



**STATE OF WISCONSIN – JUDICIAL COUNCIL**

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**MINUTES OF THE MEETING OF THE  
WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
November 17, 2023**

The Judicial Council met at 9:30 a.m. on November 17, 2023 in Room 328NW.

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

**EXCUSED MEMBERS:** Judge Scott Needham; Judge Audrey Skwierawski; Ron Tusler.

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

Roll Call was taken.

Justice Hagedorn began the meeting by noting a October 23, 2023 email he had received from Timothy Barber of the Supreme Court Staff, which noted that interested persons regularly receive email communications of upcoming Supreme Court hearings and other matters of interest, such as pending petitions. As of the date of this meeting, only Gleisner was noted as an interested person on behalf of the Council. It was agreed that other members of the Council should receive notices including: Vice Chair Margo Kirchner and Professor Lanny Glinberg agreed to be on the list (and all sitting Judges, including the members of the Council, receive notices from the Supreme Court). Chair Gleisner will send an email to Mr. Barber with the names of those who agree to be on the list.

Then the September Minutes were discussed, and corrections were proposed. Amended Minutes were proposed and the September Minutes were approved as amended. A second amended set of the September Minutes were thereafter distributed to the Council.

Gleisner began the meeting by noting that Judge Dugan had raised a number of matters, including especially the DAR recording systems now employed throughout the State. Judge Dugan was attending a funeral and so Judge Gasiorkiewicz agreed to provide a report on the DAR systems. Judge Gasiorkiewicz provided the following report.

“As you know, at the last meeting Judge Dugan raised the issue of the DAR recording system. Members of the public can now purchase a DAR recording on a CD of a court proceeding for as little as \$10, but there is no oversight of what is contained in such recordings. The microphones in the Courtroom can record on eight tracks and everything that happens in a courtroom can be picked by this recording system. While the microphones are supposedly directional, there is not a light or other indication when the microphones are live. There are buttons but very few lawyers know about them. If lawyers move the buttons on the microphones into a vertical position, the mikes still pickup everything.

“When the public gets these CDs there is very little oversight or methodology for redacting anything that is recorded in the courtroom. The mikes may pickup attorney client conversations from the defense bar, prosecutors, sidebars and so on. So that is the nature of the problem.

“Gleisner sent out a number of articles regarding DAR systems, and their supporting technologies. I did look at the Wisconsin Supreme Court DAR Guidelines (authorized by Supreme Court Rule 71.01) which my Court Administrator told me were controlling here. As I understand it, the record is held by the Court Reporter but there is a built-in redundancy so the record is also shipped out to five different locations, so you never lose track of anything. The DAR Guidelines indicate that ‘anyone’ can request a copy of the recording.

“A member of the public can fill out a form which theoretically is supposed to go to a court official for review. But I’ve never seen such a form and I do not think that is being done in Wisconsin. One of the things Gleisner provided is the 2013 National Center for State Courts (NSCS) *Making the Record Utilizing Digital Electronic Recording*. The NSCS says 1) that courts should make clear what recordings are accessible by the general public; 2) Limiting recordings to the parties to a case; and 3) note which portions of the recordings can only be accessed by order of the court.

“The NSCS position is all fine and dandy, but that is not Wisconsin law. According to Wisconsin law. Under the Open Records Law in Wisconsin provides that as much information as possible should be provided by government bodies to anyone who wants it. So, here’s the disconnect I see at this point. This needs to be studied more by the DAR Technology Committee which will be co-chaired by me and Judge Dugan, and we need to evaluate how to treat these DAR recordings under the Open Record Law so as to enable court personnel to redact information that should not be disclosed except by court order.

“Let’s be clear, under the Open Records Law as it exists now, DAR recordings are public records, but at the very minimum attorney client discussions of any kind are an exception to the Open Records Law and so that at a minimum should be redacted before DAR recordings are made available to the public.

“So there are a number of problems here. First of all, counsel must be alerted to how they

can effectively silence DAR microphones so as to protect attorney client communications so that they are not recorded in the first instance. There is another problem and that is the microphones are so sensitive that even if counsel at one table mutes a microphone, these DAR microphones are so sensitive that conversations from other counsel's tables may be recorded."

Judge Snow offered the following observation. She stated that it isn't sufficient with the DAR microphones to simply push down a button to prevent recording. Counsel will have to be instructed to push a button down and continue to hold it down until the privileged discussion is completed.

Judge Gasiorkiewicz agreed and stated there is no visual signal when the mike is off. Judge Gasiorkiewicz then continued with his report.

According to Judge Gasiorkiewicz, "I have never been asked by my court reporter to review a DAR recording, but that is a secondary issue. If the Judges have to go through each DAR recording to redact it, that is going to make an enormous amount of work for the Judges. As far as I know, there is no good redaction software built into the DAR recording system."

