STATE OF WISCONSIN **IN THE SUPREME COURT**

In the Matter of the Petition for Amendment of Supreme Court Rule 60.04

REPORT re PETITION 13-14

REPORT OF FOLLOW-UP STUDY COMMITTEE FOR RULE PETITION 13-14

On July 1, 2014, the Wisconsin Supreme Court filed its order in Rule Petition 13-14, amending SCR 60.04 "to clarify that a judge's reasonable efforts to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard are consistent with a judge's obligations to perform all judicial duties fairly and impartially." [Order, p. 1] Rule Petition 13-14 also provided as follows [Order, pp. 8-9]:

> IT IS FURTHER ORDERED that three years after the effective date of this order the court will evaluate the impact of this rule on the Wisconsin court system. To facilitate the court's review, the Committee of Chief Judges is directed to confer with the Wisconsin Court of Appeals and to convene a committee charged with filing a report with the court by January 1, 2015, proposing criteria and a protocol to evaluate these amendments. Upon receipt of the report, the court will schedule an open administrative rules conference to discuss the report and determine how to proceed with the review.

In July 2014, Court of Appeals Chief Judge Richard Brown appointed three judges from the Court of Appeals and Chief Judge Jeffrey Kremers appointed three judges from the Committee of Chief Judges to fulfill this charge. The undersigned judges submit this report proposing criteria and a protocol to evaluate the amendments.

THE TASK OF THE COMMITTEE

New SCR 60.04(1)(hm) provides:

> A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially. A judge shall also afford to every person who has a legal interest in a proceeding, or to that person's lawyer,

the right to be heard according to the law. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

Comment

A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following:

1. Construe pleadings to facilitate consideration of the issues raised.
2. Provide information or explanation about the proceedings.
3. Explain legal concepts in everyday language.
4. Ask neutral questions to elicit or clarify information.
5. Modify the traditional order of taking evidence.
6. Permit narrative testimony.
7. Allow litigants to adopt their pleadings as their sworn testimony.
8. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order.
9. Inform litigants what will be happening next in the case and what is expected of them.

The court's order includes a concurrence by Justice David T. Prosser, reflecting a concern that the new rule might have adverse unintended consequences. Although the petition was modified by the court, Justice Prosser stated that it still presents some serious concerns regarding: (1) the scope of the new rule, (2) the expectations, if not directives, it places on judges, and (3) the impact it will have on the practice of law. Concurrence at ¶3. To assist the future review ordered by this court, Justice Prosser articulated his observations and concerns with respect to each of these areas. This

Committee considered how these areas could best be evaluated in order to determine the impact of the rule.

QUESTIONS POSED IN THE CONCURRENCE

The concurrence notes that the scope of new 60.04(1) (hm) is broad, applying to (a) municipal courts, circuit courts, the court of appeals, and the supreme court; (b) all types of cases, civil and criminal, hearings and trials, appeals and extraordinary writs; (c) cases in which all parties are represented by counsel and cases involving pro se litigants. ¶5. The following questions were posed by the concurrence and should be considered when designing the questions for any survey.

1) Will motions by self-represented individuals be treated less rigorously in the future to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard? This could include post-conviction motions filed under Wis. Stat. §974.06, motions to withdraw pleas, and motions under Wis. Stat. §806.07 seeking relief from judgments. ¶7.

2) What effect will the rule have on *ex parte* communications? ¶10.

3) While the word "may" in SCR 60.04(1) (hm) is intended to preserve judge's discretion to use the measures listed in the comment, do the words "responsibility" and "reasonable" create an expectation that judges should do them? ¶13-14.

4) What will happen if a judge is requested to use the methods set out in the comment and declines to do so? ¶16.

5) Will the rule create more pro se litigation or cause clients to question why they hired an attorney if the judge is going to help the other party? Might attorneys feel that their clients have been unfairly disadvantaged by the judge's behavior? ¶18.

SUMMARY OF THE WORK OF THE COMMITTEE

Committee members met four times during the fall of 2014, three times by teleconference and once at the Judicial Conference. In preparing this report, the Committee has conferred directly or by email with the following: the Wisconsin Judicial Commission; Charles Franklin, Director of the Marquette Law School Poll; Sara Ward-Cassady, Deputy Director of Court Operations, Director of State Courts Office; Jean Bousquet, Chief Information Officer; 1st Judicial District Chief Judge Jeffrey Kremers; Holly Szablewski, the 1st Judicial District Court Administrator; Judge Roderick Cameron of the 10th Judicial District Self-Represented Litigants Initiative; and Lisa Roys, Katie Stenz and Fred Petillo, Wisconsin State Bar Association. In addition, email contact was made with all judges and court commissioners who spoke at the hearing on Rule Petition 13-14, and several comments were received.

