



Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS

110 E. MAIN STREET, SUITE 410

MADISON, WISCONSIN 53703

Hon. Randy R. Koschnick
Director of State Courts

Patience Drake Roggensack
Chief Justice

Diane M. Fremgen
Deputy Director for Court
Operations

March 25, 2019

Wisconsin Supreme Court
110 East Main Street
P.O. Box 1688
Madison, WI 53701-1688

RE: Petitioner's Response to Comments to Petition 19-01

Honorable Justices of the Wisconsin Supreme Court,

I am writing in response to the comments received about Petition 19-01. I am grateful for the thoughtful submissions by court reporters, circuit court judges, the National Court Reporters Association (NCRA), the Wisconsin Court Reporters Association (WCRA), the American Association of Electronic Reporters and Transcribers (AAERT), and the Wisconsin Association for Justice (WAJ). This letter is meant to assist the Court in clarifying the content and intention of the rule petition.

Comments from Circuit Court Judges

Judge Babler expressed strong support for the petition, highlighting many of the advantages of digital audio recording devices (DAR) and digital court reporters, including the ability for stenographic court reporter students to gain speed while being employed as digital court reporters. His experience demonstrates how DAR can help students learn on the job as they work towards their stenography certification. Likewise, DAR can be useful later on in stenographic court reporters' careers, to help alleviate repetitive stress injuries and provide flexibility to avoid future injuries.

Judge Lazar also expressed support for the petition, citing her personal experiences in federal court with digital recording. During the Making the Record Committee process, committee members traveled to the federal district court in Madison, where the court uses digital recording on a daily basis to take the record. The visit showcased how DAR can be used over decades to make an accurate record.¹ Judge Lazar lauded the petition for not altering the ability for a court reporter to be the personal appointee of a judge. This decision was part of the committee's thoughtful deliberation on how to address the court reporter crisis without extensively modifying existing practice.

The Walworth County Circuit Court judges also submitted comments, noting that they keenly understand the problem of the court reporter shortage. In fact, the Second Judicial Administrative

¹ *Report of the Making the Record Committee*, Director of State Courts Office (August 3, 2018), pages 13-14, at <https://www.wicourts.gov/publications/reports/docs/2018mtrrpt.pdf>.

District (Kenosha, Racine, and Walworth counties) has the highest percentage of court reporters eligible for retirement compared to the other judicial districts across the state (62% of the official court reporters in the Second Judicial Administrative District were eligible for retirement as of December 31, 2018, as opposed to 43% across the state). As to their concern regarding the addition of the word “primarily” in SCR 68.12(3), the recommended change in Petition 19-01 will not modify existing practice, but rather make the rule consistent with Wis. Stat. § 751.025 regarding the temporary assignment of official court reporters to other branches. *See* Petition 19-01, Section 2, related to a modification of SCR 68.12(3).

Comments from NCRA, WCRA, WAJ, and Several Court Reporters

Several court reporters, NCRA, WCRA, and WAJ commented, expressing concerns related to the use of digital audio recording devices in Wisconsin. I have responded to each concern below with some additional information that I hope will be helpful in clarifying my recommendation to transition to a blended court reporting system in Wisconsin.

Live Reporters and Monitored Digital Audio Recordings

The recruitment and retention of qualified court reporters is integral to the court system’s plan for a blended system in Wisconsin. A blended approach enables judges to hire stenographic court reporters, voice writers, realtime court reporters, or digital court reporters to fill vacant court reporter positions.² There is no intention to eliminate court reporter positions under Petition 19-01. On the contrary, the court system is seeking to add diversity and flexibility to the pool of candidates eligible for court reporter jobs, filling each court reporter position with a qualified candidate who can take the record for his/her judge, utilizing the systems currently available.

In order for DAR to be successfully implemented in Wisconsin, Petition 19-01 establishes the use of “monitored digital audio recording” as a standard way of making the record. *See* Petition 19-01, Section 8, related to changes to SCR 71.01(3). The word “monitored” is intentional in the drafting. The standard use of DAR will involve employing a digital court reporter, who will be responsible for monitoring the DAR equipment. Like stenographic court reporters, digital court reporters are personal appointees of their judges and are expected to adhere to quality standards maintained by all court reporters.

In their final report, the Making the Record Committee recommended that the use of DAR should always be accompanied by a digital court reporter who can effectively monitor the equipment. In emergency circumstances, when a digital court reporter is unavailable, the report recommends that the DAR system be monitored by a clerk. The committee’s ultimate conclusion was that unmonitored DAR is not appropriate for circuit court use.³

The Making the Record Committee’s final report was unanimously approved by the committee members present in person and over the phone at the final meeting on August 3, 2018.⁴

² As of March 21, 2019, the Wisconsin Court System employed 280 stenographic court reporters (of which 79 are realtime court reporters) and 10 digital court reporters.

