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To: Sheila Reiff
Clerk of the Wisconsin Supreme Court and Court of Appeals
P.O. Box 1688, Madison, WI 53701-1688
Attention: Deputy Clerk-Rules

From: Wisconsin Association for Justice

Date: March 20, 2019

Re: Comments on Rule Petition 19-01

I. Introductory Remarks

The Wisconsin Association for Justice (WAJ) is the state's largest voluntary bar association. WAJ's core mission is to preserve full and fair access to the courts for redress of wrongs and protecting the constitutional right to trial by jury. Our members actively participate in court proceedings—including jury trials—in civil cases throughout the state, in both rural and urban counties. A smaller segment of our members also handle criminal matters. Consistent with WAJ's core mission, we have long supported sensible reforms to court practice and procedure, as well as the implementation and modernization of technology in the courtroom, where doing so helps to ensure that our circuit courts continue to operate efficiently and effectively. However, where a proposed rule change may have the opposite result, or there are countervailing factors that may not have been adequately considered, WAJ has historically sought to provide input in order to bring that additional perspective to the forefront for consideration before a final decision is made. We feel compelled to do so here in connection with Rule Petition 19-01.

Having reviewed Rule Petition 19-01, we are concerned about its adoption at this time, especially in its current form. The current system, using stenographic court reporters, is reliable and efficient. Wisconsin lawyers can trust that, under the current system, court appearances of all

types—from motion hearings to trials—will be recorded accurately, and transcripts will be available quickly, and at predictable costs.

As set forth below, allowing real-time court reporters to potentially be replaced with digital audio recording (DAR) systems, particularly in the context of jury trials where accurate and real-time transcripts are of critical importance, is something to be avoided, not embraced. WAJ submits that any rule change to allow DAR in certain contexts should make clear that the use of DAR is not allowed as a substitute for having a live stenographic court reporter at trial. Rather, in connection with trial proceedings, DAR should only be allowed to supplement but not replace certified court reporters.

As for allowing courts to use DAR in place of live court reporters during other court proceedings, WAJ urges the Court to not adopt Petition 19-01 at this time on a statewide basis. With all due respect to the hard work and time commitment of the Honorable Randy R. Koshnick, the Director of State Courts staff, and the members of the Making the Record Committee, it appears that no private practice attorneys, district attorneys or public defenders served on that committee or were consulted in any meaningful way in connection with the formulation of the proposed Rule Petition. Providing public notice of the proposed rule and an opportunity to submit comments is not an adequate substitute for up-front input by those practicing attorneys in both the private and public sectors who regularly appear in court and who have a direct stake in the changes being sought. WAJ recommends, instead, further study and reflection, with specific input being sought from the public and private sector attorneys who appear before circuit courts throughout the state, including input from the State Bar of Wisconsin.¹

In addition, we believe that a cautious and incremental approach should continue to be followed. Specifically, we recommend expansion of pilot programs and a further study period before consideration of statewide adoption. Continued use of pilot programs will allow a

¹ I, Edward E. Robinson, am also a member of the State Bar Litigation Section. Members of that Section received notice of this proposed rule petition on February 20, 2019. Unfortunately, we were advised by the State Bar that the timetable for submitting written comments was simply too short for either the State Bar Board of Governors or the Litigation Section to get approval to formally “weigh in” on this petition. Under these circumstances, it would be incorrect and unfair to construe the absence of any official position by either the State Bar or the Litigation Section as endorsement of the petition.

meaningful track record to be made where circuit courts and attorneys may build familiarity with the system, identify flaws, and recommend improvements.

II. There Is No Adequate Substitute For Live Court Reporters During Trials

The need to have an accurate, complete and legible trial transcript is of vital importance to trial attorneys. It is beyond debate that it is essential that our circuit courts accurately record what happens in their forum. The information contained in transcripts of proceedings plays a key role in determining who wins and who loses, not only at the circuit court level, but may also at every stage of the appellate process. As this Court and the Court of Appeals have noted, where a transcript is incomplete or does not exist, appellate review of an alleged error is limited. *See, e.g., Ryde v. Dane County Dep't of Soc. Servs.*, 76 Wis. 2d 558, 563, 251 N.W.2d 791 (1977) (lack of a transcript limits review to those parts of the record available to the appellate court); *Austin v. Ford Motor Company*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979) (“It is boilerplate law that, when an appeal is brought on a partial transcript, the scope of the review is necessarily confined to the record before the court. While the court can consider errors of law revealed in a trial court memorandum, the court will assume, in the absence of a transcript, that every fact essential to sustain the trial judge’s exercise of discretion is supported by the record.”) (internal citations omitted).

