STATE OF WISCONSIN **IN THE SUPREME COURT**

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

MEMORANDUM IN SUPPORT OF PETITION 13-___

INTRODUCTION

The Wisconsin Access to Justice Commission files this memorandum in support of its petition seeking an amendment to Supreme Court Rule (SCR) 60.04 of the Wisconsin Code of Judicial Conduct to address self-represented litigants.[1] The core of the proposed amendment creates SCR 60.04(1)(i), which makes clear that "reasonable efforts to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard" are consistent with a judge's obligation to perform all judicial duties fairly and impartially.[2] The proposed amendment also creates a comment to this new SCR 60.04(1)(i) to provide additional guidance, and it amends SCR 60.04(1)(g) and (h).

The need for this amendment arises out of the increasingly large number of litigants representing themselves in the Wisconsin court system. This has affected the duties of judges in fundamental ways. As examples of these numbers, in Portage County in 2011, only 12 percent of the divorce cases had an attorney on both sides; and in Sauk County both sides are unrepresented in approximately 80 percent of the family law cases coming before the court

[1] The Access to Justice Commission was established by order of the Wisconsin Supreme Court in 2009. The mission of the Commission is to develop and encourage means of expanding access to the civil justice system for unrepresented low-income Wisconsin residents.
See http://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=36727.

[2] The Wisconsin Code of Judicial Conduct uses the term "judge" throughout, defining it to mean "a justice of the supreme court, a judge of the court of appeals, a judge of the circuit court, a reserve judge, a municipal judge, a court commissioner, and anyone, whether or not a lawyer, who is an officer of the judicial system and who performs judicial functions." SCR 60.01(8). The word "judge" as used in this memorandum has the same meaning.

commissioner.[3] These numbers present challenges to the efficiency and effectiveness of our court system. They also raise significant issues for judges concerning their ethical obligations. Judges have a duty to be impartial; they also have a duty to provide a fair process for all litigants. How do these duties fit together when one or both parties are not represented by counsel and are not knowledgeable about the substantive law that governs the case?

The proposed amendment gives guidance to judges on this important question and assures a uniform understanding of the Code. It will also facilitate the fair adjudication of cases involving self-represented litigants and thus further access to justice for all litigants. With this amendment, Wisconsin would join the 24 other states and the District of Columbia that, following the 2007 American Bar Association Model Code of Judicial Conduct (ABA Model Code),[4] have adopted provisions in their judicial codes addressing the adjudication of cases involving self-represented litigants.

DISCUSSION

I. Relevant Current Provisions of the Wisconsin Code of Judicial Conduct

The Wisconsin Code of Judicial Conduct currently does not explicitly address, either in the rules or comments, ethical standards for judges when adjudicating cases for self-represented litigants. SCR 60.04 requires that "A judge shall perform the duties of judicial office impartially and diligently," and SCR 60.04(1) specifies a judge's obligations when performing adjudicative responsibilities. Portions of some of the subsections of SCR 60.04(1) may have particular

[3] These numbers come from the testimony of Attorney Melissa Dalkert, president of Portage County Legal Aid, at the public hearing held by the Access to Justice Commission in Wausau on October 2, 2012, and from the testimony of Sauk County Court Commissioner Leo Grill at the public hearing held by the Commission in Madison on September 16, 2012.

[4] All references to the ABA Model Code are to the 2007 version unless otherwise noted.

relevance to a judge's role in adjudicating cases with self-represented litigants, but none directly address that circumstance. For example:

"During trials and hearings, a judge shall act so that the judge's attitude, manner or tone toward counsel or witnesses does not prevent the proper presentation of the cause or the ascertainment of the truth. *A judge may properly intervene if the judge considers it necessary to clarify a point or expedite the proceedings*." SCR 60.04(1)(d) (emphasis added).

"A judge shall accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law…." SCR 60.04(1)(g). (The remainder of this subsection addresses ex parte communications.)

