SECOND REVISED
MINUTES OF THE MEETING OF THE
WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
OCTOBER 20, 2023

The Judicial Council met at 9:30 a.m. on October 20, 2023 in Room 328NW.

MEMBERS PRESENT: Chair William Gleisner; Justice Brian Hagedorn; Judge Thomas Hruz; Judge Hannah Dugan; Judge Eugene Gasiorkiewicz; Judge Kristine Snow; Sarah Barber; Ryan Billings (by phone); Saveon Grenell (by phone); Steven Kilpatrick; Margo Kirchner (by phone); 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. Professor Lanny Glinberg;

SPECIAL GUEST: Ron Tusler's representative Nick Schultz.

Roll Call was taken.

Then the September Minutes were discussed. First, Chair Gleisner thanked Margo Kirchner for her usual excellent job of reviewing the Minutes from the September meeting. Judge Hruz also had corrections. Thereafter, the September Minutes were approved as amended, and an amended set of the September Minutes were distributed to the Council.

Gleisner began the October meeting by noting again the interesting colloquy between Judge Hruz and Justice Hagedorn during the September meeting as to what the Council can consider. Gleisner reviewed what had happened at the September meeting. Judge Hruz stated his belief (shared by other Council members) that the Council should by and large limit itself to matters which are clearly procedural in nature. Justice Hagedorn suggested that the Council could also address certain substantive issues, such as those which might arise during a consideration of pending *Supreme Court Petition 23-01* (proposing an amendment to Wis. Stat. §809.12) and similar rules.

It was further noted in the Agenda of the October meeting that a discussion (as to what the Council may properly consider) implicates both the Council's foundational rules contained

in Wis. Stat. §758.13 and the rules of pleading and practice in Wis. Stat. §751.12. While Wis. Stat. §758.13(2) contains limitations placed on what the Council may consider,[1] that does not fully encompass the powers of the Council. Pursuant to Wis. Stat. §751.12(5), "The judicial council shall act in an advisory capacity to assist the court in performing its duties under this section."

As further noted in the Agenda for the October meeting of the Council, while the colloquy between the Council's top jurists (Justice Hagedorn and Court of Appeals Judge Hruz) is interesting, it also addresses ***the*** issue which is at the heart of the Council's *raison d'être*: What is the proper and fundamental purpose and focus of the Judicial Council? I have been on the Council since 2008, and during that time the Council has never addressed this issue in so many words. To be sure, we have discussed why a particular subject is or is not within the purview of Wis. Stat. §758.13. But we have never discussed just the fundamental purpose and focus of the Council.

Along with the October Agenda, members were provided with copies of the following: 1) *Petition 23-1*; 2) Main Memorandum in support of *Petition 23-1*; 3) Supplemental Memorandum re that Petition; 4) Response from Petitioners; 5) State Bar Comments; and 6) Comments by Judge Hruz. As a committee of the whole, the Council then proceeded in the October meeting to address substantive vis-à-vis procedural issues, using *Petition 23-1* to help achieve a definition of the fundamental purpose and focus of the Council.

Gleisner began by stating that whenever the Supreme Court weighs in and asks the Judicial Council to do something, while it may be technically limited to procedural matters, the Council should always respond to requests from the Supreme Court even if the Council may suspect the request involves a substantive matter. Of course, absent a request from the Supreme Court our enabling statute Wis. Stat. §758.13(2) limits the Council to procedural matters. Judge Hruz then stated that a couple of years ago he had asked what could the Council do, and Tom Shriner responded that the Council should focus on what is procedural, although it is sometimes difficult to draw a proper line.

Justice Hagedorn noted that there was no pending case involving the issue under discussion and so he can discuss the substantive vis-à-vis procedural issue at hand. Shriner said there is no way of drawing a distinction between substantive and procedural statutes. There are two statutes which help define the limits of the Council's purview. One is Wis. Stat. §758.13(2), which is reproduced in the footnote 1. This statute speaks of rules and issues of court administration, and really sets the boundaries of the Council's scope of review.

[1] Wis. Stat. §758.13(2) provides as follows. "(2) Powers and duties. The council shall: (a) Observe and study the rules of pleading, practice and procedure, and advise the supreme court as to changes which will, in the council's judgment, simplify procedure and promote a speedy determination of litigation upon its merits. (b) Survey and study the organization, jurisdiction and methods of administration and operation of all the courts of this state. (d) Receive, consider and in its discretion investigate suggestions from any source pertaining to the administration of justice and to make recommendations.(e) Keep advised concerning the decisions of the courts relating to the procedure and practice therein and concerning pending legislation affecting the organization, jurisdiction, operation, procedure and practice of the courts.(f) Recommend to the legislature any changes in the organization, jurisdiction, operation and methods of conducting the business of the courts, including statutes governing pleading, practice, procedure and related matters, which can be put into effect only by legislative action. (g) Recommend to the supreme court, legislature and governor any changes in the organization, operation and methods of conducting the business of the courts that will improve the efficiency and effectiveness of the court system and result in cost savings" Please note, there is no "section c" in the foregoing statute.