It has been said that “technology makes a useful servant, but a dangerous master.”² Given the crucial importance of trial transcripts, it is simply unacceptable to find out after the fact, when a transcript of a DAR is requested, that an important portion of the trial proceedings was not captured on an audio recording due to a technological glitch, or is undecipherable. In some cases, the lack of a transcript due to technological malfunction may result in the need to declare a mistrial, resulting in needless additional costs and delays to the prejudice of the litigants, and additional expense to the court system in having to have a case retried before a different jury.

In this regard, WAJ seconds many of the points articulated by Making the Record Committee member and court reporter Sheri Piontek in her public comments.³ As Ms. Piontek has noted, the final recommendations of the Making the Record Committee were the product of a

² This quote has been attributed to Christian Lous Lange (17 September 1869 – 11 December 1938), a Norwegian historian, teacher, and political scientist, and recipient of the Nobel Peace Prize.

³ Sheri Piontek, Comments on Rule Petition 19-01, March 13, 2019 available at <https://www.wicourts.gov/supreme/docs/1901commentpiontek.pdf> (last accessed March 18, 2019).

“majority vote,” not the unanimous recommendation of the panel.⁴ Any pivot away from live court reporters to DAR in the context of trials creates potential new problems that deserve greater attention. Ms. Piontek has noted several such concerns:

I tried to educate the committee on the many faults of this FTR equipment; namely, the malfunctioning of the equipment, the inability to have the words picked up unless everyone is speaking into a microphone, thus, causing many inaudibles when typing up the transcripts, and how it just stops working for no apparent reason. Also, in areas of the state where the internet is not reliable, this equipment won't work to its fullest capability. My concern is many court hearings will have to be redone and causing the State additional money. These things have been happening already in the areas of the state with our DAR equipment mainly because the clerks have been turning the equipment on and off and were unable to monitor the proceedings because of their other duties in the courtroom and the equipment says it is working and it is not. Remote monitoring such as one person monitoring four courtrooms at a time does not provide the monitoring required for a reliable record.⁵

Incentivizing a switch to audio recording systems in lieu of live court reporters may also increase disputes about the accuracy of the record. Without a live reporter to troubleshoot problems, it will fall on the court system to find ways to resolve disputes about unclear and ambiguous recordings. Resolving these issues will impose time delays and financial costs on the parties as well.

Moreover, court reporters play a crucial role in the court room that goes beyond simply documenting the proceeding. As trained professionals, court reporters help ensure that parties do not speak over one another, and are able to intervene to make sure that an accurate record can be prepared. Live court reporters identify other problems when they occur and ask participants to correct them immediately. Court reporters are also able, upon a lawyer's request, to read back a question, or a portion of a witness's testimony, quickly and efficiently without awkward delays in the proceedings. Court reporters are also able to provide instant rather than delayed rough drafts as well as daily copy of a portion of a transcript upon the request of an attorney, which is indispensable to trial lawyers.

In addition, WAJ supports the introduction of realtime reporting technology in the courtroom, which is currently available through private court reporters, but has not yet been made available in the courtrooms in this state. Under realtime reporting, the court reporter's stenotype is immediately converted into written word and can be instantly transmitted wirelessly to a lawyer's

⁴ *Id.*

⁵ *Id.* at 2.

and the judge's computer in the courtroom.⁶ As explained by the National Court Reporters Association:

A realtime transcription can be sent simultaneously to several users in a courtroom. This is done unobtrusively with wireless technology, and it provides multiple benefits to multiple users.

A realtime reporter uses machine shorthand to preserve the record, and a rough draft transcript appears immediately on the judge's bench-top computer. This instant voice-to-text conversion assists judges in ruling on objections. Before ruling, a judge can read the actual testimony rather than rely on notes or memory. Realtime also aids judges in preparing rulings and jury instructions by allowing them to mark case issues and testimony and pull the marked portions into a document.

Realtime transcription frees judges from taking extensive contemporaneous notes during testimony. This allows judges to observe witnesses as they testify and to make more informed credibility determinations.

Attorneys in the courtroom also benefit from realtime reporting. They do not have to rely solely on notes in questioning a witness. They can use the realtime transcript to precisely frame cross-examination questions. They can review testimony during breaks or overnight to make any needed adjustments in their courtroom presentation. And they can use the realtime transcript as an aid in formulating effective closing arguments.

