proposed rule should address this issue. Sarah also suggested checking with the Clerk of Courts as to how selections will be made. Will there be a e-filing form that can be or should be used?

A motion was made and seconded referring the August 30, 2023 DOJ letter and the recommendation contained therein to the Appellate Procedure Committee for study. The motion was passed unanimously and the referral was made.

The Council then turned its attention to Committee Reports.

APPELLATE PROCEDURE COMMITTEE REPORT

As Committee Chair, Judge Thomas Hruz gave the Appellate Procedure Committee (APC) Report. First, as discussed further in Section I of his Report below, Judge Hruz addressed the Proposed Petition and supporting Memorandum concerning the adoption of a new rule (numbered 809.109) to establish a procedure for appeals from circuit court

orders regarding prejudgment determinations of whether a criminal defendant is competent to stand trial, including a rule which would permit involuntary medication aimed at restoring the defendant to competency pursuant to WIS. STAT. § 971.14, *et. seq.* Second, as discussed in Section II of his Report below, Judge Hruz provided an update on Rule Petition 23-01, regarding amended Wis. Stat. §809.12 in relation to appellate review of motions for relief pending appeal.

APC SECTION I: PROPOSED WIS. STAT. § 809.109

According to Judge Hruz, there was a lot of input concerning the issue from DOJ, DHS, etc. As Hruz noted, the core issue here is how to deal with appeals from circuit court orders regarding defendants who are thought to be mentally incompetent to stand trial. And then the issue arises concerning involuntary commitment and the involuntary administration of certain medicines. And this raises a number of constitutional questions which have been addressed both in the Wisconsin and U.S. Supreme Courts. And the Appellate Procedure Committee did not concern itself with such substantive issues. But there has been a glaring hole in the appellate procedure process as to how such cases are to be handled while on appeal.

While such a case is on appeal you have significant liberty issues at stake, including the questions as to how to handle the involuntary administration of medicine. A number of issues arise on appeal, such as when should such orders be stayed, **and who does the same.** There is another issue regarding limitations on restoring competence (12 months if a felony is involved; 9 months if a misdemeanor is involved). A proposed petition and supporting memorandum was distributed to the Council for review and discussion regarding WIS. STAT. § 971.14 and related issues.

Gleisner asked if the petition and memo were ready for filing. Judge Hruz answered in the affirmative. Gleisner then invited discussion regarding the petition and memo. Sarah questioned the language that the petition seeks “to supercede all inconsistent provisions of this chapter.” Sarah is concerned about this provision because the inconsistent provisions are not identified. Sarah suggested that such language could go in a comment, rather than in the body of a rule. Tom Shriner stated that this is a rule which is intended as a fix and if there are rules which may seem contrary, the contrary rules should not be interpreted as undercutting the new proposed “fix.”

Judge Hruz then noted that the proposed petition and memo have been vetted with the three most important sections of the State Bar, **namely the criminal, appellate and litigation sections.** A motion was made and seconded to authorize the Appellate Procedure Committee to file a Petition and supporting Memorandum, as amended by that Committee, concerning WIS. STAT. § 971.14, *et. seq.* and related statutes, The Motion was passed and the referral made. Adam Plotkin raised a point of order and thanked Judge Hruz for his hard work on this project. According to Adam, “on behalf of the Public Defenders’ office, we want to thank Judge Hruz and his Committee for producing a really quality work product.”

APC SECTION II: UPDATE ON RULE PETITION 23-01.

Judge Hruz does not think this Petition is properly before the Council. He thinks the State Bar's Appellate Practice Session is on top of this. Judge Hruz suggests that no action be taken on this Rule Petition. Justice Hagedorn weighed in and asked why we think the Petition is more substantive than procedural.

Putting aside the Petition in question, Justice **Hagedorn** says that an issue arising, say, under Wis. Stat. §809.12 is the sort of thing which could be addressed by the Council. Justice **Hagedorn** asked Judge Hruz if he thought the Council had the capacity to address such an issue, and Judge Hruz stated yes the Council has the capacity to address such an issue. But Judge Hruz said that there is an issue about whether appellate courts should review a circuit court substantive decision at such an early stage of a proceeding. Gleisner said that this entire colloquy should be placed on the Agenda for next meeting.

EVIDENCE & CIVIL PROCEDURE COMMITTEE REPORT

Tom primarily reported on the project to update, and in some cases revise, the Wisconsin Rules of Evidence with the assistance of M.U. Law Professor Dan Blinka and U.W. Law Professor David Schwartz. He also reviewed previous work performed by the Committee.

CRIMINAL PROCEDURE COMMITTEE

Judge **Hannah** Dugan is taking over the head of this Committee and will meet in Room 415NW following the Council's meeting. Gleisner will attempt to secure Room 415NW for meetings of the Criminal Procedure Committee going forward.

AD HOC "COUNCIL CORNER" COMMITTEE

Council Vice Chair Margo Kirchner delivered the Report of this Committee, in her capacity as Chair of the "Council Corner" Ad Hoc Committee. The purpose of the Committee is to raise awareness among the membership of the State Bar concerning the work the Council. Ms. Kirchner will be working with the State Bar representatives on the Council to create new articles for the Council Corner this year and next.

The business meeting concluded at 11:15 a.m.

Minutes prepared by Attorney Gleisner