DISCUSSION

DEFINING WHAT WE SEEK TO EVALUATE

Rule Petition No. 13-14 amended the Code of Judicial Conduct. It seeks to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard. The Committee has not identified any methodology that will directly measure change in procedural or substantive fairness.

One proxy for directly measuring change in procedural or substantive fairness might be to attempt to detect changes in behavior of judges and court commissioners (judicial officials covered by the Code) caused by the Rule Petition, such as increased use of the enumerated "reasonable efforts". However, a measurement of change in judicial behavior may not accurately reflect a corresponding change in the ability of litigants to be

fairly heard, or effectively gauge whether the judicial behavior change resulted in an actual or perceived increase in procedural or substantive fairness.

Further, Rule Petition 13-14 suggested the evaluation not be limited to changes in judicial behavior. The Rule Petition discussed an evaluation of the impact on the litigants and Wisconsin court system. For example, in his concurrence, Justice Prosser expressed concern about the impact on the practice of law. He questioned whether the Rule Petition would accelerate pro se litigation, with consequences for the legal profession, and whether it would affect attorney-client relationships.

The Committee discussed how a rule change might impact other stakeholders. Might this rule encourage an increase in the number of self-represented litigants, thereby affecting the workload of court personnel? Might the greater use of reasonable efforts lengthen court hearings, causing court congestion? Might an increase in the number of self-represented litigants adversely impact the business of the practice of law? Might this rule change affect how other stakeholders behave, such as court personnel, clerk of courts or legal practitioners? Might this rule change affect how clients regard their own attorneys, raising questions of why they are hiring counsel if the judge can help them anyway? For the reasons discussed below, the Committee concludes that these are exceedingly hard questions to answer.

The potential benefits from the rule change are equally hard to assess. The Committee discussed the possibility that greater use of "reasonable efforts" might result in increased satisfaction by litigants and attorneys, fewer de novo reviews, fewer appeals and motions to consider, better compliance with court orders, fewer contempt orders

issued, or shorter case processing times. However, these results are also quite difficult to observe or measure.

DETERMINING THE CAUSE OF CHANGE

The Committee's charge is to propose criteria and a protocol to evaluate the amendments of Rule Petition 13-14. Assuming the evaluation process demonstrates some change in judicial use of reasonable efforts following adoption of the new rule, accurate evaluation would require that the process distinguish change caused by the adoption of the new rule from change due to other reasons.

Factors other than adoption of the Rule Petition may affect the ability of all litigants, including self-represented litigants, to be fairly heard. Changes in judicial use of reasonable effort practices may be due to a generational shift of judges, or to education through the Office of Judicial Education, rather than the new rule. Similarly, changes in perception of procedural or substantive fairness by litigants may be due to other causes. The Supreme Court has been active in promoting a number of initiatives to provide assistance to self-represented litigants. The State Bar is working on rules for Limited Scope Representation. Many local bar associations sponsor help desks and other programs to assist self-represented litigants, and there is a Self-Represented Litigants Initiative in the 10th Judicial District.

The Committee could come up with no objectively reliable way to measure either changes or the causes of such changes. Determining whether the rule is a cause of change and differentiating causes for change remain challenges in any evaluative process.

ALTERNATIVE METHODOLOGIES FOR EVALUATION

Rule Petition 13-14 amended the Code of Judicial Conduct. One evaluative approach may be to attempt to empirically measure whether there has been any change in judicial use of reasonable efforts. Several challenges are presented.

Data analysis. The most reliable evaluative method would be one which is objective and statistically valid. Committee members explored what data is available through the CCAP case management system. Committee members talked with Jean Bousquet, Chief Information Officer, and Sara Ward-Cassady, Deputy Director for Court Operations, to see what data was available. The Committee learned that "reasonable efforts" of judges, as that term is used in the new rule, is not a data point tracked currently by CCAP or in any case management system. There is no empirical information available as to the degree of reasonable efforts in use at the time of the adoption of Rule Petition 13-14 to use as a control. Further no reasonable modification to the CCAP system was identified that would allow empirical tracking of any efforts taken by judges in response to the new rule. The Committee concluded that the data available in CCAP unfortunately would not yield any useful insights.

It is also difficult to systematically identify cases involving self-represented litigants. The Committee discussed how to determine if this rule change might encourage an increase in self-represented litigants, thus affecting the workload of court personnel. The Committee learned that data on the number of cases or proceedings where litigants are self-represented is inconsistent and cannot be derived from the case management system at this time. It can be difficult to identify whether a person is self-represented in a particular action if the person is represented at some points in time and not at others.

Some people are self-represented when the action is begun against them, but hire a lawyer later. Some use a lawyer initially, but later fire the lawyer. Some sequentially fire several attorneys and so are "serial" pro se. It is difficult to know when to measure the presence or absence of an attorney. Other confounding factors are the use of unbundled legal services and standby counsel. The National Center for State Courts is currently developing a tool to help states measure the level of activity by self-represented litigants, but they agree that it is a difficult thing to measure.

