Comments of Legal Action of Wisconsin in Support
of Rule Petition 10-08

1. *Turner v. Rogers* does not prohibit the adoption of the proposed rule.

Petitioners do not seek adoption of proposed Rule 11.02(2) on the ground that the Due Process Clause of the United States Constitution requires it. Nor do petitioners seek the establishment of a *right* to counsel in all civil cases, or in certain classes of civil cases. Rather, petitioners take the position that, in Wisconsin, fundamental fairness in judicial proceedings should be assured through the adaptation of this Court=s reasoning in *Joni B. v. State*, 202 Wis.2d 1 (1996). Petitioners urge this Court to adapt that *Joni B.* reasoning to the operation of the Wisconsin court system through the adoption of the proposed rule.

In *Joni B.*, this Court insisted that fundamental fairness requires that circuit judges be given the discretion to determine what due process requires on a case-by-case basis. This includes a determination as to whether appointment of counsel is required:

> *Although parents do not have a constitutionally protected right to counsel in all child protective hearings, the Petitioners contend that due process may require it in particular instances. Therefore, the circuit court must have the ability to make an individualized determination as to whether the facts of the case before it necessitates the appointment of counsel. Again, we agree with Petitioners.*

*Id.* at 12.

> *We conclude that fundamental fairness requires that a circuit judge be given the discretion to make the determination of what due process requires on a case-by-case basis.*

*Id.* at 18.

This is so even if this reasoning comes to serve as a standard higher than those Aminimally tolerable@ under the United States Constitution:

> *A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.*

*Id.* at 16.

We contend that the incorporation in court operations of *Joni B.=s* deep regard for fundamental fairness through the proposed rule is wise public policy for all the reasons given in our memorandum in support of Rule Petition 10-08.

*Turner v. Rogers,* 564 U.S. _____, 131 S. Ct. 2507, 180 L. Ed.2d 452 (2011), does not prohibit, or advise against, the promulgation of the proposed rule. The United States Supreme Court in *Turner* followed rather than repudiated the *Joni B.* approach to fundamental fairness. The *Turner* Court engaged in a case-by-case approach, applying the *Mathews v. Eldridge* test, 424 U.S. 319, 335 (1976), to the case before it. 131 S. Ct. at 2517-18. It held that Turner=s incarceration violated the Due Process Clause. It vacated the South Carolina Supreme Court=s judgment and remanded to the lower courts to determine whether South Carolina=s alternative procedures would provide due process. *Id.* at 2520. It held open the possibility that, in other cases, due process may require the appointment of counsel should there be other factors present. Two of these factors were the other side=s having an attorney and a complex case in which the defendant could be fairly represented only by a trained advocate. *Id.*

Thus, *Turner v. Rogers* does not constitute a bar to this Court=s promulgation of proposed rule 11.02(2).

2. <u>The rule sought by this petition will create no new legal rights</u>.

The proposed rule will not create new substantive legal rights. It will require that a court provide counsel at public expense where the assistance of counsel is needed to protect the litigant=s existing (not new) legal rights affecting basic human needs. An example is a tenant=s right to legal notice of eviction, which affects her basic human need for shelter. The rule will not create a substantive and independent legal right to sustenance, shelter, heat, etc.

3. <u>The representation of other parties by counsel should be included as a factor</u>.

The National Coalition for a Civil Right to Counsel urges the addition of the representation of other parties by counsel as a factor for the court to consider in determining whether to provide counsel to the indigent litigant. We agree. We suggest adding after Athe complexity of the case@ the phrase Aand whether other parties in the case are represented by counsel.@

4. <u>The cost of providing counsel might be reduced by appointing lawyers *pro bono* and by ordering repayment</u>.

When appointing counsel under this rule, judges might ask the appointed counsel whether s/he would be willing to provide the representation at no charge. SCR 20:6.1 provides:

> *Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to at least 50 hours of pro bono publico legal services per year.*

SCR 20:6.2 provides:

> *A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as . . .*

Attorneys have an ethical *pro bono* obligation, and they are officers of the court, Anecessary to the efficient administration of justice by the courts.@ *In re Integration of the Bar*, 5 Wis.2d 618, 622, 93 N.W2d 601 (1958). Thus, there should be a willingness on the part of attorneys to take these appointments without fee as a means of fulfilling their *pro bono* obligation and of assisting the court. They could perhaps accept one in two appointments *pro bono*, or one in three, or one in four. A judge certainly would not be precluded from asking, AAre you willing to do this *pro bono*?@ To the extent that attorneys are willing, the cost is reduced.

