



STATE OF WISCONSIN – JUDICIAL COUNCIL

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN January 17, 2025

The Judicial Council met at 9:30 a.m. on January 17, 2024 in Room 328NW.

MEMBERS PRESENT: Chair William Gleisner; Vice Chair Margo Kirchner; Justice Brian Hagedorn (by phone); Judge Thomas Hruz; Judge Emily Lonergan (by phone); Judge Audrey Skwierawski (by phone); Judge Kristine Snow; Steven Kilpatrick; Professor Lanny Glinberg; Sarah Barber; Daniel J. Blinka, Jr.; Rebecca Maki-Wallandar (by phone); Molly McNab; Tom Shriner; Senator Van Wanggaard (by phone); and Sarah Zylstra.

EXCUSED MEMBERS: Judge Eugene Gasiorkiewicz; Judge Scott Needham; Saveon Grenell; Rep. Ron Tusler;

Roll call was taken and the November 22, 2024 Minutes were approved.

After we achieved a quorum, we reviewed and voted to approve the Minutes from November 22, 2024 meeting.

Addressing first old business, Chair Gleisner stated that we must bid a sad farewell to one of our excellent members, Adam Plotkin. Gleisner noted that the Office of State Public Defender must now appoint a replacement for Adam. The new Chair of our Criminal Procedure Committee, Dan Blinka, Jr., also requested that Gleisner name an ad hoc member to his committee, which he did. Gleisner appointed Kara Janson to Blinka's Committee. Janson is currently Senior Counsel for Criminal Law at the Wisconsin Department of Justice. Because she will be an ad hoc member of Blinka's Committee, Gleisner stated that he will not be adding her or her contact information to the Member Roll of the Judicial Council.

Vice Chair Margo Kirchner was asked to make a statement. Kirchner noted that there will be an issue coming to the Council involving interpreters in municipal courts. The Supreme Court indicated in a rules conference that it would be referring this issue to the Council, but as of yet the Court order has not issued. Until there is a referral, there is no need to discuss this matter further at this time, but the Council should be aware of it. Tom Shriner observed that this issue has been brought forward by the organization of which Kirchner is a member seeking to have the Supreme Court adopt a rule for the use of interpreters in

municipal courts. Gleisner said he appreciated the advance notice, but at this point since it is not on the Agenda, we should move on, which is what we did.

Gleisner continued the meeting stating that especially without funding it is clear that we cannot address every new development that may come our way. However, Gleisner went on to state consistent with our mandate under Wis. Stat. §758.13, we should at least acknowledge new developments and, when possible, refer those developments to committee for study. That is why the Council is involved in addressing DAR related issues. Along the same lines, Gleisner thinks it is important even if it is not time now to begin work to at least acknowledge another major development, namely “AI.” Gleisner noted that he had furnished some materials with the Agenda which he hoped would facilitate a meaningful discussion.

Shriner’s Evidence and Civil Procedure (ECP) Committee is doing and needs to continue doing excellent work on improving our Rules of Evidence. Gleisner said that after a brief discussion at this meeting, it was his inclination to refer the issue of AI and the law to all three standing committees and let them do with it as they deem fit for the time being.

Gleisner emphasized that without in any way diminishing the excellent work of the ECP Committee, we must acknowledge the brave new world of artificial intelligence (“AI”). As Gleisner stated, we may very well want to wait for the United States Judicial Conference to formulate new rules, but it is time to become conversant as a Council with the new developments in this area. For example, Gleisner noted that the American Bar Association recently conducted a webinar entitled “Do We Need New Rules of Evidence for AI-Generated Evidence?” A copy of the flier for this webinar accompanied the Agenda. According to that flier: “This webinar explored the pros and cons of various proposals that have been submitted to the Federal Rules of Evidence (FRE) Advisory Committee since 2023 to address AI-generated evidence, both acknowledged and unacknowledged (i.e., deepfakes).” As Gleisner also noted, legal articles appear almost every month on this topic. *See, e.g.,* Edwards & Rich, *Discovering and Admitting AI Data in State and Federal Court*, 97 Wisconsin Lawyer 8 (Dec. 2024); Turner, *Deepfakes and the Legal Profession*, 98 Wisconsin Lawyer 21 (Jan. 2025).

Gleisner stated that he did not think that AI would necessitate a complete rethinking or rewriting of the Rules of Evidence. Gleisner noted that he has been doing a great deal of work and research on this topic. Gleisner referred to a treatise that MU Professor Jay Grenig and he have co-authored since 2005 entitled *eDiscovery and Digital Evidence* (Thomson Reuters 2025). Gleisner supplied Chapter 21 from that treatise entitled “The Evolving Concept of ‘AI,’ ‘AI Hallucinations,’ and ‘Deepfake Evidence.’” Gleisner noted that Chapter 21 was the second chapter in his treatise which addresses directly AI as evidence.