Observation of court proceedings: The Committee discussed the possibility of observing court proceedings to see if there were discernable changes in the behavior of judges, court commissioners, lawyers, litigants and others. The Committee decided that this alternative was not feasible for two reasons: no prior study was done before the rule changed to use as a baseline, and such a study would be very complex and expensive. The question of whether a judge's use of more reasonable efforts might lengthen court hearings, causing court congestion, faces similar impediments.

Examination of transcripts: The Committee considered whether a judge's reasonable efforts could be evaluated by examination of transcripts. There was concern whether this method would be statistically valid. To evaluate by transcript one would have to review transcripts from cases prior to July 1, 2014, to determine reasonable efforts practices prior to the new rule and then examine subsequent transcripts. However, most cases are not transcribed unless appealed and most cases are not appealed, so cases on appeal seem unlikely to present a representative sample. Appellate judges see many transcripts, but do not see enough relevant transcripts to have an informed opinion regarding whether the rule has changed the practice of particular circuit court judges,

much less court commissioners. Even when a transcript reveals that a judge employs a practice listed in new SCR 60.04, short of a judge referring to the rule on the record there would be nothing to indicate that use of the practice is a result of the new rule.

Experience of Judicial Commission: The Committee considered whether an examination of records at the Wisconsin Judicial Commission might provide an evaluation point. A Committee member talked with Jeremiah Van Hecke at the Judicial Commission. Although the Judicial Commission currently does not classify complaints received in relation to SCR 60.04, Mr. Van Hecke said it would be possible to watch for any complaints received by the Judicial Commission to see if this issue surfaces over the next three years. Although the Commission would need to take care with confidentiality, it should be possible for the Commission to provide a summary of relevant information if directed to do so by the Court.

Surveys of participant experience: A Committee member consulted with Professor Charles Franklin, Marquette University Law School, who conducts the Marquette Poll, to learn about survey methodology. Professor Franklin thought that a survey could be used to capture the personal experience of judges. Since the rule is designed to make clear that judges may provide more information and advice, a survey might simply ask the judges questions designed to elicit whether they have provided information and advice more often, less often, or about the same. Such a survey might provide relevant information at a modest cost. With more money and time, a survey could be designed to reach all of the identified stakeholders, but Professor Franklin thought that such a wide-ranging survey would be unlikely to produce any useful information because

everyone would simply be relaying their impressions, i.e. providing an opinion based on personal experience.

Questions need to be framed in a way that allows meaningful evaluation and summarization of the responses. Professor Franklin indicated that there is local talent available to design and conduct a survey in the University of Wisconsin Madison Service Center, and a similar resource at UW Milwaukee. He indicated that the UW Service Center has worked with such agencies as the DNR, surveying its constituent groups on a variety of topics. The State Bar also has a research division that offers survey services.

Committee members expressed concern whether a survey, especially of non-judicial stakeholders, would produce objective and statistically reliable results. Responses might tend to be based on limited experience and anecdotal information. Those surveyed might also be affected by subjective bias relating to the result in the case.

Another challenge is designing a survey which would pose questions permitting compilation of survey results. Framing questions in a way that provides a fairly standardized method to answer may facilitate meaningful evaluation and summarization of the responses, but may also limit the information obtainable from the survey. It would be necessary to identify a representative sample of each group to keep the number of surveys manageable for tallying them and evaluating the results.

Focus groups and in-depth interviews. Committee staff spoke with representatives of the State Bar about services offered by their research division. Fred Petillo, research manager for the State Bar, said that in addition to surveys, good qualitative information can be gained from focus groups, which are small-group discussions guided by a trained leader to learn about opinions and beliefs on a designated

topic, and then to suggest future action. They also recommend the use of in-depth phone interviews, talking with fewer people for a longer time, with the ability to ask follow-up questions. They noted that for some subjects, a smaller amount of qualitative material is preferable to a more superficial quantitative measure. However, use of these techniques is not inexpensive, as described below.

MECHANICS OF A SURVEY

The Committee discussed how surveys might be directed to a number of different stakeholders:

Judicial officers. A simple survey of Circuit Judges, Court Commissioners and Appellate Judges could be done fairly easily through court email lists. Circuit court judges and court commissioners could be asked if their practices have changed since the new rule was adopted and what changes they have observed in their courtrooms as a result. If the judge provided more advice or information, was there an improvement in the efficiency of case management or doing justice in the case? Appellate judges might be asked about what changes they have seen through transcripts, as well as any changes they might have implemented themselves. The responses from judicial officers will necessarily reflect a subjective assessment of their own behavior and its effect on the litigation.