Tom Shriner then noted that Judges aren't going to want to hear attorney client privileged conversations, even after the fact. That in and of itself may constitute a violation of the attorney client privilege. The conversations are privileged for a reason, but these mikes are picking up everything and that can lead to some serious problems.

Judge Gasiorkiewicz continued with his report. "That's exactly right, and if it's a jury trial what about motions after verdict? You don't want attorney client privileged communication out in the public. That is not just contrary to the law, it's bad public policy."

Judge Hruz, appearing by phone, then added the following. According to Judge Hruz, "I spoke to a couple Judges at the Judicial Conference a couple weeks ago and several judges were also concerned that the DAR mikes were also picking up things Judges are saying which are not intended for public dissemination, such as sidebars or communications with their clerks or court personnel."

Judge Gasiorkiewicz then continued his report. According to Judge Gasiorkiewicz, that's a good point, although theoretically side bars should be part of the record if they can be recorded. I will be on this new committee with Hanna [Dugan]." Sarah Zylstra volunteered that she would also like to be part of the DAR Committee, and Judge Gasiorkiewicz welcomed her as a member. Judge Gasiorkiewicz then stated, "I think the Director of State Courts should be on the DAR Committee."

Judge Snow also opined as follows. "A number of other attorneys and organizations may wish to have representation on the DAR Committee. Open Records attorneys should also

be represented.” Gleisner also offered to be a member of the Committee. Gleisner noted that besides a national court reporters association, there is also a national DAR reporters association, and they should be represented on this committee.

Tom Shriner then made the following observations. “These materials (distributed with the Agenda by Gleisner) were interesting. In the past, a court reporter’s notes were in a form of code so others could not immediately translate the raw notes. But with DAR, there is no filter, there is no barrier between what is said and what one hears on the recordings. Whatever is said, is right there for all to hear, providing they have the CDs containing the record. When we’re dealing with a court reporter transcript, there is a court reporter who can redact material that should not be made public. There is no such filter available in the case of DAR recordings. It’s all there, warts and all. Technology is supposed to streamline things, but who has time to sit around and for no compensation review a DAR recording. This is a significant problem for the system. The spirit of the Open Record Law should not allow for access to such raw materials as DAR tapes. There was an incident a number of years ago where a confidential informant reported something to the police. An open record request was made and someone learned the identity of the informant, and he was murdered. This may not happen with a DAR recording, but it illustrates how serious we should be about privileged information.”

Judge Snow said there is not clear guidance as to what can be turned over to the public and what can’t be turned over. Judge Gasiorkiewicz stated, “that’s a good point. Someone can go in and ask for a DAR recording of a juvenile hearing. That’s privileged but I don’t know that every reporter knows that.” Judge Snow said “I had a court reporter come in and ask me if I could provide a transcript to a non-party. She didn’t know. There just is no clear guidance on what can and cannot be released and to whom.”

Gleisner made some observations regarding research he found over at the State Law Library. Particularly the Liberty Digital Court Reporting article discussing the powers and tools which can be incorporated into DAR software. We should explore the potential of software additions to the DAR recording systems used in Wisconsin. Judge Snow replied that this is not so new in federal courts and so maybe we should be in contact with the U.S. District Courts for the E.D. and W.D. of Wisconsin. Judge Gasiorkiewicz observed that it is easy for the Feds because they have unlimited resources at their disposal.

Justice Hagedorn stated the Director of State Courts should be the point person on all these issues. The Justice said the first place to start is to sit down with the Director of State Courts and have a conversation about what they know, what policies they have developed, etc. so we are busy recreating the wheel here. Justice Hagedorn believes that one of the first conversations we have should be with the present Director of State Courts, and then with the former Director of State Courts, Randy Koschnick. Justice Hagedorn said that he has to believe that these issues were raised with the Director of State Courts at some point. He also stated that this is the first he has heard of the issues raised today.

Gleisner then asked to clarify who would like to be on the DAR Committee. According to Gleisner, besides Judges Dugan and Gasiorkiewicz, the following want to be on the Committee: Professor Glinberg, Gleisner and Sarah Zylstra. As suggested by Justice Hagedorn, the Committee should also invite the current and immediate past Director of State Courts to join the Committee. A representative of a national DAR reporters association should also be invited to join. Judge Dugan also suggested that the Committee should seek input from legal counsel for the Supreme Court.

At this point, the phone participants were accidentally disconnected by Gleisner. Gleisner was and is sincerely sorry for this mistake. The discussion then under way will be continued at the January 19, 2024 meeting of the Council.

The business meeting concluded prematurely at 11:00 a.m.

Minutes prepared by Attorney Gleisner