



# WISCONSIN COURT OF APPEALS

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CHAMBERS OF  
JUDGE PAUL LUNDSTEN

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January 6, 2017

Wisconsin Supreme Court  
P.O. Box 1688  
Madison, WI 53701-1688

Re: Report of Follow-up Study Committee for Rule Petition 13-14  
Results of Additional Surveys

Honorable Justices of the Supreme Court:

On July 1, 2014, the Supreme Court amended SCR 60.04(1) and the comment to this rule. The rule and comment address “reasonable efforts” a judge may make “to facilitate the ability of all litigants ... to be fairly heard.” On the same date, the Court charged this Committee with proposing criteria and a protocol to evaluate the effect of the amendments.

On December 11, 2014, this Committee filed its first report detailing a number of options for evaluating the amendments. The Court subsequently requested that this committee conduct a survey or surveys to determine how the rule has worked in practice. On January 22, 2016, this Committee filed its second report with the results of a survey of judges present at the 2015 Judicial Conference. Today, this committee files its third and final report with survey results of the circuit court commissioners and clerks of circuit court.

## **Results of the Circuit Court Commissioner Survey**

The survey of circuit court commissioners was conducted using an online survey tool. On November 28, 2016, a link was sent to all circuit court commissioners with an invitation to participate in the survey. The survey was preceded by an overview of the rule amendments for those commissioners who were not familiar with them. We received 48 responses. Attached is a summary of the results and all of the narrative responses.

The survey results inform us that most of the commissioners (71%) were aware of the rule amendments. In response to the amendments, most report that they have not changed the

techniques they employ in handling cases (no changes 52%, changes 17%). They reported an equal number of complaints (13%) and compliments (13%). They reported that by employing the techniques or employing them more often, it helped ensure that all litigants, including self-represented litigants, are fairly heard (yes 63%, no 2%). In their narrative responses, many expressed the view that the rule amendment confirmed or supported their existing practices. Some said they are now more aware or more comfortable with the practices. Many of the narrative responses describe how the commissioners put the rule into practice.

### **Results of the Clerk of Circuit Court Survey**

At the Clerk of Circuit Court Conference on October 14, 2016, the clerks heard a brief presentation on the amendments to SCR 60.04. They were then given a questionnaire asking what changes they had observed in the courtroom practices of judges and court commissioners, as well as what feedback they might have received from lawyers and litigants. 58 responses were received. Attached is a summary of the results and all of the narrative responses.

The survey found that most of the clerks (76%) were unaware of the rule changes. They had not observed many changes since 2014 in the courtroom practices of judges (no changes observed, 76%) or court commissioners (no changes observed, 91%). They reported few complaints (9%) and few compliments (7%). To the extent that changes were observed, clerks considered them helpful to the goal of making sure litigants are heard (yes 30%, no 15%).

### **Conclusion**

Overall, the results of these two surveys are consistent with the results of the judicial survey taken a year previously. Judges, court commissioners and clerks all report little effect from the rule changes. The narrative responses suggest that is because the changes were consistent with existing practices. From these results, the Committee concludes that the rule is working as intended. We found no reason why the amendments should not remain as adopted.

We thank you for this opportunity to serve the Court. Our original chair, Judge James Duvall, ended his participation on the committee when he stepped down as chief judge of his circuit court judicial district. In the absence of a current chairperson, I am signing on behalf of the Committee. Please feel free to contact me if you have any questions.

Sincerely,

Judge Paul Lundsten

encl.

## **SURVEY OF CIRCUIT COURT COMMISSIONERS**

### **December 2016**

#### **Introduction**

On July 1, 2014, the Wisconsin Supreme Court amended SCR 60.04 and related commentary to clarify the reasonable efforts a judicial officer may use to facilitate the ability of all litigants to be fairly heard, consistent with the obligation to perform all judicial duties fairly and impartially. Below is a brief overview of the new rule. Supreme Court Rule Order 13-14 also asked a committee of Court of Appeals Judges and Chief Judges to develop a protocol to evaluate the impact of this rule on the Wisconsin court system. To assist in its mission, the committee asks that you complete a short survey following the overview of the rule.

#### **Overview of the rule change**

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 to the rule**

The comment to new SCR 60.04(1)(hm) provides:

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.