State Bar members. It may also be fairly straightforward to survey a sample of members of the State Bar. The State Bar does not sell or share its email list, but the State Bar representatives said that the Bar would most likely be willing to send a survey to its members on the Court's behalf. However, a State Bar survey represents an incomplete sample of all cases, since it would not capture cases with no attorney involvement, and

attorney responses may not accurately reflect the point of view of self-represented parties. Work will be needed to select a representative sample of the State Bar membership.

Clerks of court. It is also straightforward to survey a sample of clerks of court or other court personnel through the court email system. The Committee discussed whether court personnel would be able to distinguish any perceived change in their workload or their observation of court proceedings as being due to the Rule Petition change as opposed to the other factors described in the causation section.

Self-represented litigants. Obtaining evaluative responses from self-represented litigants would be challenging. As noted above, identifying cases involving self-represented litigants through CCAP is very difficult and unreliable. Professor Franklin also questioned whether litigant responses would be heavily influenced by whether they won or lost the case, making it questionable whether their opinions about a judge's advice or information would reveal anything about the impact of the Rule Petition. Self-represented litigants might know about their individual cases, but may not be familiar with "reasonable efforts" practices at the time of the rule adoption in order to opine as to whether the rule changed those practices.

If the survey was taken immediately at the conclusion of the case, responses might be even more influenced by the outcome of the case. If not taken immediately, it would be costly to contact self-represented persons at a later time, and a later contact may significantly reduce the response rate.

Proxies for self-represented litigants. The Committee also discussed whether there are any groups who could be surveyed as a proxy for the point of view of self-

represented litigants. Possibilities, discussed individually below, include court commissioners, domestic violence advocacy groups, victim-witness coordinators, legal services organizations, and volunteer attorney help desks.

- Although court commissioners represent the judicial stakeholder viewpoint, they also certainly have greater experience with self-represented litigants and may have some feeling for their point of view.

- A number of DV advocacy groups provided input at the time of the Rule Petition adoption. However it is unclear whether this group fairly represents all self-represented litigants. The experience of DV advocates probably relates to an important, but limited, area of litigation. Their viewpoint as advocate for the DV victim may be associated with one particular side of a two-sided litigation.

- Similarly, the responsibility of victim-witness coordinators is limited to a particular type of litigation and only one side of that litigation.

- While one would suspect attorneys with Legal Services/Judicare agencies frequently deal with self-represented persons, this group provides representation to their clients and may not represent the point of view of self-represented persons.

- Some counties have volunteer attorney help desks and other resources to help self-represented litigants. However, these groups may not be actually involved at the litigation stage or see the outcome of litigation. Further, their experience may not reflect the experience of self-represented litigants who do not benefit from volunteer help desks.

The question of how to obtain survey results from self-represented litigants remains a challenge. Even with the proxy groups, it may be difficult to identify the right person to answer the survey and obtain an email address.

COST OF A SURVEY

The Committee determined that there are three primary steps to conducting a survey: writing questions appropriate to the groups to be surveyed, assembling email lists (or mailing lists) for sending the survey out, and tabulating and analyzing the results. The Committee received the following information about possible costs.

UWM Center for Urban Initiatives and Research. A Committee member spoke with Terry Batson, the Director of the UWM Center for Urban Initiatives & Research. She estimated that if UWM surveyed only circuit court judges (an estimated 250 people) and asked 10 questions, the cost would vary from under $3000 (if it could be done online through an email list, with linking answers to the UWM system) to around $5000 (if done by mail). Costs vary directly with the number of people surveyed, the number of questions, and the method of data entry.

State Bar services. The State Bar offers research services that include surveys, focus groups, and in-depth telephone interviews. Research manager Fred Petillo provided the Committee with a detailed analysis of research methods that might be considered, as well as information about services and pricing. A letter from Mr. Petillo is attached to this report as an exhibit. If a survey method is chosen, the State Bar would most likely be willing to send a survey to its members without charge. Mr. Petillo recommended the Court not wait three years to conduct the first survey, since memories fade and attitudes change over time. Instead, he recommended conducting shorter surveys every 6 or 12 months.

Online survey. The Office of Court Operations has an existing contract with an online commercial survey mechanism called "Survey Monkey". The PPAC Planning Subcommittee uses Survey Monkey to conduct its biennial critical issues survey, and other court programs use it periodically for evaluations and surveys. Survey Monkey makes it easy to send questions to an email list, have people enter the answers online, and tabulate the answers. There is no cost for this aspect of the work. Additional work is needed before and after, to write the questions, identify a random sample of larger

groups, and analyze the results, particularly if narrative answers are received. This work might be done by court staff or by a contractor skilled in survey work. Mr. Petillo noted that surveys that are not professionally designed often do not yield meaningful results.