Realtime transcription ensures immediate and accurate readback of portions of a proceeding. This can be used to assist jurors or other courtroom participants if a cough, nervous tapping, transient noise, or a drop in a speaker's volume make a statement inaudible. Realtime readback can also assist counsel and witnesses in continuing a line of testimony. Readback is much more difficult and onerous to access when using an electronic recorder.⁷

DAR systems cannot provide instant conversion of spoken to written word. That can only presently be done through stenographic realtime reporters.⁸

Additionally, a court reporter may help mark exhibits and generally perform other functions that help bring about orderly trial proceedings.

In addition, our members are concerned about the impact that DAR will have on the ability of attorneys and witnesses to move around the courtroom during trial, due to the dependence of DAR systems on microphones. Lawyers need to have the flexibility and freedom to move away from counsel table or a podium at times, such as when approaching witnesses to hand them exhibits. Witnesses, particularly expert witnesses, need to have the flexibility to step out of the

⁶ For more information about "realtime" feeds, *see, generally*, "What's So Great About a Realtime Feed?" (February 14, 2014) at <https://planetdepos.com/what-is-a-realtime-feed-from-a-court-reporter/> (last accessed March 20, 2019).

⁷ *See* "A Cost Comparison of Stenographic Reporting and Electronic Recording in the Courtroom," Final Report of National Court Reporters Association (May 2014), at 8, available at [https://www.ncleg.gov/documentsites/committees/BCCI-98/Meetings/2015-01-20/06%20NCAOCR_N CRA%20Cost%20Comparison%20White%20Paper%20\(condensed\)_2015_01_20.pdf](https://www.ncleg.gov/documentsites/committees/BCCI-98/Meetings/2015-01-20/06%20NCAOCR_N CRA%20Cost%20Comparison%20White%20Paper%20(condensed)_2015_01_20.pdf) (last accessed

March 20, 2019)

⁸ *Id.*

witness box to perform demonstrations or to point out things on an exhibit. These types of situations occur frequently during a trial, and the jury is still able to hear the attorney or the witness. If the court reporter is unable to hear the attorney or witness, the court reporter is able to advise the lawyer or witness of that in real time, so that a complete and legible transcript is made. There is a real risk that a DAR system may not, unfortunately, pick up all of the speaking if the attorney or witness is too far removed from a microphone.

In summary, WAJ is concerned about Rule Petition 19-01, to the extent that it could pave the way for live court reporters being replaced with DAR systems during trial proceedings. WAJ is opposed to such a change. According to court statistics, of the 316,151 circuit court cases disposed of statewide in 2018, there were 2,256 jury trials and 11,508 court trials.⁹ Thus, trials accounted for only 4.3% of the total case dispositions. To continue to require certified court reporters during trial proceedings should, therefore, hopefully not present any undue hardship.

III. Practicing Attorneys Were Not Given Any Meaningful Input Into Rule Petition 19-01

Changes as impactful as those proposed in Rule Petition 19-01 should feature input from all stakeholders. Secondly, the Court should strive to implement changes that feature broad support. The procedure followed to date is not consistent with that approach.

WAJ is grateful for all of the work done to date by the Hon. Randy R. Koshnick, the Director of State Courts staff, and members of the Making the Record Committee. However, the composition of the Making the Record Committee did not represent all stakeholders to the system. It does not appear that attorneys who appear before and practice in our circuit courts, from both the private and public sectors, had any direct or meaningful input into the development of this proposed rule petition.

The primary document providing support for the changes proposed in Rule Petition 19-01 appears to be the final report of the Making the Record Committee, a body created by the Director of State Courts in 2017.¹⁰ The committee consisted of nineteen individuals.¹¹ Of the nineteen who served, five were circuit court judges. One was an appellate judge. Three were court

⁹2018 Circuit Court Statistics, available at <https://www.wicourts.gov/publications/statistics/circuit/docs/disposumstate18.pdf> (last visited March 20, 2019).

¹⁰ Report of the Making the Record Committee, Director of State Courts Office (August 3, 2018) at <https://www.wicourts.gov/publications/reports/docs/2018mtrrpt.pdf> (last accessed March 18, 2019).

¹¹ *Id.* at Attachment A.

reporters. There were two court system clerks: the Clerk of the Supreme Court and the Clerk of the Court of Appeals as well as the Clerk of a county circuit court. There were two District Court administrators, five members of the Director of State Courts' office, including the petitioner, the Director of State Courts. Two staff members from the Director of State Courts office completed the roster.