"A judge shall dispose of all judicial matters promptly, efficiently and *fairly*." SCR 60.04(1)(h) (emphasis added). (The comment to this rule elaborates on the obligations of promptness and efficiency, but not on the obligation of fairness.)

A recurring topic of discussion at judicial education seminars is: what do these Code provisions mean when a judge has before him or her one or more parties who are not represented by counsel and do not understand basic concepts of the procedural or substantive law that governs the case. James Alexander, recently retired executive director of the Wisconsin Judicial Commission, has expressed his view at judicial education seminars on the Code that implicit in the above provisions is permission for a judge to employ reasonable means of facilitating a fair hearing for self-represented litigants.[5] However, Mr. Alexander is also of the view that a provision in our Code directly addressing this topic would be helpful to clarify this and provide guidance for judges.

[5] As of August 28, 2013, Jeremiah C. Van Hecke is the executive director of the Wisconsin Judicial Commission.

II. 2007 ABA Model Code of Judicial Conduct

As part of the revisions to the ABA Model Code, the ABA adopted Rule 2.2, "Impartiality and Fairness," and a comment to that rule addressing self-represented litigants. Rule 2.2 provides that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment 4 states that "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."

According to a comparison chart prepared by the ABA, updated in April 2012, the judicial codes in ten states have language identical to the ABA Model Rule 2.2 and Comment 4;[6] and the judicial codes in twelve states, plus the District of Columbia, have similar language.[7]

[6] The ABA chart can be found at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_2.authcheckdam.pdf. The ten states with language identical to ABA Model Rule 2.2 and Comment 4 are:
Arkansas, https://courts.arkansas.gov/rules-and-administrative-orders/arkansas-code-of-judicial-conduct;
Colorado, http://www.courts.state.co.us/userfiles/file/Code_of_Judicial_Conduct.pdf;
Connecticut, http://www.jud.ct.gov/Publications/PracticeBook/Judicial_Conduct.pdf;
Indiana, http://www.in.gov/judiciary/rules/jud_conduct/index.html;
Minnesota, https://www.revisor.mn.gov/court_rules/rule.php?name=prjudi-toh;
Nevada, http://judicial.state.nv.us/nevcodejudicialconduct3new.htm;
Oklahoma, http://law.justia.com/cases/oklahoma/supreme-court/2010/461550.html;
Tennessee, http://www.tsc.state.tn.us/rules/supreme-court/10;
Washington, http://www.cjc.state.wa.us/Gov_provision/code_canons.htm; and
Wyoming, http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=JudicialConduct.xml.

[7] The twelve states with similar language are:
Arizona, http://supreme.state.az.us/ethics/NewCode/2009Code_Internet_Maste_5-03-10.pdf;
Hawai'i, http://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm;
Iowa, http://www.iowajqc.gov/ethical_rules/Iowa_Code_of_Judicial_Conduct/;
Maryland, http://mdcourts.gov/rules/reports/codeofjudicialconduct2010.pdf;
Missouri, http://www.courts.mo.gov/page.jsp?id=703;
Montana, http://supremecourtdocket.mt.gov/view/AF%2008-0203%20Ot her%20--%20Order?id=%7B7F2426C5-4E87-4C48-AE15-3E8E997CF8FC%7D;
Nebraska, http://supremecourt.ne.gov/supreme-court-rules/ch5/art3;
New Hampshire, http://www.courts.state.nh.us/rules/scr/scr-38-new.htm;
New Mexico, http://public.nmcompcomm.us/nmpublic/gateway.dll/?f=templates&fn=default.htm;
North Dakota, http://www.ndcourts.gov/rules/Judicial/frameset.htm;
Ohio, http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond.pdf; and
Utah, http://www.jcc.utah.gov/code/index.html.
We do not include Kansas in this group of states, as does the ABA chart, because, while Kansas adopted Rule 2.2, it did not adopt Comment 4 or similar language. The District of Columbia Code of Judicial Conduct can be found at http://dc.gov/DC/CJDT/Governing+Provisions+and+Regulations/Code+of+Judicial+Conduct.