More information about the rule can be found at <https://www.wicourts.gov/scrules/1314.htm>.

**SCR 60.04 Follow-up Study Committee**  
**SURVEY OF CIRCUIT COURT COMMISSIONERS**  
**December 2016**

**Survey conducted online, November 28 - December 9, 2016**  
**48 responses**

	<b>Yes</b>	<b>No</b>
<b>1.</b> Prior to today, were you aware Rule 60.04 was amended as discussed above?	<b>71%</b>	<b>29%</b>
<b>2.</b> If you were not aware of the rule change, do you plan to make any changes to the manner in which you handle cases or the techniques you employ in handling cases now that you are aware of the amendment? Please explain.	<b>10%</b>	<b>19%</b>
<b>3.</b> If you were aware of the rule change before today, please answer the remaining questions. As a result of the amendment have you changed the techniques you employ in handling cases? If so, please give examples.	<b>17%</b>	<b>52%</b>
<b>4.</b> If you have changed your practice by employing the techniques or employing them more often, have you found the techniques listed in the amendment to be of benefit in ensuring all litigants, including self-represented litigants, are fairly heard? If so, please explain.	<b>63%</b>	<b>2%</b>
<b>5.</b> Have you received any negative feedback or been appealed as a result of any changes you have made due to the amendment? If so, please explain.	<b>13%</b>	<b>50%</b>
<b>6.</b> Have you received any positive feedback as a result of any changes you have made due to the amendment? If so, please explain.	<b>13%</b>	<b>48%</b>

Thank you.

## Narrative responses

- |   |            |            |
|---|------------|------------|
| <b>1.</b> Prior to today, were you aware Rule 60.04 was amended as discussed above?   | <b>71%</b> | <b>29%</b> |
| <br>  |            |            |
| <b>2.</b> If you were not aware of the rule change, do you plan to make any changes to the manner in which you handle cases or the techniques you employ in handling cases now that you are aware of the amendment? Please explain.   | <b>10%</b> | <b>19%</b> |
| <ul style="list-style-type: none"><li>• The ability to provide resource information is invaluable.</li><li>• That is basically the way I handle the matters now.</li><li>• I make more use of using pleadings as testimony - especially in domestic violence injunction matters.</li><li>• I will keep this in mind when questioning whether or not I am affording too much help to litigants.</li><li>• I am new to the position (2 years). I have operated in this manner for the two years.</li><li>• I usually try to explain and inform pro se litigants of proceedings when they are before me.</li><li>• In reviewing the "reasonable steps" enumerated in the Comments to the Rule, I found that I typically employ them, as appropriate. However, I will now follow them religiously.</li></ul>  |            |            |
| <br>  |            |            |
| <b>3.</b> If you were aware of the rule change before today, please answer the remaining questions. As a result of the amendment have you changed the techniques you employ in handling cases? If so, please give examples.   | <b>17%</b> | <b>52%</b> |
| <ul style="list-style-type: none"><li>• I give more leeway to pleadings and ask more questions to see if there might be a basis for what is being requested if the testimony or pleadings do not give a solid basis.</li><li>• I explain more about proceedings, may ask a question.</li><li>• I have explained procedure to pro se parties who may not understand the process. I have directed questions and at times taken things out of turn.</li><li>• I ask more questions of pro se litigants and also allow them to adopt their pleadings as their testimony.</li><li>• First, I think this was a nice review of the changed language. I have tried to take more time to explain the law to small claims litigants prior to giving the ruling. I also try to remember to refer litigants to the Wisconsin court website for self-representation assistance.</li><li>• When hearing Small Claims matters with pro se litigants in particular, I explain the proceedings and things like the burden of proof, I do ask neutral questions and allow narrative testimony when appropriate.</li></ul> |            |            |

- I think the rule changes simply clarified that we have the responsibility to attempt to ensure that all litigants are fairly heard, and the options set forth in the Comment are some particular methods of exercising that responsibility. I have used many of those methods for years.
- With or without this rule change, this is standard practice in my court in the interest of justice, fairness and reasonableness. Everyone has rights including the right to be heard, understand the process, and the reasons for the judicial decision(s).

4. If you have changed your practice by employing the techniques or employing them more often, have you found the techniques listed in the amendment to be of benefit in ensuring all litigants, including self-represented litigants, are fairly heard? If so, please explain.