ABSENCE OF A BASELINE

To accurately measure the effect of the rule petition, it would be extremely helpful to have a baseline against which to measure change. Without any baseline, there is no data as to current practices nor any comparison point against which to measure change. No information exists on what reasonable efforts judges were taking as of the date of the rule adoption, and this information cannot be drawn from current CCAP data.

It may be possible to attempt to establish a baseline by performing a survey to identify reasonable practices presently employed by judges. However, the timeline to obtain a baseline survey may be problematic. This report is due to the Supreme Court by January 1, 2015, after which the Supreme Court will schedule an open administrative rules conference to discuss the report and determine how to proceed with the review. Therefore any baseline evaluation would likely occur at the earliest a significant period of time after the Rule Petition's adoption and publication, reducing the value of any attempt to measure a baseline as of July 1, 2014. In addition, conducting two surveys, a baseline survey and then another survey three years after the Rule Petition adoption, would significantly increase the administrative cost of performing the evaluation.

At the time of the Rule Petition's adoption, there was discussion that the proposal was not intended to change the law or to impose new obligations on the judge, and that the rule change was an attempt to bring the Code of Judicial Conduct in compliance with the current practices of the trial court. As stated in Justice Prosser's concurrence,

"Clearly, the proponents believe that work with pro se litigants 'may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination.' " The absence of a baseline measure of frequency makes it difficult to determine if judicial behavior has changed or not.

ADVANCE NOTICE OF DATA COLLECTION

The Committee discussed whether there should be an additional component to this effort to increase the likelihood that changes in judicial behavior will be observed and remembered. A communication could be sent now to inform those who might be surveyed letting them know that the rule has changed and the Supreme Court plans to evaluate the impact of the change, and asking them to watch for possible effects over the coming three years. This would mitigate the absence of baseline information. While this might help the survey return more meaningful results, it might also influence the behavior itself.

Alternatively, the Office of Judicial Education and the State Bar could simply be asked to include the new rule in education programs in the normal course of business. The Supreme Court may also want to ask the Judicial Commission to track complaints relating to the new rule for review as part of a later evaluation.

APPELLATE PRACTICE

In the open rules conference, the Supreme Court discussed the proposed amendment in the context of appellate courts. Justice Prosser's concurrence also noted that the Rule Petition applied to all Wisconsin courts, including appellate courts, and to all case types, including appeals and extraordinary writs.

The interaction of appellate judges with parties is different than at the trial court level. Appellate courts usually review decisions which have already been made, and frequently the standard of appellate review involves deference to the discretion of the trial judge. The appellate court bases its decision on the record and may at times search the record for a foundation for exercise of trial court discretion, even when a prevailing pro se respondent on appeal does not effectively defend the trial judge's decision.

Appellate courts provide explanations for orders issued, and expressly provide the basis for their decisions in writing. Occasionally, the parties may be asked to provide additional briefing with an explanation as to its purpose. The only direct interaction appellate courts have with litigants and counsel is during infrequent oral argument. In that circumstance the issue to be discussed is usually well defined. The parties provide information in response to a request and the court may ask questions. It is unlikely any of the reasonable efforts considered in the rule change would be used during oral argument. Any questions about appellate practice will need to be structured in a way that captures the different way the appellate courts may interact with litigants.

The Committee believes that the new rule is unlikely to affect practice in the court of appeals because of the limited opportunity to employ the practices listed in the rule. It might be more meaningful to ask appellate judges what changes they have observed, if any, in the transcripts and briefs they receive from the circuit courts.

PROPOSED CRITERIA AND PROTOCOL

As a prefatory matter, the Committee recognizes the valid concerns expressed by the concurrence regarding the potential for adverse impacts from the rule change and how changes in judicial behavior might be perceived by litigants and counsel. Nonetheless,

having the benefit of time and focus on the questions raised, it is difficult to make a recommendation in support of any of the research methods studied. The Committee does not believe any of the available methods can objectively measure the changes in judicial behaviors that may have resulted from the new rule. The subjective opinions that may be more easily collected may not help the court determine whether the goals of the rule have been accomplished. Use of one or more carefully selected focus groups might provide a meaningful exploration of the experience and perceptions of the relevant participants.

If the Court determines that a study would be helpful, the Committee has concluded that surveys of people affected by the rule change may be the most efficient method for gaining insight into the changes wrought by the rule. The survey should be directed to a representative sample of each group to keep the number of surveys manageable for tallying them and evaluating the results. Surveys of appellate court judges, circuit court judges, circuit court commissioners, and clerks of court can be done fairly easily through court email lists. Similarly, it may be fairly straightforward to survey a sample of State Bar members through email addresses provided by the State Bar.