Shriner also noted that *Petition 23-1* and similar Court petitions and related matters are often not provided to interested parties in a timely manner.

Justice Hagedorn replied that there is a standard list which Court Commissioners rely upon when providing notice of Petitions and the like, and adding to that list is a simple matter. This issue was revisited at the November 17, 2023 Council meeting. Justice Hagedorn stated that notices had been sent to Gleisner in the past. The list of Council members who will receive notices will be expanded.

Shriner stated that Wis. Stat. §758.13(2) is a broad statute and it has over time encouraged people to come to the Council with suggestions. In fact, lawyers generally know that it is the function of the Council to look at matters such as those outlined in Wis. Stat. §758.13(2) and will bring areas where improvements can be made. Shriner stated that everything which is said about Wis. Stat. §758.13(2) must be considered against the background of the Supreme Court's primary rule enabling statute, Wis. Stat. §751.12, and especially §751.12(5).[2]

After noting the powers of the Supreme Court to promulgate rules under Wis. Stat. §751.12(1), Shriner noted especially the following from §751.12(1): "The rules shall not abridge, enlarge, or modify the substantive rights of any litigant." Shriner stated that from the Council's perspective, we should stay away from anything that might possibly be construed as abridging substantive rights of any litigant.

Gleisner stated that it was good to have this discussion just so we make it clear that we know and are sensitive to what our limits are as a Council. Having said that, if the Supreme Court assigns something to us, we should not concern ourselves about whether it is substantive or procedural. If the Supreme Court assigns a task to us we should assume the Supreme Court has already concluded that it is procedural and we should proceed accordingly. Sarah Zylstra stated that while she agrees with much of what Tom said, to her the line is not that clear. She thinks that there are many times when we might want to see the Supreme Court codify the common law. For example, perhaps a clarification of the

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[2] Wis. Stat. §751.12 provides as follows: **751.12. Rules of Pleading and Practice.**
(1) The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant. The effective dates for all rules adopted by the court shall be January 1 or July 1. A rule shall not become effective until 60 days after its adoption. All rules promulgated under this section shall be printed by the state printer and paid for out of the state treasury, and the court shall direct the rules to be distributed as it considers proper.
(2) All statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section. No rule modifying or suspending statutes relating to pleading, practice, and procedure may be adopted until the court has held a public hearing with reference to the rule.
(3) Notice of public hearings shall be given by publication of a class 3 notice, under ch. 985, the expense of the publication to be paid out of the state treasury. Notice shall also be given in an official publication of the State Bar of Wisconsin. The notice to be published not more than 60 days nor less than 30 days before the date of hearing shall include, at a minimum, the time, date, and location of the hearing and a summary of the proposed rules, including changes, if any, in existing rules, that are the subject of the hearing. The State Bar of Wisconsin shall not charge the state treasury for publication of this notice. The full text of the proposed rules, including changes, if any, in existing rules, shall be placed on the Internet site maintained by the director of state courts for the supreme court.
(4) This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure.
(5) The judicial council shall act in an advisory capacity to assist the court in performing its duties under this section **[Emphasis supplied].**

standard of review. However, here Sarah stated she agrees with the State Bar that *Petition 23-1* would actually change what the law is. Sarah would weigh in and inform the Supreme Court that we are joining the submission of the State Bar.

Shriner stated he wasn't sure that we should. Shriner noted that one of the things the Petitioner in *23-1* does is to note how the Federal Courts of Appeal deal with Federal Rule 8. We have to focus on what precipitated this *Petition 23-1.* Analogies to federal practice are unhelpful because federal appellate courts are not the final court of review on the federal level. The rule envisioned by *23-1* is one administered by a court of mandatory jurisdiction.

Justice Hagedorn then observed as to matters on which the Council might weigh in on and made the following observation. The Supreme Court has as of late all types of emergency issues, including political issues, as to which there is often a good deal of debate, including on the Court. It would be helpful to have some sort of framework that would assist in making a decision as to how to act. Maybe there isn't; maybe it is a matter of equitable considerations.

Shriner said that the State Bar's submission makes the point that what is really happening is that the appellate court is being asked to consider what is in effect an injunction against what will happen. And the Council has already been looking at (for some time) revamping our injunction law to make it more like Federal Rule 65.