63% 2%

- I regularly explain the purpose of the hearing and next steps; litigants seem to appreciate having that knowledge.
- I have always used them even before the rule was amended.
- I explain the proceedings in terms they can understand and make sure they get the opportunity to speak and be heard as well as ask questions.
- I'm not sure...at times I wonder how fair it is to the other side, or have I crossed over the line by allowing someone to make a case based upon my questioning. There is a danger that litigants go away thinking they do not have to do anything and it is the court's job to elicit the facts.
- Explain process and what to expect at the hearing and in future hearings. Refer to legal clinics. Allow narrative testimony.
- I get a better understanding of the issues by asking questions myself.
- In small claims court, it's fairly necessary to have someone guide or direct the case towards progress. Folks don't understand "prosecuting a case" or making motions in defense.
- I employed many of those suggestions previously; I am simply more cognizant of them in my daily court routine.
- There are always litigants that do not listen or comprehend. However, I have felt that people come in better prepared and better understand rulings if the explanation is given.
- Explaining procedure is helpful to self-represented litigants.
- I do think explaining the burden of proof at the outset is helpful and also explaining the statutory right to have the matter heard, de novo, by the judge is helpful. It calms the litigants nerves a bit to understand the expectations and procedures.
- Pro se parties need be told what the next step is--leaving them to figure it out on their own rarely works.

- Information and explanation about the proceedings saves time during later parts of the hearing, especially if a "road map" is provided to litigants. Explaining legal concepts in everyday language helps to ensure that everyone understands what is going on during the hearing, as well as the basis for decisions, and also increases the likelihood that the decision is understood, accepted, and that the orders are followed. Neutral questions to elicit information are often necessary to have facts in evidence upon which to base decisions. Narrative testimony is sometimes required--while I can ask neutral questions, I don't necessarily know what questions to ask. The only thing listed in the Comment that I rarely, if ever, do is to allow litigants to adopt pleadings as sworn testimony. I believe I need to hear them to determine credibility.
- I routinely explain legal concepts to unrepresented litigants in common language during any hearing where they express confusion or in which I'm accepting a waiver of any right. I also routinely permit unrepresented parties to testify in a narrative fashion when testimony is taken. I also, slightly more occasionally, ask questions of unrepresented litigants designed to clarify their position. Finally, I refer unrepresented litigants to available free legal clinics and the county-operated Self Help Center for family law cases.
- I explain the process, the burden of proof and what litigants need to exchange with each other and file with the court before the trial date so the court has time to review the information. I further state to the parties that I am not their counsel; that they are free to hire counsel; and that they are free (if nothing prohibits contact) to negotiate and come to an amicable resolution prior to the time of trial. The concern for the court is that parties don't want to pay an attorney; that they want the court to be their counsel and simply want to win by argument without more. The Clerk of Court's office does an excellent job of providing documents, explaining procedures and more, but again often-times litigants come into court prepared to argue only.
- All litigants have a right to due process. SCR 60.04 levels the playing field for all litigants.

5. Have you received any negative feedback or been appealed as a result of any changes you have made due to the amendment? If so, please explain.

**13% 50%**

- I had an attorney say that I was "too nice" to a pro se litigant by explaining the process to them and "giving legal advice" when I directed them to resources for enforcement.

- Fairly frequently, the side that may have some knowledge of the process (but not represented by an attorney) gets upset at any direction given to the other side, or simply having the court attempt to get to the truth of the matter. Plenty of people feel they should win by ambush against the other side.
- No complaints – at least not that I know about.
- I try to ensure that everyone, including the represented litigant when one party has a lawyer, understand why I am doing what I am doing.
- I've been informed that attorneys on the other side of unrepresented litigants thought I went too far in explaining things to pro se litigants on two occasions. Those complaints were made to my supervising judge who discussed the cases with me and determined I'd acted appropriately.
- Negative feedback: "Can't afford a lawyer," "didn't know," "nobody told me I had to do that," "Call so-and-so if you want to find anything out," etc. Appeals occur at all trial and appellate levels because unrepresented litigants feel there is nothing to lose. Yes, there have been de novo reviews of my decisions for the reasons stated previously plus the fact that they are mad and want to be heard again.