The Committee does not recommend that the court attempt to survey self-represented litigants. As described above, identifying cases involving self-represented litigants through CCAP is very difficult and unreliable. Professor Franklin questioned whether litigant responses would be heavily influenced by whether they won or lost the case, making it questionable whether their opinions about a judge's advice or information would reveal anything about the impact of the Rule Petition. If the survey was taken immediately at the conclusion of the case, responses might be even more influenced by the outcome of the case, but if not taken immediately, it would be more difficult to make

contact. Self-represented litigants also would have no information about any change in "reasonable efforts" practices over time.

Accordingly, the Committee recommends the following criteria and protocol, subject to the practical research concerns raised in the State Bar report:

1. Use of a survey or focus groups as the evaluative tool.

2. The following persons should be considered as possible participants:

    a. Judicial officers
    b. A representative sample of State Bar members
    c. Clerks of circuit court
    d. Groups that may serve as proxy for self-represented litigants (see p. 12-13)

3. The questions for either method should be professionally designed, in collaboration with the Supreme Court.

4. A single study should be employed at the end of the evaluative period.

5. The Court should consider whether the evaluative period should be shorter than three years, as recommended by the research professionals, in order to produce more reliable information.

Respectfully Submitted,

Judge Joan Kessler
1st District Court of Appeals

Judge James Daley
Chief Judge, 5th Judicial District

Judge Paul Lundsten
4th District Court of Appeals

Judge James Duvall
Chief Judge, 7th Judicial District

Judge Lisa Stark
3rd District Court of Appeals

Judge Gregory Potter
Chief Judge, 6th Judicial District

December 12, 2014

STATE BAR OF WISCONSIN
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November 13, 2014

Ms. Marcia L. Vandercook
Wisconsin Supreme Court Operations
110 East Main Street
Suite 410
Madison, WI 53703-3356

Dear Attorney Vandercook:

Thanks for the opportunity to discuss your project concerning petition 13-14 and the modification to SCR 60.04. I am setting down some highlights of our conversation with some of the definitions and methodological considerations that you requested I expand on; I hope these will be helpful to you going forward. We certainly covered a lot of ground during our conversation, but let me attempt to summarize some important points.

- One of your earliest decisions will be whether the research is primarily quantitative or qualitative. Quantitative research focuses on numerical data and statistical techniques. In your case, the quantitative research question may be whether or not some observable state of affairs—for example, the prevalence of pro se representation—is statistically increased after the adoption of 13-14. We discussed something like this, and I think your view is that collecting data of this sort is impractical or infeasible. I don't know the court's databases, so it is hard for me to have an opinion, but I have seen many projects in which the presumed difficulties of obtaining quantitative data were overcome. In any event, quantitative research will often give the most direct and clearest answer to the kinds of questions you posed.
- Within quantitative research, there are three ways to approach a problem.
    - The ***experimental approach*** would lead you most directly to an answer as to whether or not 13-14 was causally responsible for an outcome of some sort. This is most often the way you described the research objective. However, my initial thinking is that this is probably infeasible for you on two grounds: (1) there are probably too many variables affecting the outcome and you won't be able to measure and control for all of them, (2) the experimental approach depends on randomizing the treatment and you are probably ethically prohibited from randomly assigning litigants to courts in which the 13-14 rule is either used or not used. There is an approach called "structural equation modelling" that does not depend on this randomization procedure and that can get you to a causal analysis, but it is well beyond the capability of many researchers and would probably require collaborating with an academic researcher.
    - The ***confirmatory approach*** is to measure one or more phenomena at different times or under different circumstances to see if there is a statistically significant

P.O. Box 7158 | Madison, WI 53707-7158 5302 Eastpark Blvd. | Madison, WI 53718-2101
(800) 728-7788 (608) 257-3838 Fax (608) 257-5502 www.wisbar.org service@wisbar.org

difference. For example, you may want to know whether pro se representation is increased after the introduction of 13-14, or you may want to know if 13-14 is used more in circuit courts versus appellate courts. Some form of this approach may be feasible if there is a possibility of counting instances of the thing you want to study, for example, the number of litigants representing themselves during a given time frame. It won't give you a causal connection between 13-14 and the outcome, but it will confirm whether or not something has changed, and this is the way you at times described the research objective.

- The ***descriptive approach*** summarizes data. For example, you may want to track the prevalence of pro se representation over time to see if there is a trend that changes after the introduction of 13-14. For example, I can imagine counting and then charting the number of pro se cases each month for two years before and after the adoption of 13-14 to see if the curve "bends" upwards at about the time of adoption. There is no statistical testing going on here—it is just an attempt to summarize and describe something observable—so the methods usually don't require any special training.