Gleisner said he agreed with Sarah. Judge Hruz has already written the Supreme Court and in his letter he stated "we look forward to providing whatever assistance we can to the Supreme Court" which Gleisner said reads to him like "we're going to get back to you." So Gleisner thinks there should be some kind of letter following up on Judge Hruz's letter, where we would inform the Supreme Court that we adopt the points made by the State Bar in their submission concerning *Petition 23-1*.

Shriner said that we should at least say the Council is not going to add any additional points re *Petition 23-1.* Gleisner said fine, but we should respond in some way because Judge Hruz's letter sort of indicated the Council is going to respond. Sarah agreed with that, but she wondered if we should do that because the State Bar has done a very fine job. Judge Dugan, citing the many pro se people who have appeared before her, said she thought that it would be good to codify the standards to be applied when there is an appeal so that pro se folks can understand what will happen during an appeal.

Shriner said that dealing with pro se litigants is very challenging. He cited to the experience of Judge Gasiorkiewicz that when a pro se litigant is told something is hearsay, pro se litigants often don't understand why it can't be brought into evidence. Shriner stated that there is a limit to which we change our rules so that the least educated litigant understands them. The rules are the rules. But what are you going to do? You can say here's a case go read it. But pro se litigants have no background or education which will help them

understand some cases. Judge Hruz noted that most people who are not trained in the law think of hearsay as "gossip."

Judge Hruz said that although he wrote the original letter on behalf of the Council, it is his view that any further communique should come from the Council itself. Sarah made a motion that the Council file a letter (because we said we were going to) and state that we believe that the State Bar Section has appropriately articulated all of the concerns about *23-1* and we adopt them as our own. We should also write to the Court that we believe that litigants and the Bar would benefit from some clarity as to what should happen while a Circuit Court decision is being considered on appeal, but we do not believe that *Petition 23-1* and its supporting memoranda adequately spell out what the law is in Wisconsin. And perhaps we could add that the Council is willing to study the issues raised by *Petition 23-1* and help amplify on the State Bar's submission.

There was a second, but Shriner said before there is a vote let's discuss this further. Shriner said he does not think we should do that. Just agree with the State Bar's analysis and leave the issue of our involvement in an effort to codify to another day. Shriner stated that he doesn't believe it is our role to codify rules in an effort to educate pro se litigants. Shriner offered an amendment to Sarah's Motion. Shriner would simply send a letter which says we have looked at *Petition 23-1* and we have reviewed the State Bar's response to the Petition, and we accept the State Bar's analysis and we will not offer anything additional at this time.

Judge Gasiorkiewicz is not willing to have the Council give its imprimatur to the State Bar. Judge Gasiorkiewicz says we should just say we believe the filings now before the Court adequately address the issue. Judge Gasiorkiewicz has no problem with codification because that helps us educate litigants and the public about the role of the Courts. In that regard, Judge Gasiorkiewicz agrees with Judge Dugan.

Judge Hruz pointed out that the public hearing on *Petition 23-1* will be on December 11, 2023. Judge Dugan stated that there is no need to submit anything in writing. A member of the Council could go into the hearing on that date and make comments.

Sarah Zylstra then stated that she could just withdraw her motion. Judge Hruz said that in rereading his letter we are not bound to respond, and Shriner agreed. Shriner said that maybe we should just send a letter saying we have reviewed the materials and don't think there is much we can add but if the Court requests our assistance we will comply. Sarah took that as a friendly amendment of her motion and as such it was seconded that a letter should be sent saying we have reviewed all the materials and we don't believe we can add anything at this time. Gleisner clarified Sarah's motion as follows: We have reviewed all the materials in connection with *Petition 23-1* and we have nothing to add at this time. But if the Supreme Court requests our assistance concerning *23-1* we will be happy to comply. The motion passed, with Justice Hagedorn and Senator Wanggaard abstaining.

Justice Hagedorn weighed in and pointed out that there will be a public hearing on the 11th of December and anyone is welcome to speak, including anyone from the Council.

Reports by Committees:

a) Judge Hruz, Chair of the Council's Committee on Appellate Procedure reported as follows. The Committee did file the petition to the Supreme Court, which had been approved by the Council previously. That's in the hopper. Judge Hruz also stated that the APC is in the process of gathering individuals who can be part of an ad hoc committee investigating the venue provision brought to our attention last meeting by Assistant Attorney General Kilpatrick.

b) Thomas Shriner, Chair of the Council's Standing Committee on Evidence and Civil Procedure, reported that the ECP Committee had our meeting yesterday (the 19th of October) and spent the whole time on a couple of provisions of Chapter 908. The committee is going to address some of those unusual quirks of the evidence code where it is said what hearsay is and then proceed to define certain evidence as not hearsay (even though we know that certain evidence is hearsay). For example, past recollection recorded. Of course it's hearsay, but like a ruling by a referee we all agree it is not hearsay, even though of course it is hearsay. It has been very helpful to have the assistance of Professors Blinka and Schwartz, both of whom are the evidence gurus of their respective law schools. Shriner reported that the ECP will want to circulate our work product to various stakeholders (like the State Bar) and then we will return it to the Council for further consideration. At some point, we will be looking to prepare a petition to the Supreme Court with our recommendations for changes to the law of evidence.