6. Have you received any positive feedback as a result of any changes you have made due to the amendment? If so, please explain. **13%** **48%**

- A few litigants have thanked me for explaining or acknowledged reading the information.
- I have had litigants thank me for some basic explanations about the court hearing process.
- I really did not change what I was doing as a result of the Amendment. It just clarified that what I WAS already doing was ok.
- Not applicable - I really don't think I have made any changes as a result of the Rule amendments.
- There is a reduction in the number of contested pro se divorces.
- Litigants have said thank you to me for explaining procedures, burden of proof, why I need documents, witness lists, etc. to review before the trial date. The biggest feedback I get is the thanks for explaining the law, general procedures and explain to them what each side needs to do (read the applicable statutes) and do a better job with contracts, scope of work, billing practices, and more so that they don't come back to court.



**SCR 60.04 Follow-up Study Committee  
SURVEY OF CLERKS OF CIRCUIT COURT  
October 2016**

On July 1, 2014, the Wisconsin Supreme Court amended SCR 60.04 to clarify the efforts that a judge may use to ensure that all litigants are fairly heard, in a manner consistent with a judge's duties of fairness and impartiality. To develop a protocol for evaluating the impact of this change, we ask that you complete the following survey. Thank you.

<b>Survey conducted at Clerks of Circuit Court Conference, October 13, 2016</b>		<b>Yes</b>	<b>No</b>
<b>58 responses</b>			
<b>1.</b>	Prior to today, were you aware Rule 60.04 was amended as discussed above? <ul style="list-style-type: none"> <li>• Our judges and court commissioners have always done these things. (6 responses)</li> </ul>	<b>24%</b>	<b>76%</b>
<b>2.</b>	Have you noticed any changes to the way <u>judges</u> handle cases or the techniques they employ in handling cases? Please explain or give examples. <ul style="list-style-type: none"> <li>• The judges explain more, ask more questions. (9 responses)</li> <li>• The judge will question witnesses if he needs more information. In pro se testimony he will initiate the questioning. He's more personable and puts everyone at ease.</li> <li>• Referral to legal services is common.</li> <li>• We have a new judge so it's hard to pinpoint any changes. (6 responses)</li> </ul>	<b>24%</b>	<b>76%</b>
<b>3.</b>	Have you noticed any changes to the way <u>court commissioners</u> handle cases or the techniques they employ in handling cases? Please explain or give examples. <ul style="list-style-type: none"> <li>• Our court commissioners have always worked well with pro se. The judges have made more exceptions and spend more time with the litigants.</li> <li>• I believe self-represented litigants who appear before the court commissioner leave happier and more informed than those who appear before the judge.</li> <li>• These techniques are not being used by our court commissioner. It would be nice if she would help a little.</li> </ul>	<b>9%</b>	<b>91%</b>

- |    |   |            |            |
|----|---|------------|------------|
| 4. | If you have observed any changes, do you think the changes have helped the litigants, including self-represented litigants, to be fairly heard? Please explain:   | <b>30%</b> | <b>15%</b> |
|    | <ul style="list-style-type: none"> <li>• Cases are being heard fairly, but the changes don't affect the end result.</li> <li>• The previous judge took no time to explain rulings or what comes next, and people would look at me and ask what just happened. The judge we have now takes time for everyone. Self-represented litigants share their appreciation and thank the judge for taking time for them.</li> </ul> |            |            |
| 5. | Have you heard any negative feedback from litigants or attorneys as a result of these changes? If so, please explain:   | <b>9%</b>  | <b>91%</b> |
|    | <ul style="list-style-type: none"> <li>• Attorneys seem annoyed at times and feel like the judges are trying their cases.</li> <li>• Our court commissioners have not changed. I hear negative comments about the way people are treated.</li> </ul>  |            |            |
| 6. | Have you heard any positive feedback from litigants or attorneys as a result of these changes? If so, please explain:   | <b>7%</b>  | <b>93%</b> |
|    | <ul style="list-style-type: none"> <li>• Litigants seem to appreciate explanations.</li> <li>• The judges and court commissioners are very respectful and concerned about all parties.</li> <li>• The judges have always been very thorough in making sure pro se litigants understand.</li> </ul>  |            |            |

Thank you.