Courts could also order that a litigant repay the cost of counsel when s/he is financially able to do so. Many indigent litigants will not achieve this financial status, but some will. Obviously, such repayment will reduce the overall net cost of counsel. A key element of this is that the courts not presume an ability to repay when none exists.

5. <u>The use of several funding sources could minimize the impact on each source while making appointed counsel affordable</u>.

Several funding sources could be combined to fund appointed counsel. This could minimize the impact on each source. Here is one possible combination:

1. Start with the amount of the Court Support Services Surcharge that is now being kept by the State rather than returned to the courts: $14,500,000/yr.

2. Add the proceeds from an array of fees, such as an equivalent of the 8 fees that fund CCAP: $10,000,000

3. This totals $24,500,000, leaving $31,500,000 to be supplied from state funds. If this comes from State Operations (administrative funds), it is only .837% of all State Operations ($3,764,144,000).

4. Thus:

| | |
|---|---|
| CSSS | $14,500,000 |
| Array of fees | $10,000,000 |
| State Operations | <u>$31,500,000</u> |
| | $56,000,000 |

6. <u>Requests and eligibility for appointed counsel can be ascertained through a form and a colloquy</u>.

An indigent litigant=s request for, and eligibility for, appointed counsel can be ascertained

through use of a form and engagement in a colloquy between litigant and judge with minimal burden on the judge. The form could be something on this order:

I am low-income and do 9 do not 9 request that an attorney be appointed to represent me.

My household, income and assets are:

_____ Minor children + _____ adults = _____ Total household

| Income Source | Monthly Gross Amount |
|---|---|
| Source 1 | |
| Source 2 | |
| Monthly gross income of household | $ |

| Assets | Value |
|---|---|
| Cash/Account > $1,000 | $ |
| Real property NOT residence and not income-producing | $ |
| Stocks or bonds | $ |
| Recreational vehicle | $ |
| Total | $ |

The court can have a reference card or sheet readily available at the bench that shows eligibility:

| **Poverty levels (for use by court):** | | | |
|---|---|---|---|
| **Household** | **200% of Poverty** | | |
| | Annual | Monthly | Weekly |
| 1 | $21,780 | $1,815 | $ 419 |
| 2 | $29,420 | $2,452 | $ 566 |
| 3 | $37,060 | $3,088 | $ 713 |
| 4 | $44,700 | $3,725 | $ 860 |
| 5 | $52,340 | $4,362 | $ 1,007 |
| 6 | $59,980 | $4,998 | $ 1,153 |
| 7 | $67,620 | $5,635 | $ 1,300 |
| | | | |

| | | | |
|---|---|---|---|
| 8 | $75,260 | $6,272 | $ 1,447 |
| +1 | $ 7,640 | $ 637 | $ 147 |

The colloquy would be something like:

> Court: Mr. Jones, you have checked on this sheet that you request that an attorney be appointed to represent you because you are low-income and can=t afford an attorney?
>
> Litigant: Yes, sir.
>
> Court: And have you accurately and truthfully entered on this sheet your income and assets?
>
> Litigant: Yes, sir.
>
> Court: I will appoint Attorney _____ to represent you.
>
> OR
>
> I will not appoint an attorney to represent you because [reason: case simple, legal issue doesn=t affect basic human needs, etc.]

7. SCR 60.05(7) and 70.41(5) greatly limit the assistance which the courts can give to *pro se* litigants.

The need for the proposed rule is enhanced by the fact that *pro se* litigants cannot turn to the courts for the help that they really need: advice on how to present their cases. They cannot turn to the courts because sharp, yet justifiable, limitations on the assistance which courts can give to litigants are set forth in SCR 60.05(7) and 70.41(5).