c) Judge Hanna Dugan, Chair of the Council's Standing Committee on Criminal Procedure reported that the Criminal Procedure committee met last month for the first time. Her committee was planning to meet today but so many folks had conflicts that we decided not to meet. Judge Dugan reported that next month her committee will have someone come in to talk about videoconferencing, especially across counties where the counties have different rules. We are also going to look at the issue of taking DNA samples.

d) Judge Dugan raised a different issue. Her Criminal Procedure Committee is concerned with the new digital recordings of court proceedings (called DAR). There is a concern about the fact that anyone, not just the parties, can request recordings of court proceedings. There is a lack of uniformity between the counties and within the counties. Right now anybody can get those raw recordings and the way that they are done you can hear people talking about potentially confidential conversations. You can hear sidebars, conversations between prosecutors and witnesses, including police. Gleisner asked if the recordings included privileged material and Judge Dugan said yes. And redacting is very time consuming and

uncompensated for court reporters. We have to figure out how to protect tape recordings altogether, like making tape recordings an exception to the Open Records law, or make sure that there is uniformity on how it is tape recordings are handled. Waukesha has a form which says the information is on a disk, but there is no control over that disk. Gleisner observed that means that privilege and confidential information might be released, such as the identity of children or other confidential information like addresses or personal information. Judge Snow said the only way to handle this is to have the Court listen to a hearing again, and Judge Dugan said that is not a workable solution because she does not want to hear what an attorney tells his or her client, and there is no compensation for in effect sitting through a hearing again. Gleisner suggested that the Council should start working on addressing the recording problem. Judge Dugan stated her committee was not going to do that.

Judge Snow stated that there are four reporters in her courthouse, two of which are DAR reporters. The recording is hard to understand, especially because it is 8 track recording. She said that the microphones are very sensitive. Judge Snow said that she and her fellow judges have never been taught anything about DAR. Gleisner asked Justice Hagedorn if it would be helpful for the Council to submit a rule and the Justice stated that the first place he would go is the Director of State Courts. The Director works with the Counties and with court reporters. Justice Hagedorn said that this is the first he has heard of the issue discussed today. Justice Hagedorn stated the Chief Judges should also be made aware of the problem.

Judge Dugan then asked if there would be anything wrong with putting an embargo on all court recordings until we can come up with some workable rules. Several members said that "recordings are already public records." Judge Dugan responded that the recordings may be considered public records but no one has discussed the status of the DAR recordings. Judge Snow stated that right after covid they did get a directive to set up signs around courtrooms that everyone has to be aware that things can be recorded using this DAR technology. She didn't do that because she was concerned about alarming defense counsel. She didn't worry about it at the time because she had a stenographer.

Judge Gasiorkiewicz then suggested that either Gleisner or Judge Dugan, using our Council letterhead, send letters to the Director of State Courts and to the Chief Judges that we have become aware that there are problems with DAR. This accomplishes two things. We thereby let the Chief Judges know that we are concerned about something that affects practitioners and we also let the Director of State Courts know that we are attempting to protect the interests of the citizens of Wisconsin. It's a win-win. Shriner agreed stating that under Wis. Stat. §758.13(2) the Judicial Council clearly has a broad remit to deal with issues regarding the administration of justice.

e) Margo Kirchner, Chair of the ad hoc Committee on the "Council Corner" gave

her report. She stated that she is working on a short article for the Inside Track concerning the Unsworn Declaration Act, and she will also give a short update on the work of the ECP Committee's work on the Rules of Evidence. Margo asked Judge Hruz if he would be able to write an article for early February (also for Inside Track) about the Petition his Committee just filed with the Supreme Court and about any other work the Appellate Procedure Committee is doing. Judge Hruz agreed. Shriner asked Nick Schultz (Ron Tusler's assistant) what was going on in the Assembly concerning the Unsworn Declaration Act. Margo noted that the Senate passed this Act and it is in the Assembly as Assembly Bill 27. Ron Tessler's assistant reported that the Act is moving forward.

Shriner asked for a report from Senator Wanggaard concerning funding. Gleisner asked if there was any chance of reviving a home for the Council in some place like the Legislative Bureau. The Senator said he was still exploring that option. Gleisner said that we should rename ourselves "a tribe of nomads" because we have not had an office for so many years.

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

Minutes prepared by Attorney Gleisner