



STATE OF WISCONSIN – JUDICIAL COUNCIL

AMENDED MINUTES
OF THE MEETING OF THE
WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
January 19, 2024

The Judicial Council met at 9:30 a.m. on January 19, 2024 in Room 328NW.

MEMBERS PRESENT: Chair William Gleisner; Justice Brian Hagedorn; Judge Thomas Hruz (by phone); Judge Hannah Dugan (by phone); Judge Kristine Snow; Judge Audrey Skwierawski; Sarah Barber; Ryan Billings; Professor Lanny Glinberg; Steven Kilpatrick; Margo Kirchner (by phone); Rebecca Maki-Wallandar; Tom Shriner; Sarah Zylstra; and Senator Van Wanggaard (by phone).

EXCUSED MEMBERS: Judge Gasiorkiewicz; Judge Needham; Representative Ron Tusler; Saveon Grenell; Molly McNab; Adam Plotkin

SPECIAL GUEST: Ron Tusler's representative Nick Schultz.

Roll Call was taken.

Before beginning, Gleisner noted that the co-chairs of the DAR Committee have been very busy. Judge Gasiorkiewicz took Justice Hagedorn's suggestion and contacted the Chief Judge of the Chief Judges.

November 17, 2023 Minutes approved, as amended.

Judge Dugan began her Report. Judge Gasiorkiewicz and I are co-chairs of this committee. During the recent Judicial Conference Gasiorkiewicz spoke to a number of judges and tried to get their take on the new DAR system. Judge Gasiorkiewicz could not be here today, but Director State Courts Judge Audrey Skwierawski is here today. Judge Dugan then supplied a number of handouts.

The Chief Judges were informed by Justice Hagedorn about what the Council is doing, and the Chief Judges have moved very quickly and have designed a rule. In 2018, then Director of State Courts Randy Koschnick proposed amendments to SCR 71 which would integrate DAR system in Rule 71. This all has to be seen against the background of a decline in the

importance of court reporters for over 26 years. The initial amendments were superficial but necessary. There was a concern that DAR type materials constituted a public record, but the Supreme Court did not address the issue of whether DAR materials are public records. This was not an immediate problem, but then along came Covid.

With the coming of Covid, substantial sums of money became available for improvements in how courts could use technology. At the same time, Wisconsin continued to battle a shortage of court reporters, which was made worse because Wisconsin is roughly 47th in the Nation in terms of compensation for court reporters. The influx of money earmarked for technology also promised to provide a possible solution to the court reporter problems by turning to electronics. About the same time, the Chief Judges had created a committee known as the Making of the Record Committee.

The money that had been earmarked for technology was not put into human resources. Instead, it went into technology. It appeared a movement began about this time to reduce or eliminate reliance on human resources, in favor of technology resources.

Returning to the 2019 update to SCR 71, the amendments to SCR 71 directed the Director of State Courts to create an Operations Manual to deal with the new court technology as it developed. This is where we find some evidence of attempts to control the disks and recordings that would turn into the DAR system. An Operations Manual was prepared and published in March of 2023. This Manual's origin actually grew out of the Making the Records Committee.

My take on where we are now is different from the Chief Judges' take. Their view was a reaction to the problem, whereas my reaction is that if we continue on the course we are on we are going to fundamentally change the court system in Wisconsin. As matters now stand, the judges are really going to be responsible for what is the record. But during Judge Dugan's first two years on the Bench, she did not have a court reporter at all, except for jury trials. So, she decided that the best procedure was to have her Clerk turn on DAR, all 8 tracks, every morning. It was turned off at lunch, and then it was turned back on in the afternoon. As a result, everything in the courtroom was recorded.

Judge Dugan's court reporter wasn't a court reporter, and wasn't being paid to be a court reporter. But if she did not turn on DAR, nothing would be recorded. So all the sidebars of comments of lawyers, everything, was being recorded every day by DAR. During this period, the Chief Judges noticed that there were not any backups to the DARs. So every courtroom was fitted with a backup recording system that Judge Dugan and her fellow judges did not know about. Therefore, everything in the Courtroom is being recorded, whether it is in session or not. Several Milwaukee Judges (e.g., Judge Sosnay) discovered that everything in a courtroom is being recorded, but no decision has been made on whether these recordings should be made available to the public.

Redactions done in my Court were done by my DAR reporter, and she did not get paid for that. But more importantly, we really need to have a discussion about open records. Are the DAR recordings open records or are they something else. I can tell a press reporter that they cannot record anything, and yet they can get the DAR recordings. Anybody can get these recordings. If you look at Family Law, the statutes say that only a party can get a transcript, but how matters now stand anybody can get a transcript.