³ *Report of the Making the Record Committee*, Director of State Courts Office (August 3, 2018), page 7, at <https://www.wicourts.gov/publications/reports/docs/2018mtrrpt.pdf>

⁴ Of the three voting committee members who were not participating in the meeting, Judge Blanchard and Judge Russell contacted committee staff to voice their support of the final report prior to the meeting. The only committee member who did not participate and did not vote was Sheri Piontek. *August 3, 2019 Minutes of the Making the*

Digital Court Reporters, Confidence Monitoring, and Transcription

Digital court reporters function in the same manner as stenographic court reporters and are expected to faithfully discharge the duties of their office to the best of their ability. Similar to stenographic court reporters, digital court reporters are expected to know when proceedings are on or off the record and identify speakers by name. Just as a stenographic court reporter does not take notes when a part of a proceeding is not on the record, a digital court reporter pauses the audio recording when a part of the proceeding is not on the record. In addition, digital court reporters also need to be cognizant of reducing the audio volume to avoid the device inadvertently recording privileged conversations. This is no different than expectations of stenographic court reporters, who may unintentionally overhear attorney-client conversations, but who would never include those discussions in their stenographic notes.

During court proceedings, digital court reporters are required to keep extensive log notes, which are descriptive annotations regarding court events, the individuals speaking, and the time of each event and speaker. These log notes are integral to the creation of a transcript.

In addition to the log notes, digital court reporters should always wear headphones during the proceedings so that they can confirm that the microphones are capturing what individuals are saying. This is a technique known as “confidence monitoring,” in which reporters are diligent to ensure that no sounds or objects are obscuring the recording (e.g. attorney papers, background noise). In addition, digital court reporters are responsible for politely reminding individuals addressing the court that they need to be in close proximity and speak directly into the microphone. During trials, digital court reporters may provide attorneys with DAR lapel microphones, which allow attorneys to move freely throughout the courtroom while the record is being captured. These basic safeguards eliminate inaudible or muffled recordings and make it easy to use the audio recording for transcription.

Transcripts of digital audio recordings are done by the responsible digital court reporter, just as original stenographic notes are expected to be transcribed by the stenographic court reporter who took them. In both situations, if the court reporter is unavailable, SCR 71.04(10)(a) applies, which allows for another court reporter to transcribe the proceeding. The court reporter assigned to transcribe the digital audio recording has access to the extensive log notes completed by the responsible digital court reporter.

Under current practice, when a court reporter is unavailable to transcribe a verbatim record, a judge will typically contact the district court administrator or the chief judge to help him/her find a court reporter who may have time to complete the transcript request. Court reporters are not required to transcribe another court reporter’s notes/verbatim record, but may choose to do so if they are able.⁵ Petition 19-01 does not alter a court reporter’s ability to decline to transcribe another court reporter’s verbatim record.

Record Committee, Director of State Court’s Office at <http://intranet.wicourts.gov/committees/makingtherecord/docs/0818minutes.pdf>.

⁵ Due to each stenographic court reporter having a unique dictionary, sometimes other stenographers are not able to transcribe their notes. In contrast, digital audio recordings, which are backed up on CCAP servers, are available for any court reporter to transcribe.

DAR Transcript Certification and Alternate Means of Making the Record

The proposed rule does not make any changes to the certification of transcripts or the ability of the Director of State Courts to authorize alternate means of taking the verbatim record.

Quality of Digital Audio Recordings

In responding to Petition 19-01, several individuals expressed concerns regarding the quality of audio recordings. It appears from the comments that they were referring to county-provided audio recording systems in court commissioner hearing rooms, where the majority of the recordings were unmonitored. Without specific case numbers to reference, I cannot verify that they are referring to these county systems.⁶ Therefore, I have contacted the court reporters who commented on Petition 19-01, asking them to provide my office with specific case numbers so that I can research their concerns and provide information to the Court at the public hearing on April 8, 2019.⁷

As Nichole Wiest, who has been a digital court reporter in Wisconsin for 10 years, stated in her comment, a problem with audio quality is a result of inadequate training, rather than inadequate equipment. She affirmed that DAR systems can effectively take the record during all types of proceedings, including jury trials. The person monitoring the DAR system must understand the equipment and appropriately listen to the audio during the proceeding in order to effectively take the record. If a DAR device is monitored and the audio recording is deficient, it is a reflection of that individual's lack of technical ability to use the DAR system properly. Confidence monitoring is vital to guaranteeing the accuracy of the audio recording. This is why confidence monitoring is a key component in DAR training programs and digital court reporter certification programs.