While the Committee drew on the experience of pilot programs that ran, in some cases for a decade, in several counties, it included only the perspective of circuit court judges but no meaningful polling or input of the attorneys who appeared.¹² Practitioners who regularly appear before the circuit courts throughout our state and have the greatest need for complete and accurate court transcripts of court proceedings were not directly involved in the process that resulted in the creation of this Rule Petition.

WAJ respectfully submits that before proposing such statewide changes regarding how court proceedings are recorded and transcripts are made, input should have been—and still should be—sought from district attorneys, public defenders, and private practice attorneys who regularly appear in court rooms, elicit testimony and make arguments on their clients' behalf, and who have to either defend a verdict or court decision on appeal or advocate for reversal. The opportunity to comment at this stage of the process is not an adequate substitute for front-end input.

IV. WAJ Recommends Additional Pilot Programs Before Considering Statewide Adoption Of The Proposed Changes

Traditionally, this Court has embarked upon a measured and deliberate approach when considering changes in this area. When a previous iteration of the Making the Record Committee reviewed the issue a decade ago, it too recommended incremental change.¹³ The Court should continue this thoughtful approach.

At present, based on the input of those prior review panels, pilot programs have been permitted and digital recording systems are in use in several counties throughout the state—though, it should be noted, installation of digital equipment has not met the pace expected in

¹² *See id.* at 14-16.

¹³ Report of the Making the Record Committee, Director of State Courts Office (August 3, 2018) at 4, <https://www.wicourts.gov/publications/reports/docs/2018mtrrpt.pdf> (last accessed March 18, 2019).

2007-8.¹⁴ A key part of why digital recording systems were not adopted, aside from costs, is that retirements among court reporters did not take place at the rate initially feared.¹⁵

We should continue learning from the experience of pilot projects. The final report of the Making the Record Committee revealed that:

As of 2018, digital reporters serve as the official court reporter for seven Wisconsin circuit court judges. High-quality compatible digital audio recording systems are also used in 39 court commissioner hearing rooms, where they record initial appearances, traffic, small claims, and family proceedings.¹⁶

At present, there are about 250 circuit court judges throughout the state. Based on the successful implementation of pilot programs on such a limited basis, it makes sense to continue expanding the sample size, to determine not only that a technology-based solution works, but also that it is the *best* approach for Wisconsin courts, before changing the rules in ways that may allow the abandonment of stenographic court reporters statewide.

WAJ does not take a position regarding the demographic, financial, economic and geographic underpinnings that provided the foundation for this process leading to the current proposal.¹⁷ The important work done to date provides a sound basis from which other stakeholders should begin their evaluation. A full vetting of the proposed rule change based on input and consideration by the full array of court system participants, however, may result in different conclusions being reached based on the same information. It would be worthwhile, for example, to examine why approaches to a perceived shortage of court reporters focus on turning to technology as a replacement to court reporters rather than ways to encourage more individuals to pursue employment and careers as certified court reporters. By its own acknowledgment, the Committee did not examine key ways to incentivize more people to become court reporters and focused only on the potential adoption of DAR systems.¹⁸

If the Court determines that it is necessary to move forward with this proposal, it would be best to continue doing so through additional pilot programs. Pilot programs continue to be the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See id.* at 5.

¹⁷ Report of the Making the Record Committee, Director of State Courts Office (August 3, 2018) at 4, <https://www.wicourts.gov/publications/reports/docs/2018mtrrpt.pdf> (last accessed March 18, 2019).

¹⁸ *Id.* at 2 (“there were two issues that the committee did not address: changing the statute that makes court reporters personal appointees of individual judges, and changing the statutes that allow court reporters to keep the income from transcripts they produce.”).

best way to balance the interests of all stakeholders while giving the opportunity for input and additional changes.

V. Conclusion

Rule Petition 19-0, if adopted, will represent the greatest step away from live stenographic court reporters in the twenty years that the Court has been examining the issue. Rather than simply using technology as a measure to fill the gap caused by open court reporter positions, this may incentivize some positions to remain unfilled. Consequently, more safeguards are needed to preserve the character of our current system—even if changes are adopted.

WAJ hopes that this Court will build on the work done by Judge Koshnick, his staff, and members of the Making the Record Committee by giving Wisconsin practitioners an opportunity to examine these changes in detail.

Wisconsin lawyers know and trust the system we use today. We are confident that rule changes in this area, whether they embrace the current approach or make wholesale changes, will have greater acceptance, smoother implementation, and likely avoid unnecessary costs if everyone affected by the adoption of rule changes is consulted and allowed to provide meaningful input.

Thank you for your time and consideration.

Sincerely,



Attorney Edward E. Robinson
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Attorney James D. Rogers
Government Affairs Director