Section 60.05(7) provides:

> *A judge may not practice law. Notwithstanding this prohibition, a judge may . . . give legal advice to and draft or review documents for a member of the judge=s family . . .*

The Comment to this rule states that a Ajudge must not, however, act as an advocate for a member of the judge=s family in a legal matter.@ It also states:

> *The restraint against a judge giving advice to parties in matters before the judge does not prohibit a judge from advising such*

> *parties to obtain lawyers . . . and from advising such parties on similar matters unrelated to the merits of the matter before the judge.*

It is quite clear, therefore, that a *pro se* litigant cannot turn to the judge for any advice on how to prosecute or defend her case, which is the advice she really needs.

Nor can she turn to court staff. SCR Rule 70.41(5) sets forth 17 separate and specific things that court staff may *not* do. This list includes providing legal advice or recommending a specific course of action for an individual; giving directions regarding how an individual should respond or behave *in any aspect of the legal process*; filling in a form, unless required by the ADA; recommending whether to file a petition or other pleading; recommending when or whether an individual should request or oppose an adjournment; and interpreting the meaning or implications of statutes or appellate court decisions as they might apply to an individual case. Thus, court staff are forbidden from giving *pro se* litigants the kind of help they really need.

In recognition of the need for an attorney, Rule 70.41(6) instructs a court staff member that, when s/he is uncertain whether the advice or information requested is authorized and a supervisor is unavailable, s/he should Aadvise the individual to seek assistance from an attorney.@

8. Moving courts to the Ainquisitorial@ and Arelaxed rules@ system is not the answer in Wisconsin.

There have begun to appear in the literature recommendations that we seriously consider moving to the Ainquisitorial@ court role featured in the judicial systems of some other countries. In this system, the judge takes on much more responsibility for investigating the facts of the case, developing those facts and the law, securing and questioning experts and other witnesses, and advising the parties during settlement negotiations, to name a few functions. There are also current recommendations that the rules of evidence and procedure be relaxed or even eliminated in cases in which *pro se* litigants are present, and even that common law precedent be eliminated. *See, e.g.*, Cynthia Gray, AReaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants,@ 27 *J.Nat=l Ass=n. L. Jud.* 97 (Spring 2007); Sande L. Buhai, ASymposium: Access to Justice for Unrepresented Litigants: A Comparative Perspective,@ 42 *Loy. L. A. L. Rev*. 979 (Summer 2009).

Contrary to the latter article, which attributes our current system of justice to a Asporting theory of justice,@ we believe that there are sound reasons underlying the impartiality of the judge, the ban on *ex parte* communications, the rules of evidence, the rules of procedure, the use of case precedent, and rules such as SCR 60.05(7) and 70.41(5). While this is obviously a long and separate discussion, which we will not undertake, the fact that many people share our view has practical implications for a move to an Ainquisitorial@ and Arelaxed rules@ scheme as the primary and short-term resolution of the *pro se* crisis.

The burden of the *pro se* crisis must be borne by one or another part of the justice system B judges, lawyers or lay litigants. At present, that burden is primarily on lay litigants. There are associated difficulties for judges and attorneys who oppose them, but the burden is mainly on the lay litigants, who must go into court without help to defend their vital interests.

Should this burden be shifted to judges through adoption of the inquisitorial model? This would be a huge addition to the current duties of a judge. Consider what it would mean for a judge with 200 cases. How could s/he possibly handle these with expedition if s/he is to investigate facts and develop each case in lieu of an attorney? We would obviously need more judges, each with a smaller caseload. *See Symposium* at 1015-16, 1018. It is doubtful that this would really be cheaper than appointing counsel in critical cases.

Our notion of the court as objective, impartial and unbiased, and of allocating to the parties the primary responsibility for discovering the relevant evidence, finding the relevant legal principles and presenting them to a neutral judge or jury, is deeply ingrained. Even if a vanguard of thinkers agreed that the solution to the *pro se* crisis is to move to the inquisitorial system, this would take a very long time, probably in excess of 20 years. In the meantime, unequal and unfair justice would continue to be meted out, and the courts would continue to be swamped with *pro se* litigants.

As to relaxed rules: Can we, and should we, really wholesale change our entire system? No more rules of evidence, rules of procedure, or case authority? No use of experts, even if helpful to the court? How many years will this take, and how expensive will it be? Should we have two legal systems B one Arelaxed@ for *pro se,* and one with rules of evidence and procedure for attorneys? What rules apply where one side is *pro se* and the other has a lawyer B Arelaxed@ or traditional? If one party is *pro se,* do we ban experts?