More recently, two additional states, Louisiana and Maine, have amended their codes to address self-represented litigants, and petitions to amend codes on this topic are pending in Pennsylvania and New York.[8] Thus, at the present time 24 states, plus the District of Columbia, have amended their codes to address self-represented litigants, and at least two other states are in the process of doing so.

III. Resolution of the Conferences of Chief Justices and State Court Administrators

The movement among states to amend their judicial codes to address self-represented litigants has been supported by the Conference of Chief Justices and the Conference of State Court Administrators. At their July 2012 annual meeting, they passed *2012 Resolution 2: In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Represented Litigants* (the Joint Resolution).[9] This recommends that states consider adopting Rule 2.2 with the inclusion of the following wording:

> (A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.
>
> (B) 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.

The Joint Resolution also suggests that "states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants."[10]

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[8] Louisiana, http://www.lasc.org/rules/supreme/cjc.asp,;
Maine, http://www.jrd.maine.gov/code_conduct.html;
Pennsylvania, https://www.pabar.org/pdf/report%20final.pdf;
New York, http://www.nycourts.gov/rules/comments/PDF/Rule100-3B12PC-Packet.pdf.

[9] http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/07252012-Support-Expanding-Rule-ABA-Model-Code-Judicial-Conduct-Self-Representing-Litigants.ashx

[10] At least five jurisdictions have amended their judicial codes to include in comments specific actions judges might permissibly take in cases involving self-represented litigants. In Iowa, specific actions are listed in

Thus, the Joint Resolution expands on the ABA Model Code in that it places in the rule, rather than in a comment, the general principle that 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." In addition, the Joint Resolution suggests that more guidance be given on the meaning of this general principle through commentary reciting specific actions judges may take.

The "whereas" clauses setting forth the reasons for the Joint Resolution include the statement that "the Conference of Chief Justices and the Conference of State Court Administrators have long recognized the importance of access to justice for all." Those clauses also include the statement that "judges would benefit from additional guidance regarding their role in cases involving self-represented litigants." Both the principle of access to justice for all and the benefit to judges of additional guidance are persuasive reasons for adopting the amendment the Commission proposes.

IV. Drafting Process

The Courts and Administrative Tribunals Committee of the Access to Justice Commission created a drafting subcommittee to develop a proposed amendment. The subcommittee consists of ten circuit court judges, three court commissioners, and two Commission members**:** Circuit Court Judges Carl Ashley (Milwaukee), Andrew Bissonnette (Dodge), Karen Christenson (Milwaukee), Shelley Gaylord (Dane), Scott Horne (La Crosse), Mary Kuhnmuench (Milwaukee), Michael Rosborough (Vernon), Maryann Sumi (Dane), Mary

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Comment 4 to Rule 51:2.2 of the Iowa Code. In Louisiana, they are listed in the Commentary to Canon 3A(4) of the Louisiana Code. In Ohio, Colorado, and Washington D.C., the specific actions are listed in comments to Rule 2.6 in each of those codes, which track Rule 2.6 of the ABA Model Code. Rule 2.6, "Ensuring the Right to Be Heard," provides in part: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." *See* ABA comparison chart for ABA Model Rule 2.6 at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_6.authcheckdam.pdf.

Triggiano (Milwaukee), and Thomas Walsh (Brown); Court Commissioners Barry Boline (Ozaukee), Dolores Bomrad (Washington), and Gloria Doyle (La Crosse); and Commission members Marsha Mansfield, Clinical Associate Professor at the University of Wisconsin Law School, and Margaret Vergeront, retired Court of Appeals judge. The Courts and Administrative Tribunal Committee recommended that the Commission petition the Supreme Court to adopt the proposed amendment, and the Commission voted unanimously to do so on September 6, 2013.