- The alternative to quantitative research is qualitative. This approach uses methods that rely on ideas, opinions, descriptions, and other contextual data that don't easily lend themselves to quantification. For example, it might be enough to capture the perceptions of attorneys and judges as to the impact of 13-14 on the outcomes of cases. There are a number of tools that can be used such as focus groups, in-depth telephone interviews, electronic suggestion boxes, and diaries. Some quantification is possible if the responses are coded and counted, but this is usually time consuming and expensive. The best use of qualitative research is exploratory. For example, you might want a list of the most frequently cited unintended consequences of 13-14 in the opinion of certain court users. Exploratory research using qualitative methods is often useful at the earliest stages of research when you may not even know what questions to ask using more structured or quantitative methods.
- We also talked a lot about doing a survey. It is important to note at the outset that a survey is not a research approach: Any of the above mentioned approaches can use a survey. A survey is just a tool for collecting data. When a survey is being used primarily to collect exploratory qualitative data, there is usually a more efficient and effective approach to be had. Surveys are best when the response choices are structured (e.g., which is the best…, check all that apply…, rank the following…, etc.). Surveys are also best when you are reasonably confident that the respondents have the information you need; if not, then it is a good idea to precede a structured survey with a bout of qualitative research. There are very many things to consider when designing and fielding a survey, and I'll mention just a few of them.
    - Nature of the sample: You may have in mind surveying every attorney, court user, judge, etc. involved in every case; we call this a "census." I can see two ways to do this: (1) work from court records, or (2) survey just the professionals (and not the amateur litigants) using, for example, the State Bar's list of attorneys and judges. The problem with the first approach is that compiling the list alone may

be daunting, especially if you are going back three years. In addition, this is probably an inefficient approach since most potential respondents won't have been involved in a courtroom proceeding in which 13-14 was a factor. The second approach also may be inefficient because many attorney aren't involved in courtroom litigation. I think that some careful work needs to be done around figuring out the right sample for this research, and I don't have an off-the-cuff idea for you, except to make this observation about the research objective. It might be that 13-14 has unintended consequences, and those are important to know. But it might also be important to know if 13-14 is achieving the intended consequences. Each of these objectives may require a different sample. For example, if I want to know about the intended consequences, I might only need to sample the pro se litigants and perhaps judges. If I want to know about the unintended consequences, I might need to sample opposing counsel and perhaps judges. For each type of survey respondent, it is possible that I would need a different questionnaire. In general, choice of the sample has many downstream consequences for methodology as well as upstream consequences for the research objective. In any case, you will probably need to find a way to focus the sample on only those cases involving the application of 13-14, perhaps by using a qualifier question at the start of the survey.

- Sampling method: In those cases where a census is not practical, we try to use a probability sample. This means that the respondents have been randomly selected to participate. This allows us to use the sample results to make pronouncements about the whole population even though we didn't survey everyone. When we pick and choose the participants or do not do a careful job of composing the sample, we run the risk of either not being able to project the results beyond the sample or worse, we project the results in error. My impression is that this research requires very careful sample composition without which it is possible that you only will get what is called a "convenience sample," which is just a sample of respondents that were easy to get to or who self-selected into the survey. Using these results, the court will be able to summarize what the sample says, but the court will not be able to project the results beyond that.
- One way in which surveys are not great for primarily qualitative research is that respondents aren't good at it. When busy respondents are faced with a blank box on a questionnaire and a vague question like, "In what ways do you think the application of 13-14 has affected the outcomes of court cases," most respondents give no answer or a vague, uninterpretable, or truncated answer. On my State Bar surveys, I have been including an open-ended comment box on every structured question. Over the past three years, only 3% of those boxes have been used by respondents, and most of their answers have been irrelevant or unusable. But perhaps the worst part is that when you get an occasional good answer, you can't probe the respondent for deeper insights; all you get is what you get. Imagine a situation in which you deploy a survey and get a typical answer like this: "The application of 13-14 is the single most important Supreme Court Rule adopted in

the last 20 years!!!" Well, there's a lot I want to ask this respondent… Do you mean that it is important in a good way or bad way? Is it important because it makes proceedings efficient or because it makes them fairer? Specifically, in what way is the administration of justice better for having adopted this rule? Do you see any troubling variations in the way that the rule is applied? Are there still ways to improve the rule? Were you a proponent of the rule prior to its adoption?... and so on. A competent focus group facilitator or interviewer will be effective at using a number of techniques—probing, laddering, projective tasks, etc.—to get at a more complete understanding than ever you will get from an open-ended survey question.

