

BAYFIELD COUNTY CIRCUIT COURT

TENTH JUDICIAL DISTRICT OF WISCONSIN BAYFIELD COUNTY COURTHOUSE

Hon. John P. Anderson
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Deputy Chief Judge, 10th District

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Wisconsin Supreme Court
110 E. Main Street, Suite 440
Madison, WI 53703

Re: Petition 20-09A Videoconferencing Technology – Effect of 2021 Wisconsin Act 141

Honorable Justices of the Wisconsin Supreme Court:

I am writing to address the court's request for comments as to the effect of 2021 Wisconsin Act 141 ("Act 141") on the pending 20-09A rule petition. After review of Act 141, the Videoconferencing Subcommittee of the Planning and Policy Advisory Committee (PPAC) determined Act 141 creates conflict between the newly-created Wis. Stat. §§ 938.299 (5) (b) and 967.08 (4) and both the current version of Wis. Stat. § 885.60 (2) and the proposed amendments to Wis. Stat. § 885.60 (2) and (3) submitted in Petition 20-09A.

Act 141 created two sections addressing the court's response to an objection regarding the use of telephone or live audiovisual means for critical stages of the proceedings. In juvenile proceedings, Wis. Stat. § 938.299 (5) (b) requires the court to sustain an objection to the use of remote technology for a critical stage of the proceeding raised by either the juvenile or prosecutor. Similarly, Wis. Stat. § 967.08 (4) requires the court to sustain an objection if *any* party objects to the use of telephone or live audiovisual means for a critical stage of the proceeding. These new sections are in conflict with § 885.60 (2) (d), which requires that the court sustain an objection only when the objection is made by the defendant or respondent at a proceeding where he or she is entitled to be physically present.¹

As described in the supporting memo, Petition 20-09A proposes amending § 885.60 to allow the court to use its discretion in determining whether to sustain an objection made to the use of videoconferencing technology in criminal proceedings and proceedings under chapters 48, 51, 55, 938, and 980. Petition 20-09A proposes the creation of several new sections in § 885.60 that outline considerations and allow the judge to balance the rights of defendants, respondents, and

¹ Section 885.60 provides guidelines for the use of videoconferencing technology in criminal cases and in proceedings under chapters 48, 51, 55, 938, and 980. Section 885.60 (2) (d) currently reads, "If an objection is made by the defendant or respondent in a matter listed in sub. (1), regarding any proceeding where he or she is entitled to be physically present in the courtroom, the court shall sustain the objection. For all other proceedings in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56."

victims, and the interest of the court in avoiding unnecessary delays. The new language in Wis. Stat. §§ 938.299 (5) (b) and 967.08 (4) precludes the judge from weighing these different factors.

The members of the Videoconferencing Subcommittee agree that when any objection is made during the course of any proceeding, the judge should determine that objection consistent with their responsibility to uphold the Constitution and relevant statutory requirements. The newly-created Wis. Stat. §§ 938.299 (5) (b) and 967.08 (4) allows the prosecution and defense to supersede a judge's decision-making authority, which arguably violates the separation of powers doctrine.² Requiring the court to sustain an objection to the use of telephone or videoconferencing technology by any party diminishes the authority of the judicial branch and may lead to unnecessary delays of the court process. Moreover, these delays could adversely affect the rights of victims which are to "be protected by law in a manner no less vigorous than the protections afforded to the accused."³ However, these newly-created statutes would prevent judges from upholding the constitutional and statutory rights afforded to victims.

To address the concern that sections of Act 141 impair judicial decision-making authority, the Videoconferencing Subcommittee respectfully requests the Supreme Court take action to resolve the conflict that currently exists between Wis. Stat. §§ 885.60, 938.299 (5) (b), and 967.08 (4). Having conflicting statutes makes it difficult, if not impossible, for circuit court judges to act in a predictable and consistent manner.

The court has clear authority to amend the statutes in question. Pursuant to Wis. Stat. § 751.12, the court shares authority with the legislature to amend all statutes related to pleading, practice, and procedure. Section 967.08 was created by Supreme Court Order in 1987 and has been amended by both the legislature and a subsequent Supreme Court Order. Additionally, the sections in Chapter 938 that are amended by Act 141 were also created by the same Supreme Court Order.⁴ Although the source of the statutes is not determinative of who may amend them, these rules are clearly procedural in nature and do not relate to any substantive rights. Historically, it is the Supreme Court, not the legislature, who has primarily enacted rules with regard to how telephone or live audio visual means may be used in court proceedings.

The petitioners request that the court adopt the proposed amendments in Petition 20-09A and bring consistency to the statutes at issue.

Respectfully submitted,

/S/ John P. Anderson

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² See *State v. Stenklyft*, 2005 WI 71, discussing Wis. Stat. § 973.195, which states that the court shall deny a petition for sentence adjustment if the district attorney or victim objects. *Stenklyft* holds that reading this statutory language to allow a veto by the district attorney or victim is unconstitutional, and the court still has discretion to determine whether the sentence adjustment is in the public interest when the district attorney or victim objects.

³ Wis. Const. Art. I, § 9m(2).

⁴ All sections at issue here that were amended by Act 141 were originally created by Sup. Ct. Order, 141 Wis. 2d xiii (1987). This order created or amended many statutes to provide for the use of telephone or live audio visual means to conduct specified proceedings. Sections 48.295, 48.299, and 48.30, which were included in the 1987 order, are the predecessor statutes to §§ 938.295, 938.299, and 938.30.