In deciding upon the language of the proposed amendment, the drafting subcommittee studied the ABA Model Code, the Joint Resolution, the various versions adopted by other jurisdictions, and additional options presented in a memorandum prepared by the Self-Represented Litigation Network (SRLN "Options for Alternative Comment Language").[11]

The drafting subcommittee also consulted with Mr. Alexander at the beginning of the drafting process and shared the initial draft with him, inviting his comments. Mr. Alexander has provided some technical advice, but has not taken a position on the wording of the amendment. The Judicial Commission itself has not addressed the proposed amendment.

After the drafting subcommittee developed a draft, members made presentations to the following groups of judges, court commissioners, and lawyers: Wisconsin Supreme Court Planning and Policy Advisory Committee, 2013 Judicial Family Law Seminar, Committee of Chief Judges, Wisconsin Trial Judges Association, Joint Conference of the Wisconsin Family Court Commissioners Association and the Wisconsin Association of Judicial Court Commissioners, 2013 Annual Meeting of the Wisconsin Municipal Judges Association, State Bar Section Leaders Council, State Bar Bench and Bar Committee, and State Bar Legal

[11] The complete title is "Model Code of Judicial Conduct Provisions on Self-Represented Litigation: Options for Alternative Comment Language Prepared in Support of Potential State Activity in Response to 2012 Resolution 2 of the Conference of Chief Justices and the Conference of State Court Administrators" (March 2013). http://www.ncsc.org/microsites/access-to-justice/home/Topics/Judicial-Role-in-Promoting-Access.aspx

Assistance Committee. At these presentations, drafting subcommittee members solicited their comments on the draft. The subcommittee also communicated by email with each judge of the Wisconsin Court of Appeals about the proposed amendment and solicited their comments on the draft.

There was broad support among judges and court commissioners for the amendment proposed, with some suggestions for modification of the draft. The drafting subcommittee considered all the comments it received before deciding upon the version of the amendment contained in this petition.

V. Explanation of Proposed Amendment

A. Creation of SCR 60.04(1)(i)[12] and deletions in SCR 60.04(1)(g) and (h)

As a preliminary matter, the drafting subcommittee recognized that the Wisconsin Code does not have an exact counterpart to Rule 2.2 of the ABA Model Code. The Wisconsin Code is, for the most part, based on the 1990 ABA Model Code of Judicial Conduct, which was extensively revised in the 2007 ABA Model Code.[13] The drafting subcommittee decided not to attempt to bring the Wisconsin Code in line with the 2007 ABA Model Code any more than necessary to address the issue of self-represented litigants in a complete and coherent way.

The first sentence of the new SCR 60.04(1)(i) adopts the language of Rule 2.2 of the ABA Model Code: "A judge shall uphold and apply the law and perform all duties of judicial office fairly and impartially." The drafting subcommittee's view is that this sentence does not add any new obligation to the Wisconsin Code. As noted earlier, the Wisconsin Code already

[12] Currently, SCR 60.04(1) has subsections (a) (h), (j), (k), (m) and (o); it does not have a subsection (i).

[13] On July 1, 1996, the Wisconsin Supreme Court repealed and recreated Supreme Court Rule 60, adopting, for the most part, the 1990 ABA Model Code. The Supreme Court has amended the Code on particular topics since then, e.g., campaigns, elections, and political activity, 2004 WI 134 (Oct. 29, 2004), and recusal, 2010 WI 73 (July 7, 2010). However, the court has not considered the extensive revisions made to the ABA Model Code in 2007.

expressly imposes the obligation of fairness in SCR 60.04(1)(h) ("A judge shall dispose of all judicial matters promptly, efficiently, and fairly.") and the obligation of impartiality in the heading of SCR 60.04 ("A judge shall perform the duties of judicial office impartially and diligently."). Thus, the first sentence of the new subsection simply brings these two obligations together in one place. This leaves subsection (h) (with the deletion of "fairly") to address only the obligations of promptness and efficiency, which are the obligations that are addressed more specifically in the existing comment to subsection (h).