- There is an impression that because SurveyMonkey and its likes are free and easy to use there is little training and experience required to develop the questionnaire. For a survey to be useful, survey questions must be very carefully constructed both in terms of their literal meaning and in terms of the rest of the research design. Take for example a seemingly straightforward question like, "Yes or No: Do you feel that the administration of justice was improved by the adoption of 13-14?" This question may be comprehensible to a prosecutor but not to an amateur pro se defendant. Even if it is comprehensible to both, will the prosecutor and the defendant interpret "improved" in the same way? And I might feel "in general" that the administration of justice is improved, even though 13-14 wasn't used in my courtroom and didn't benefit me… I could go on. A professional researcher will labor over every question to ensure that it is understandable, cogent and not ambiguous. Diligent researchers will use a checklist of 30 or 40 criteria to ensure that each survey question yields usable results, their questionnaire may go through several revisions (typically I do 8–10 revisions), and even after all that, it is often prudent to pretest the questionnaire with a small subsample of likely respondents.
- It is also important when doing survey research to work backwards from the analysis. Too often, a survey is developed and deployed and the data collected only to find that the right data weren't collected in the right way for the analysis needed. Typically, I work out my analysis plan before writing a single survey question. That way I know that I'll have the data I need in the form that I need it to draw the required conclusions, and I won't be burdening the respondent with a lot of unnecessary, nice to have, or irrelevant questions that only serve to fatigue the respondent, reduce validity, and decrease the response rate. To be sure that I have the right questions, I sometimes sketch out every chart, mock up every table, and simulate every statistical test that I expect to use in preparing the analysis and report. This process often reveals the need for an unanticipated question, or the need to choose a different response format, or the need to ask questions in a different order, etc.
- Whenever I compose a survey, I always ask if the intended sample has the information I need. One aspect of this has to do with recency. In your case, you are asking respondents to think back three years and form an impression. How accurate will that impression be? Likely their opinion will be affected more by

their most recent experience. That might be okay for your objectives, but if you are asking the respondent to compare and contrast their experiences before and after the introduction of 13-14, then this could produce unreliable results.

Well, I think you can see that there are a lot of moving parts to a research project and even a simple survey, and I've barely scratched the surface. Where to go from here?

I definitely would begin with a round or two of qualitative research. This is because the overall concern is whether or not 13-14 will produce unintended consequences. By their very nature, unintended consequences also tend to be unanticipated consequences. That means that the person or committee drafting a questionnaire will not have a reasonably thorough list of unintended consequences to test through the survey, but the qualitative research may be able to provide that kind of grist. To achieve anything meaningful, the committee will have to get a laser-like focus on just a few carefully honed things they want to know. A committee of non-researchers can be well-intentioned, but there is a risk to success without an experienced researcher at their side to help with the process of designing the objectives. So the least approach that might meet the objectives could look something like the following. Over the next six weeks, work with a researcher who could facilitate a discussion of the committee —the one charged with proposing the criteria and protocol—to focus on one to three research questions and who could draft a research protocol around those questions. If the protocol includes a questionnaire, it might be possible to have a draft questionnaire to submit with the report of the committee. At that point, you might not need to stick with that researcher to complete the actual research; whoever oversees the project could use the report as the basis for a request-for-proposal from research firms that could carry the execution forward. (In fact, if you forgo the qualitative research, and if the survey instrument can be brought to completion in the next weeks, then it might be possible to go forward with a homegrown SurveyMonkey instrument, although I do not recommend this overall approach.) My guesstimate of what it would cost to work with a researcher in preparation of a protocol is that it would involve 20 to 30 hours of work at about $125 per hour, or $2,500–$3,750. If you are looking for a research firm to carry the whole project from initial consultation to finished report of findings, then expect to spend between $10,000 and $30,000.

It is challenging to provide advice on a research partner: Each research firm has its own capabilities and orientation to research. Without knowing which of several research strategies you will choose, it is hard to say which research firm will be the best partner. With that caveat, here are some local firms that might be able to carry the project forward.

- University of Wisconsin Survey Center (Madison): This is not a regular partner for us, but their capabilities for survey research are excellent. The Associate Director is John Stevenson (608.262.9032, stevenso@ssc.wisc.edu).
- Clearspring Research (Madison): We have had excellent results with this firm for some kinds of projects. The Research Director is Traci Janikowski (608.442.8668, traci.janikowski@clearspringresearch.com).
- DecisionPoint (Madison): We don't use this firm routinely, but they have been helpful in the past. The Research Director is Nicole Wyrembeck (608.695.3027, nwyrembeck@decision-point.net).

- Sturiale & Company (Fitchburg): We use this firm occasionally for qualitative research. The Research Director is Jo Anne Sturiale (608.273.0890, sturiale@chorus.net).
- The Dieringer Research Group (Brookfield): I have not used the DRG for some years; however, they are a longstanding research firm in Wisconsin and they do have experience with the government sector. I also expect they are the most expensive option. The Business Development Manager is Nikki Riggleman (262.432.5230, Nikki.Riggleman@theDRG.com).

If none of these work out for you, please feel free to call me. I might be able to develop a different list once we know the direction you want to take with the research. I hope these thoughts are helpful. Do feel free to call me if I can clarify or advise further.

Fred Petillo

Market Research Manager
State Bar of Wisconsin
(608) 250-6162
fpetillo@wisbar.org

cc: Lisa Roys, Jan Wood