There is no control over the disks. Some judges have identified AI concerns. There are no safeguards against manipulation or doctoring of the disks. Moreover, there is not even consistency on how you get the Disks. In Milwaukee, you can get them by making an oral request. In Waukesha there is request form, but it is vey barebones.

Another danger to the unregulated use of disks is where a motion hearing occurs, and confidential or important information is shared between counsel and a client. If I am asked to review the DAR disks and I hear the confidential discussion, what do I do? It would seem like I must recuse myself.

With regard to DAR training, Judge Snow has reviewed some training materials. This reveals that there is no consistency on how DAR trained individuals are trained on how to record or handle DAR disks. And the Operations Manual I mentioned earlier, allows for oral requests for DAR disks. Well, that means there is no paper trail on who asked for disks.

There are other problems. For example, how do you handle victim notifications? Especially if an oral request is made, you would not even know when it would be necessary to warn victims or give notice to victims of a possible threat.

Even if a disk is found to be a public record, there are still some safeguards in the Open Records Law that provide some protections. But if they are not public records, then even those rudimentary protections will be missing.

Judge Dugan said that she is now required to read a notice about being recorded. Sarah Zylstra remarked that in her experience some judges read the notice, but it is rare. There is no consistency. Judge Snow observed that where there are a number of cases processed over a short period of time (such as occurs in criminal matters) it is not possible to read the notice before every proceeding.

It is not sufficient to put notices on Counsel tables informing them that they have to press a down button and hold it down while they are conferring with co-counsel or clients. Who will remember to hold down a button during trial or a hearing. And as Judge Snow then stated, after all there are at least two Counsel tables and, given the sensitivity of the microphones conversations that will not be audible to the ear may be audible to the super sensitive DAR microphones.

Judge Dugan's take away: For expediency we end up with judicial inefficiencies. Further, the Judicial Council is particularly well suited to address the issues surrounding DAR. The Council has input from a broad range of perspectives and can discuss or hold hearings to determine how best to deal with DAR. We can also bring in any number of [ad hoc] members to address the issues. By the way, one group that is not represented at present are the court reporters themselves.

Tom Shriner then opined that once the basic issues have been sorted out, the courts can come with the appropriate rules to deal with DAR. In other words, Shriner said I don't know that we need a rules petition at the end of the day. But this is exactly within our wheelhouse for the purposes of doing research and gathering information that can be used to create a basis for rulemaking by the courts. After all, everybody is in this Council and has the opportunity to advance or advocate for what is best for the organizations that they represent. Shriner then went on to observe as a trial lawyer that one of the problems is that we are looking at DAR as a vehicle for a transcript such as occurs following a hearing or a trial. But most of the time, the DAR recording is not a transcript and, most of the time, will never become a transcript. The courts have historically, for the last 200 years, act as final arbiters of what is in a transcript after a trained court reporter has translated his or her notes into a written transcript. That isn't what we're dealing with here. We're dealing with garbage, because this is a recording of everything that has happened in a courtroom. But it is extremely unwise to think of DAR recordings as transcripts. The DAR recording is a recording of every voice, every sound that occurs within a courtroom. This is not a transcript problem.

Trial lawyers have had this system thrust upon them. Other bodies would not accept this. Then Shriner addressed Judge Hruz and said, "the appellate courts wouldn't accept someone recording every privileged conversation, like conferences or opinion conferences." This DAR thing is very intrusive and adds nothing to the orderly administration of justice in a trial court. Not everything is a public record. And this DAR recording is not really a public record; this is a recording of all kinds of stuff, a lot of which is stuff that nobody ought to hear.

Judge Dugan then returned to a comment she made earlier. In 2019, the judges punted on the whole issue of whether a DAR recording is a public record. If you look at the Chief Judges proposal, at the very end, they say there are several routes that we can go, and one of those routes is to seek statutory changes to the Open Record Law. Tom Shriner agreed and said that should be part of the solution, for sure. And here is the crux of the problem. You cannot read a court reporters' statements, but when a court reporter does a transcript there is an underlying document which can be used to check the transcript. But now with these DAR recordings, what is said in a courtroom is now suddenly "available." There is no filter, no paper trail of who asked for the recording, and no way to redact or limit what is available on the DAR recording.

