SUPREME COURT OF WISCONSIN

IN RE THE MATTER OF THE RESUMPTION OF IN-PERSON PROCEEDINGS IN ATTORNEY REGULATORY MATTERS DURING THE COVID-19 PANDEMIC

FILED

JUNE 8, 2020

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

You are hereby notified that the Court has issued the following order:

WHEREAS the COVID-19 pandemic continues to require certain mitigation procedures, including social distancing measures, meant to reduce the increase in person-to-person transmission of the virus that causes COVID-19; and

WHEREAS the Supreme Court has administrative and superintending authority over the courts and judicial system of this state and a duty to promote the efficient and effective operation of the state's judicial system, Wis. Const. Art. VII, § 3; In re Kading, 70 Wis. 2d 508, 519-20, 235 N.W.2d 409 (1976); and

WHEREAS, on May 22, 2020 the Supreme Court issued an order entitled "In re the Matter of the Extension of Orders Concerning Remote Administration of Oaths at Depositions, Remote Hearings in Appellate Courts, Filing of Documents in Appellate Courts, and Appellate Court Operations During the COVID-19 Pandemic" (the May 22, 2020 appellate court order), which extended certain prior administrative orders that impacted attorney regulatory proceedings, including administrative orders that pertained to the remote administration of oaths at depositions, the suspension of in-person proceedings in the appellate courts of this state, the filing of certain documents by attaching them to emails sent to the clerk of the appellate courts, the "Temporary Mailbox Rule" for the filing of documents in the appellate courts, and the general operation of the appellate courts of this state, and which also allowed to expire certain provisions of prior

administrative orders, including the tolling of appellate deadlines the discouraging of non-emergency motions in the appellate courts; and

WHEREAS in its May 22, 2020 order "In re the Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trials, Suspension of Statutory Deadlines for Non-Criminal Jury Trials, and Remote Hearings During the COVID-19 Pandemic," this court permitted the circuit courts of this state to begin resuming in-person proceedings once they had prepared an operational plan to do so safely and that plan was approved by the chief judge of the circuit court's judicial administrative district; and

WHEREAS, the continuing public health emergency caused by COVID-19 requires that the May 22, 2020 appellate court order should remain in effect with respect to attorney regulatory matters, but that it should be modified for attorney regulatory matters to allow in-person proceedings as set forth below, consistent with the requirements for in-person proceedings in the circuit courts;

NOW THEREFORE, IT IS HEREBY ORDERED that, pursuant to this court's administrative and superintending authority, referees in attorney regulatory matters continue to be encouraged to utilize available technologies – including e-mail, teleconferencing, and video conferencing -- in lieu of in-person appearances for status conferences and non-final hearings; and

IT IS FURTHER ORDERED that referees in attorney regulatory matters may conduct the following proceedings in person, provided that the requirements set forth below are satisfied: (1) final hearings in disciplinary cases, reinstatement proceedings, medical incapacity proceedings, and other attorney regulatory proceedings; and (2) such non-final hearings as the referee determines must be held in person; and

IT IS FURTHER ORDERED that the following requirements must be satisfied for any in-person proceeding in an attorney regulatory matter:

- All participants in the proceeding (including the referee, attorneys, parties, witnesses, court reporter, etc.) and all other attendees must wear a face covering while in the room where the proceeding is occurring, except that the referee may specifically determine on the record that it is necessary for a witness or other participant not to wear a face covering, either to preserve the ability to weigh the witness's credibility or for any other legitimate reason, in which case the referee will take further reasonable precautions against the transmission of disease (such as increasing the distance between the unmasked individual and others). The referee shall ensure that a notice regarding this requirement is posted at the entrance to the room where the proceeding is occurring and that all participants and other attendees comply with this requirement;[1]
- Hand sanitizer and disinfecting wipes or spray shall be made available to all participants and other attendees, and all frequently touched surfaces shall be regularly sanitized with disinfecting wipes or spray during the proceeding;[2]

[1] The referee may require that the Office of Lawyer Regulation provide face coverings for all participants and other attendees who do not have one.

[2] The referee may require that the Office of Lawyer Regulation provide the hand sanitizer and disinfecting wipes or spray.

- All participants and other attendees shall be spaced at least six feet apart from each other during the proceeding, except that a respondent or petitioning attorney may be closer to his/her counsel if necessary to confer during the proceeding; and

IT IS FURTHER ORDERED that the provisions of this order shall be subject to further modification or termination by future orders; and

IT IS FURTHER ORDERED that the clerk of this court shall serve a copy of this order upon all currently serving referees, upon the Office of Lawyer Regulation, and upon all attorneys who are currently parties to an attorney regulatory proceeding or who represent attorneys who are currently parties to an attorney regulatory proceeding. In addition, the clerk of this court shall ensure that a copy of this order is posted on the Wisconsin Court System website, www.wicourts.gov, under the COVID-19 tab.