With respect to the obligation to "uphold and apply the law," the existing SCR 60.04(1) does not use this precise language, but the substance of this obligation is expressed in other language in the existing code. SCR 60.04(1)(b) provides that "[a] judge shall be faithful to the law …." In addition, the obligation to "uphold and apply the law" is necessarily implicit in a judge's obligation under current SCR 60.04(1)(g) to "accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law."

The second sentence of the new subsection (i) is the current first sentence of subsection (g): "A judge shall accord to every person who has a legal interest in a proceeding, or to that person's attorney, the right to be heard according to law." The drafting subcommittee decided it was important to include this sentence in the new subsection (i) because the right to be heard according to law is essential to a fair and impartial judicial system.[14] The current subsection (g), except for this first sentence, addresses ex parte communications, as does the comment to subsection (g). Thus, with the deletion of this first sentence from subsection (g) and its inclusion

[14] As already noted in footnote 10, this sentence — "A judge shall accord to every person who has a legal interest in a proceeding, or to that person's attorney, the right to be heard according to law" — is found in Rule 2.6(A) of the ABA Model Code. The interrelationship of the obligation to be fair and impartial, on the one hand, and the obligation to ensure the right to be heard, on the other, is demonstrated by the judicial codes of Ohio, Colorado, and Washington D.C. They have adopted Comment 4 to Rule 2.2 of the ABA Model Code and, in addition, have listed specific actions a judge may take to accommodate self-represented litigants in a comment to Rule 2.6. *See* ***supra*** n. 10.

in the new subsection (i), subsection (g) and the comment to subsection (g) are exclusively devoted to ex parte communications.

The third sentence of subsection (i) contains the entirely new language that directly addresses self-represented litigants. This language is essentially the same as the proposed Rule 2.2(B) in the Joint Resolution. Notably, like the Joint Resolution, this sentence is in the rule itself, rather than in a comment. The drafting subcommittee feels strongly that the issue of self-represented litigants should be addressed in the rule itself rather than only in a comment. The drafting subcommittee believes that placement in the rule itself better reflects the importance of this issue and leaves no room for doubt that a judge's obligations to uphold the law and be impartial and fair are consistent with reasonable efforts to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

Other reasons the drafting subcommittee chose to use the language of the Joint Resolution rather than that of Comment 4 to Rule 2.2 of the ABA Model Code are as follows. First, the drafting subcommittee felt it was preferable to use "reasonable efforts" instead of "reasonable accommodations" because the latter term is a term of art in certain areas of the law. *See*, *e.g.*, 42 USC 12112(b)(5) (addressing employment discrimination based on disability). Second, the drafting subcommittee decided that the purpose of the judge's reasonable efforts is more accurately described as "*to facilitate the ability* of … litigants … to be fairly heard" rather than as "*to ensure* … litigants *the opportunity* to have their matters fairly heard." Third, the drafting subcommittee strongly believes that this rule should include all litigants, not just self-represented litigants. Litigants who are represented by counsel may less often need a judge to make particular reasonable efforts to facilitate their right to be fairly heard. However, there is no

logical reason a judge should not be permitted to do so, when a judge determines that the circumstances require this, despite representation by counsel.

The third sentence in the new subsection (i) differs from that of Rule 2.2(B) in the Joint Resolution in two respects. First, the Joint Resolution's Rule 2.2(B) states that "*[a] judge may* make reasonable efforts …," while the new subsection (i) states that "*[i]t is consistent with this rule for a judge* to make reasonable efforts …." (Emphasis added.) In the drafting subcommittee's view, both phrasings convey the concept that the "reasonable efforts" are permissive. However, the drafting subcommittee believes the language it has chosen makes a stronger statement that the reasonable efforts described do not violate the rule.

It bears emphasis that the concept of permissiveness is fundamental to the third sentence of the new subsection (i), as it is to Rule 2.2(B) of the Joint Resolution and to Rule 2.2, Comment 4, of the ABA Model Code. None of these iterations mandate that a judge make the described reasonable efforts or accommodations. The drafting subcommittee is not aware of the judicial code of any state that makes these actions mandatory.