Gleisner opined that AI will not greatly affect the Rules of Evidence. However, Gleisner is of the opinion that the existence of AI may make a great deal of difference when it comes to the rules of discovery. Gleisner stated that it was his belief that there are many more similarities than differences between AI generated evidence and other forms of evidence. However, Gleisner stressed that there is no need to completely rewrite or even rethink the

Rules of Evidence; it is time for us as a Council to begin to think about this new topic and its effect on the rules of discovery. As with the emergence of e-discovery and the rules that we helped draft, the Council can and should help the bench and bar adjust to this brave new world, especially by suggesting improvements in the rules of discovery. As is pointed out in Grenig and Gleisner's Chapter 21, the whole business of "deep fakes" and "AI hallucinations" will impact all forms of discovery, especially where TAR (Technology Assisted Review) and predictive coding are utilized by a party possessing discoverable evidence. Sooner rather than later, the discovery rules on the federal and state level must deal with how the bench and bar minimize the effects of deep fakes and AI hallucinations.

Tom Shriner told a story about an effort by an attorney general to attack the use of AI only to learn that the attorney general's experts had relied on deep fake evidence. And this did not end well for the attorney gGeneral. Tom stated that it is his belief that the attorney submitting an expert report to a court has a duty to make certain that the evidence relied upon is valid or at least not manufactured. Judge Snow offered the opinion that rather than an evidentiary issue, when an expert report is furnished to a court it really comes down to an issue of professional responsibility on the part of the attorney offering a report and an attorney challenging a report to vouchsafe the legitimacy of supporting evidence.

Sarah Zylstra opined that insofar as TAR or predictive coding are concerned, our current rules cover the problem. As Sarah noted, if the receiving counsel suspects the authenticity of a document then courts are going to allow a probe of that evidence, although it would be a mistake to return the days when adversary counsel were allowed access to an opponent's entire database or computer system. There are targeted ways to deal with AI hallucinations or deep fake evidence.

Gleisner replied that he liked Zylstra's suggestion of limited access. However, Gleisner expressed especial concern with deep fakes. If someone is producing completely false evidence, limited access may not be enough. There should be a point at which enough false evidence is uncovered that a full review of an adversary's complete databases and/or computer systems becomes a justifiable remedial response.

Gleisner concluded the AI discussion by referring the issue of AI (including all that we talked about at this meeting) to all three of the Council's standing committees to do with as each committee sees fit.

1) Council Committees.

- a) Shriner gave an update on the work of the Evidence and Civil Procedure Committee, stating that the work of the Committee on the rules of evidence is nearing completion, thanks to the input of Professors Blinka and Schwartz. A lot has been accomplished since the ECP began work on the rules of evidence back in February of 2022. Shriner also reported that the Committee is nearing completion on suggested improvements to Wisconsin's injunction rules. Shriner stated that the goal is to provide Wisconsin with something it has never had: a counterpart to FRCP 65.

- b) Judge Hruz gave an update on the work of the the Appellate Procedure Committee. Judge Hruz first reported that his committee is in the brainstorming phase as they look for another project for the committee. They have put together a working group to help focus the energies of the Committee. One of the realities to address is the fact that all decisions of Courts of Appeals (including per curiam) are becoming very available to the bench, bar and public. We may have to adjust how the public sees the courts' work when we ignore a certain amount of our work by labeling certain opinions as "unpublished." We have to consider what is going to be done when, as happens, an unpublished decision contains improper authority or conclusions. How does this affect public confidence when such a decision is wrongly decided and then in effect "hidden" from public view by claiming it is unpublished. The committee plans to take a close look at Rule 809.23, which contains the categories of decisions, most importantly unpublished decisions. The committee plans to look at requesting publication of decisions. There are a lot of possible topics, including the case where a particular judge rules one way in a published decision but rules differently in an unpublished decision. There is much to study here.
- c) Attorney Blinka noted that his Criminal Procedure Committee is just getting started, and in fact hasn't met in two months. Blinka said that his committee already sustained a body blow when it lost Adam Plotkin, who was clearly very conversant with criminal law and procedure. There will be much to report once the setup of the Committee is completed.
- d) Council Vice Chair Margo Kirchner did not have anything new to report concerning "Council Corner" in either *The Wisconsin Lawyer* and *Inside Track*.

2) Adjournment.

Adjournment occurred at 10:15 a.m.

Minutes prepared by Attorney Gleisner