¶1 PATIENCE DRAKE ROGGENSACK, C.J. (*dissenting*). COVID-19 is an extremely infectious, serious disease that has caused respiratory failure, septic shock and multiple organ failure in those who become critically ill. Yixuan Wang, et al, "Unique epidemiological and clinical features of the emerging 2019 novel coronavirus pneumonia (COVID-19) implicate special control measures," 92 Journal of Medical Virology, issue 6. The disease initially presents with a cough and fever. However, because of the nature of this virus, those who are infected but without symptoms, are very infectious to those with whom they have contact. Xi He, et al, "Temporal Dynamics in Viral Shedding and Transmissibility of COVID-19," journal of Nature Medicine, April 14, 2020. It has been found that "infectiousness starts from 2.3 days before symptom onset," and that the pre-symptomatic transmission was 44%. Id.

¶2 In recognition of the seriousness of COVID-19 and its highly contagious nature, on May 22, 2020, the court adopted the recommendations of the COVID-19 Task Force. The Task Force was advised by Dean Robert Golden and Dr. Dennis Maki of the University of Wisconsin School of Medicine and Public Health. Judges, a district court administrator, clerks of court, county corporation counsel, law enforcement and attorneys participated. Task Force conclusions were driven by the science underlying COVID-19's transmissibility.

¶3 The Task Force concluded that each circuit court should begin by forming a working group of stakeholders who had interests relevant to in-person court proceedings in that county. Many circuit courts have begun this planning process, and a number of them have completed plans for resuming in-person court proceedings and jury trials. Their operational plans show thoughtful planning to ensure that in-court proceedings will be as safe for all participants as it is possible to achieve in the midst of COVID-19. As circuit courts have received approval for their completed plans, we have posted them on our website, www.wicourts.gov under the COVID-19 tab.

¶4 We ordered that part of each operational plan require participants to wear face masks when in the courtroom unless the presiding judge decided a mask should be removed for witness testimony.[1] Our orders were grounded in managing court caseloads as safely as

[1] The Task Force recognized that this created a temporary risk, but believed that it was likely a risk that had to be taken to permit fact finders to evaluate the credibility of witnesses.

practicable. We have had outstanding assistance in assuring participant safety by our circuit courts.[2]

¶5 I note that there is a non-delegable duty under the safe place statute, Wis. Stat. § 101.11(2)(a), which requires employers to furnish and to use safety devices and safeguards to render places of employment safe. Dykstra v. Arthur G. McKee & Co., 100 Wis. 2d 120, 131, 301 N.W.2d 201 (1981). Referees, whom we employ to act as fact finders in disciplinary matters, should expect that the places where they serve are safe.

¶6 We know that science tells us that COVID-19 is highly contagious, is often spread by persons who show no symptoms, and can have devastating consequences for some who become infected. The medical experts who advised the Task Force grounded their recommendation that masks are critical personal protective equipment on science, reinforced by their medical experiences at the University of Wisconsin Hospital during COVID-19.

¶7 Notwithstanding the court's past recognition of the dangers that COVID-19 presents and the court's concern for those whom the court employs and who participate in court proceedings, today it broadly removes masks as necessary personal protective equipment for the OLR referee and participants "for any other legitimate reason, in which case the referee will take further reasonable precautions against the transmission of disease."

¶8 The referees have no working group as the counties did when they created their plans for safely re-engaging in personal court proceedings. Therefore, each referee will be operating alone. How does a referee decide what is an "other legitimate reason" for not wearing

[2] A complete jury trial was held in Bayfield County, employing multiple personal protective equipment such as masks.

a mask? How is the referee to know what is a "further reasonable precaution" against COVID-19? Are referees free to ignore the science that underlies the transmissibility of COVID-19? How does a referee decide how to protect himself or herself and other participants without a medical advisor?

¶9 Furthermore, no one has asked the court to diminish the protections afforded to referees and those who participate in hearings they conduct from those the court afforded to circuit court judges and their proceedings. No one has asked the court to change the terms of our previous orders relative to the circuit court protections.

¶10 Because I would give the safety of referees and those who participate in their proceedings the same level of concern as we have given to circuit court judges and those who participate in circuit court proceedings, I respectfully dissent from the above order.

¶11 I am authorized to state that Justices ANN WALSH BRADLEY and REBECCA FRANK DALLET join this dissent.