The second way in which the third sentence in the new subsection (i) differs from the Joint Resolution is that the former does not contain the phrase "consistent with the law and court rules." The drafting subcommittee decided that this phrase was not necessary because the two preceding sentences establish that a "judge shall uphold and apply the law" and "shall also afford … the right to be heard according to the law." Therefore, the "reasonable efforts to facilitate" permitted in the third sentence are necessarily those that are consistent with the law.

B. Proposed comment to new SCR 60.04(1)(i)

The first three sentences of the proposed comment, together, elaborate on the standard set forth in the new SCR 60.04(1)(i). This portion of the comment links the right to be fairly heard

to the "reasonable efforts" referred to in the new subsection (i) and emphasizes the need for judges to have flexibility in deciding how best to ensure a fair process. It also makes clear that the judge's exercise of discretion for this purpose "will not generally raise a reasonable question about the judge's impartiality." This portion of the comment is essentially the same as that suggested in the SRLN "Options for Alternative Comment Language" and is a synthesis of commentary from various states.[15]

In the remainder of the proposed comment, the drafting subcommittee has chosen to follow the Joint Resolution's recommendation that states adopt comments to "reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants." The sentence in the proposed comment introducing the specific practices—"Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following:"—employs the language in the Washington D.C., Colorado, Ohio, and Iowa codes. An essential point conveyed in this sentence is that the listed discretionary actions are nonexclusive. The purpose is not to limit the judge's discretion to these particular actions, but, rather, to provide examples. Another essential point is conveyed by the use of the word "may" in this introductory sentence. This permissive language repeats the concept, already discussed, that the third sentence of the new subsection (i) does not mandate action by the judge.

The nine practices listed in the comment are taken either from the codes of other states or from suggestions in SRLN "Options for Alternative Comment Language."[16] They are simply examples of practices that the drafting subcommittee believes have been or could be useful to Wisconsin judges, given the circumstances of a particular case. The inclusion of these practices

[15] This language, which is suggested in SRLN "Options for Alternative Comment Language," is described as "[a]n amalgamation of these thoughts, based in large part on the full state variation in language above …." \

[16] *See* SRLN "Options for Alternative Comment Language" at 5 and 26. http://www.ncsc.org/microsites/access-to-justice/home/Topics/Judicial-Role-in-Promoting-Access.aspx.

does not obligate a judge to employ them, just as the failure to mention other practices does not mean a judge may not employ them.

VI. Pending Rule Petition 12-11

Now before the Wisconsin Supreme Court is another rule petition that concerns the Wisconsin Code of Judicial Conduct. Petition 12-11, "Creation of a Judicial Review Committee," was filed on December 27, 2012. That pending petition seeks to establish a committee "to conduct a comprehensive review of the Wisconsin Code of Judicial Conduct." The Commission believes there is no need to delay consideration of its petition because of that pending petition. The proposed amendment addressing pro se litigants presents a discrete issue that has been identified as a significant one by the Conference of Chief Justices and the Conference of State Court Administrators. The drafting subcommittee has studied what other states have done and the Commission has engaged numerous stakeholders on the topic. The Commission respectfully requests that its petition be considered independently from the pending petition for a comprehensive review.

CONCLUSION

The issue of a judge's role when adjudicating cases with one or more self-represented litigants should be addressed in the Wisconsin Code of Judicial Conduct. The proposed amendment addresses the issue in a manner that gives much-needed guidance to judges in the context of their obligations to be fair and impartial. The proposed amendment follows the Joint Resolution of the Conference of Chief Justices and the Conference of State Court Administrators, and it was developed after careful study of the ABA Model Code and the codes of the 24 other states and the District of Columbia that address this topic. The Commission respectfully requests that the Wisconsin Supreme Court adopt this amendment.

Dated this 12th day of September, 2013.

Gregg Moore, President
Wisconsin Access to Justice Commission