Over the past six months, CCAP staff have been traveling throughout the state, training court staff in each county on how to appropriately use the DAR equipment. Included in this training program is the importance of system start-up procedures, sound checks, and confidence monitoring. CCAP staff also provide court staff with documentation and resources on how to effectively take the record with the DAR system.

Although the recommended use of DAR involves a digital court reporter, there will be emergency situations in which the DAR will need to be monitored by a clerk or other court staff. The CCAP training is meant to educate court staff on how to properly use the DAR system in order to eliminate poor sound quality and inaudibles in transcripts. If court staff does not follow the training procedures, low audio quality could be the result.

Informal Comments Received for Language Consistency

In addition to the above comments, I have informally received some comments regarding phrases and terminology in SCR 61.09 and Wisconsin State Statutes Chapters 801, 809, and 968 that need to be changed to be consistent with rule changes if the court approves this petition. The changes are purely for consistency and would not impact any procedural or substantive rights.

⁶ The Making the Record Committee's final report indicates that these county-provided systems are not appropriate for circuit court use. *Report of the Making the Record Committee*, Director of State Courts Office (August 3, 2018), page 7, at <https://www.wicourts.gov/publications/reports/docs/2018mtrrpt.pdf>

⁷ I have enclosed my letter to the court reporters who expressed concerns regarding the audio quality of DAR.

The changes fall within the Wisconsin Supreme Court's ability to regulate pleading, practice, and procedure in judicial proceedings in all courts in accordance with Wis. Stat. § 751.12. They relate directly to the courts' procedures and practice and are purely administrative in function, consistent with previous Wisconsin Supreme Court orders.⁸

The phrase "reporter's notes" should be changed to "court reporter's verbatim record" in the following statutes:

- Wis. Stat. § 801.18(15)(i)
- Wis. Stat. § 809.104(2)(c)
- Wis. Stat. § 809.105(4)(h)
- Wis. Stat. § 809.105(5)
- Wis. Stat. § 809.107(4)(a)
- Wis. Stat. § 809.107(4)(b)
- Wis. Stat. § 809.107(5)(c)
- Wis. Stat. § 809.11(4)(a)
- Wis. Stat. § 809.15(1)(a)13.
- Wis. Stat. § 809.15(3)
- Wis. Stat. § 809.15(4)(b)
- Wis. Stat. § 809.30(2)(e)
- Wis. Stat. § 809.30(2)(f)
- Wis. Stat. § 809.31(5)

The phrase "stenographic reporter" should be changed to "court reporter" in the following statutes:

- Wis. Stat. § 968.04(1)(d)
- Wis. Stat. § 968.12(3)(d)

The phrase "original notes" should be replaced with "verbatim record" in SCR 61.09.

I hope these comments are helpful to the Court as you review the rule petition. I will provide the Court with more details about our blended system model at the public hearing on April 8, 2019.

Randy Koschnick
Director of State Courts

⁸ Previous Supreme Court Orders modifying Wisconsin Statutes Chapters 801, 809, or 968 include: Sup. Ct. Order 14-03, 2016 WI 29 (filed 4-28-16, eff. 7-1-16); Sup. Ct. Order No. 15-02, 2015 WI 102 (filed November 25, 2015, eff. July 1, 2016); Sup. Ct. Order No. 17-05, 2017 WI 95 (filed November 9, 2017, eff. July 1, 2018); Sup. Ct. Order 02-01, 2002 WI 120 (filed October 31, 2002, eff. January 1, 2003).



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March 25, 2019

RE: Comment to Petition 19-01

Dear [Court Reporter Name],

I read with great concern your recent letter to the Wisconsin Supreme Court reporting that a digital audio recording (DAR) system had failed to provide an accurate verbatim record of a court proceeding. Based upon your description, I assume that this was an *unmonitored* DAR proceeding. If the situation referred to in your letter did, in fact, involve a *monitored* DAR proceeding, please provide my office with the date and case number of the proceeding as soon as possible so that I can investigate the problem immediately and report the result to the Wisconsin Supreme Court at the public hearing on April 8, 2019.

Thank you for your anticipated cooperation and your interest in ensuring that our courts of record are properly equipped to reliably and accurately take and make the record.

Randy Koschnick
Director of State Courts