When one considers the daunting challenges involved in converting to Ainquisitorial@ and Arelaxed,@ it appears much easier and cheaper to keep our current system and judicial role, and appoint an attorney where necessary.

9. Wisconsin authority is that the same rules apply to *pro se* as to represented litigants.

Wisconsin shows little sign of relaxing rules for *pro se* litigants. In *Waushara County v. Graf*, 166 Wis.2d 442, 452, 480 N.W.2d 16, 20, *cert. denied* 113 S. Ct. 269 (1992), this Court stated:

> *While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk pro se litigants through the procedural requirements or to point them to the proper substantive law.*

New Mexico is in accord. Very recently, the Supreme Court of that state approved Form

4A-201, which states:

> *A self-represented litigant must abide by the same rules of procedure and rules of evidence as lawyers. It is the responsibility of self-represented parties to determine what needs to be done and to take the necessary action.*

Form 4A-201, N.M. Stat. Ann. app. (West 2009), cited in Symposium, 42 *Loy. L. A. L. Rev.* at 997.

10. The recent legislative imposition of the *Daubert* expert witness rule exacerbates the problem.

The Wisconsin legislature recently transformed a relatively simple expert-qualifying procedure into one much more complex and unclear. It adopted *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), in Wis. Stat. ' 907.02. *See*, Daniel D. Blinka, AThe *Daubert* Standard in Wisconsin: A Primer,@ *Wisconsin Lawyer* Vol. 84, No. 3 (March 2011). Now the qualification of an expert requires a showing of the reliability of the witness= principles and methods and their application to the facts. Has the witness= technique or theory been tested? Has it been peer reviewed? What is its potential rate of error? Are there standards and controls? Is the method generally accepted in the scientific community? How is *Daubert* to be applied to an expert who is not a scientist, such as a vocational consultant testifying as to employability? How does an unrepresented litigant figure all of this out, or even learn about it? She doesn=t.

11. The significance of *pro se* litigation to the courts is recognized by this Court=s Planning and Policy Advisory Committee (PPAC).

Self-represented litigants constitute a critical issue and top priority for Wisconsin courts for the 2010-2012 biennium. ACritical Issues: Planning Priorities for the Wisconsin Court System B Fiscal Years 2010-2012,@ *Wisconsin Supreme Court Planning and Policy Advisory Committee Final Report* 4. Identified critical issues are to become the court system=s short-term or immediate priorities. *Id.* at 5. As PPAC stated:

> *The number of self-represented litigants is rising and courts expect the trend to continue in the future years . . . The increasing population of self-represented litigants places an added burden on judges, court staff, and court processes beyond those resources that currently exist.*

*Id.* at 19.

Self-represented litigants were ranked a top court system priority by *every single stakeholder group*:

State Bar Board of Governors
Circuit Court Commissioners
Chief Judges and District Court Administrators
Clerks of Circuit Courts
Family Court Commissioners
Wisconsin Judicial Conference
Planning & Policy Advisory Committee
Registers in Probate

*Id.* at Stakeholder Summaries 1-13.

The 10th District undertook a study of *pro se* litigants= requests for assistance of court staff. They found that requests average 6 minutes each, and that there were 1,500 requests per month. This calculates to .9375 FTE, or 1 court staff FTE in the 10th District just to provide *pro se* assistance.

*Pro se* litigation is clearly a major impediment to the efficient and effective functioning of Wisconsin courts.

12. The proposed rule is a modest proposal.

Most *pro se* litigants who would have counsel appointed under the proposed rule will come to the attention of a judge as defendants B they will be people who have been haled into court, not come in of their own free will. The plaintiffs that judges will see will be those few people who have been able to file a motion or complaint or petition and are at a loss as to what to do after that. The proposed rule is modest because it leaves out all of those who have a cause of action but are not competent to file suit. The Maryland Access to Justice Commission=s proposal catches those people B ours does not. Our proposal covers mostly people *forced* to be in court.

The proposal is also modest because, rather than seeking to establish a *right* to counsel in a class of cases, it leaves it completely up to judges to do justice as they see fit.

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Respectfully submitted,

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