

Wisconsin Association of Criminal Defense Lawyers

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Honorable Justices of the Wisconsin Supreme Court,

We write asking the Court to reject rule petition 20-09A outright, or ask that the Court schedule a public hearing in advance of deciding the matter. Notwithstanding assertions to the contrary by proponents of the petition, the rule petition does modify substantive rights of litigants, and therefore falls outside the authority of this Court to enact. Further, it encourages this Court to override recently enacted legislation, contrary to the Judiciary's wise and longstanding deference to the Legislature in such regards. To the extent that the rules proposed anticipate the possibility of a jury trial by video, they are not merely procedural: They are tectonic.

The petition seeks to transfer power to the courts from the parties. While the petitioners note that the pandemic has provided valuable insight as to efficiencies that might be gained through the use of technology, they do not cite any instances—let alone a trend—of litigant shenanigans that would require supplanting the litigants' determination to rely upon their rights with judicial discretion. In short, the petitioners present no evidence that the rule changes are designed to meet any actual need, let alone a pressing one.

This Court does not have the authority to act as it is being encouraged to do. The statute providing authority for the Court to regulate pleading, practice, and procedure explicitly prohibits enacting rules that would abridge, enlarge, or modify the substantive rights of a litigant. Wis. Stat. §751.12. The right of a litigant to be personally present and to have parties and witnesses personally present for court proceedings is substantive. It implicates such constitutional rights as the right to confrontation, the right to due process, the right to a public trial, and others. The petition seeks to supplant the right of a defendant to object to remote proceedings with a judge's discretion aimed at "balancing" a defendant's right against expediency, or against a hypothetical victim's rights. However, the defendant's right to require in-person court appearances is not in conflict with any rights of victims. The defendant's right to insist on in-person court does not, as the petitioners contend, "diminish" judicial authority: It is and has been the rule and status quo.

This Court shares coequal authority with the legislature over these rules, but even absent the prohibition on modifying substantive rights of litigants, the judiciary's power is in this matter would be best evinced by restraint. Similar provisions have recently been before the legislature. This Court is, in fact, being asked to fix what the petitioners believe the legislature has done wrong: The petitioner contends that 2021 Act 141, signed into law just a month ago, created conflict between Wis. Stat. §§885.60, 938.229(5)(b), and 967.08(4), and that this Court must step in to fix it. But there is no conflict. The newly amended §968.08(4) reads "If any party objects to the use of telephone or live audiovisual means for a critical stage of the proceedings, the court shall sustain the objection." Likewise, Wis. Stat. §885.60 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." These do not present a conflict. If a party objects, the court shall sustain. If the defendant objects, the court shall sustain. The defendant is a party, so there is no conflict here. For non-critical stages or proceedings a defendant is not entitled to be physically present, the courts already have discretion.

WACDL opposes any change that results in the defendant being unable to insist on in-person court, including witnesses, at a critical proceeding. The right of the accused to confront a witness face-to-face is well established and for good reason. Non-verbal cues and demeanor on the witness stand are essential to the determination of the value and weight to place upon a particular witness' testimony, as has been recognized by this Court¹. This applies equally to judges and juries when acting as fact-finders.

We also have more specific concerns with some of the proposals in the petition. For example, changing the wording in Wis. Stat. §885.54(1)(c) to participants would have the effect of potentially exempting alleged victims from sequestration orders. This would set up a conflict between well-established rights of a defendant to a fair trial and new wording in the proposed statutory scheme.

There is no compelling reason the legislature as a public, deliberative body, ought not address such substantial changes, as they recently have, through the passage of Act 141. Allowing the Legislature its proper role will maintain this Court's integrity should the proposed changes face constitutional challenge. Indeed, if a challenge to these changes is to be made under the Wisconsin Constitution, this Court is the only arbiter of such a challenge, it would circumvent our system of checks and balances if this Court itself were the progenitor of the rules.

The use of videoconference can be beneficial in many ways. But for critical stages of criminal proceedings, its use must be limited appropriately to protect the constitutional and statutory rights of those accused of crimes. At critical stages of a case, particularly when testimony is taken or a jury is present, use of videoconferencing may not be appropriate.

As these are important issues, we ask that should the Court choose to proceed forward on the revised petition in this matter, that a public hearing be held.

Sincerely,



Sarah M. Schmeiser

Vice-President, Wisconsin Association of Criminal Defense Lawyers

¹See: **Matter of Dejmals Est.**, 95 Wis. 2d 141, 151–52, 289 N.W.2d 813, 818 (1980). "Such deference to the trial court's determination of the credibility of witnesses is justified, the court has said, because of ". . . the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." **Kleinstick v. Daleiden**, 71 Wis.2d 432, 442, 238 N.W.2d 714, 720 (1976)."