Again, the Council is the perfect body to tackle the relevant issues. If it is an Open Record question, we have the people here who can get that done. We have a representative of the Justice Department; we have the Director of State Courts; we have the Legislative Reference Bureau; and we have members of the Legislature. Judge Dugan stated that her recommendations are as follows. First, we need to recognize that the Council is involved given its membership and that we make a commitment to move the ball forward toward a solution of the shortcomings of the DAR system. Second, we should urge the courts to suspend the release of DAR recordings until the shortcomings of DAR have been addressed, such as 1) how to ensure that secret proceedings (like juvenile proceedings) are safeguarded; 2) how to ensure confidential communications are appropriately redacted; 3) how to ensure that only those people who have the right to recordings have been identified. We need to respect the rights of parties to listen to DAR recordings and decide if they want transcripts prepared. The disks should not defeat the right of parties to challenge the release of certain information contained in the DAR recordings. But if they are released on demand, then any hope of proper redaction is eliminated.

Gleisner stated several points for the record. First, we may be unfunded, but the membership and powers of the Council are defined in great detail in Wis. Stat. §758.13, and the Legislative back in 1951 designed the membership of the Council so that it represented the widest possible stakeholders, or their representatives, from the three branches of government in Wisconsin. So we are in a particularly good position to do research about issues such as DAR, and to seek input from the three branches of government. Sarah Zylstra asked to respond to comments by Shriner and Judge Dugan. According to Shriner, the DAR recordings are not open records. But Sarah knows that she could stand up in front of a number of judges and make a convincing argument that the DAR tapes are Open Records. Shriner responded by saying that is part of the problem. Tom said "what we need here is clarity." Sarah responded that it is the Council's role to seek clarification regarding the status of DAR recordings. Sarah also asserted that this is an issue that will have to go to the Legislature; She stated this is not an issue for the Supreme Court.

Sarah also took issue with Judge Dugan's suggestion that the release of DAR recordings should be suspended, because if the DAR recordings are public records, then suspending release will be ipso facto a violation of the Open Record Law. Judge Dugan responded that the public part of DAR recordings is that they are recordings in part of proceedings in an open and public court. Private communications (like conversations at counsel table, discussions between the Court and clerks, conversations among jurors, etc.) are not part of the public record and need to be protected.

Gleisner responded that the decision on whether to send any research or suggestions regard DAR recordings to the Legislature or the Supreme Court is premature. We will need to see what it is that we believe should be shared with the Legislature of the Supreme Court before making a decision as to whom a rules petition is addressed. I do think that under Wis. Stat. §751.12, both the Legislature and the Supreme Court may have a right to play a part as to the issue of DAR recordings.

I would add that there is another good reason why the Council makes sense as a body that can study DAR. We don't need to worry about where to send a rules petition until we have completed appropriate studies. For example, as we have done on a number of occasions, we could undertake studies of what is being done regarding DAR recordings in the other 49 states and what is being done on the federal level. We can also contact national organizations like the national DAR reporters or national court reporter associations. With all due respect, I do not think that the Supreme Court or the Legislature can easily find the time or resources to do those kind of studies.

Zylstra responded that she absolutely agrees that the study of DAR recordings is absolutely an appropriate pursuit for this Council. She is just not prepared to say that we can seek a stay on providing DAR recordings to the public until we know if DAR recordings are public records. Gleisner responded that we should consider seeking a stay from the Supreme Court until we can say with certainty how much of a DAR recording is a public record. The risk of violating the Open Record Law pales in comparison to the risks that may exist when sensitive or privileged material is released, especially if it is material that impacts a juvenile or violates the rights of crime victims to timely notice of actions which may affect their safety.

Judge Snow then pointed out Wis. Stat. §19.32(2) defines a "public record" and it is clear that it appears that DAR recordings would be public records. Judge Snow went on to note that a combined approach directed to the Legislature and the Supreme Court may be the best way to tackle this issue, and our Council is in a unique position to make such an approach. Judge Dugan responded that from a public policy perspective it would be a very good idea to compare the DAR problem with all the exceptions to what is a public record and that is something this Council is well suited to do. The problem with what we all have been doing is we have been chasing a solution without doing some basic research as to how DAR recordings fit within the definition of public records. There was general agreement on this point from Council members.

Shriner said we really are dealing with a problem that could result in real world problems. Shrine said that when he thinks about open records he thinks about the Monfils case, which was a horrible disaster. In that case up in Brown County, several workers threw a fellow worker into a pulp vat. A witness (a whistle blower) came forward and identified the culprits, who were then prosecuted. Because he could be in danger the witness's identity was not made public. The workers who had thrown the guy into the vat, then made an open records request for the identity of the witness and proceeded to murder the witness. This whole DAR issue has the potential to result in serious harm to innocent citizens.

The business meeting concluded prematurely at 11:00 a.m. on January 19, 2024.

Minutes prepared by Attorney Gleisner