

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES NOVEMBER, 2013

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following county:

Dane

MONDAY, NOVEMBER 11, 2013

9:45 a.m. 11AP387-D - Office of Lawyer Regulation v. Michael M. Rajek
10:45 a.m. 12AP2067 - Madison Teachers, Inc. v. Scott Walker

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

2011AP1400-D - Office of Lawyer Regulation v. Jeffrey L. Elverman

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
MONDAY, NOVEMBER 11, 2013
9:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Eau Claire.

2011AP387-D

OLR v. Michael M. Rajek

In this attorney disciplinary proceeding, Atty. Michael M. Rajek appeals from the report and recommendation of the referee, who concluded that Rajek had committed five of the six counts of professional misconduct alleged in the disciplinary complaint and recommended that Rajek be publicly reprimanded.

Some background: The disciplinary complaint is based on grievances relating to four separate client representations. The allegations of misconduct regarding three of the representations are similar and arise primarily out of the standard written fee agreement that Rajek was using and his failure to take certain actions after the completion or termination of his representation.

The Rules of Professional Conduct generally require that when an attorney receives money from a client that is contemplated to be used as payment for legal services the attorney will deliver in the future, the attorney must either place those funds into a client trust account until they have been earned or must follow a specified regimen of notices and actions that allows the funds to be placed immediately into the lawyer's business account. This regimen is often referred to as the advanced fee alternative.

In general, use of the advanced fee alternative, with its ability to place client funds into a business account, requires an attorney to include six specific notices into the attorney's written fee agreement with the client. When the representation comes to an end, the lawyer must provide the client with an accounting of the services provided and the use of the funds received from the client. The attorney is also obligated to refund to the client any portion of the advance fee that has not been earned. The lawyer must also notify the client that if the client disputes whether all or some of the advance fee has been earned by the lawyer, the client must notify the lawyer of that dispute within 30 days. The lawyer then has 30 days to attempt to resolve the dispute. If the lawyer is unable to resolve the fee dispute within that time period, the lawyer is obligated to submit the dispute to binding arbitration.

The referee found that Rajek's written fee agreement did not contain all of the notices required by the advanced fee alternative. He also found that Rajek had not provided a timely accounting to the clients (or their representatives). The referee further found that where there was a dispute over whether all or some portion of an advance fee had been earned, Rajek did not attempt to resolve the dispute and did not submit it to binding arbitration.

The fourth representation at issue involved Rajek's representation of an individual charged with hit and run of an attended vehicle, which is a misdemeanor crime. At a court

appearance that Rajek attended without the client, he negotiated a plea deal pursuant to which the criminal charge was reduced to a traffic offense with only a \$249 forfeiture. Because the charge was now only a traffic offense, Rajek entered a no contest plea on the client's behalf. The client, however, became upset because he had not been given notice of that particular court date and because he subsequently received an inaccurate notice from the circuit court that a default judgment on the traffic offense had been entered against him.

The client mistakenly understood this form to mean that a judgment of conviction had been entered against him because neither he nor Rajek had shown up for the court appearance. The referee concluded that Rajek had violated rules regarding the need to communicate with clients by not providing notice of the court appearance or the negotiation of the plea deal to the client. On the other hand, the referee found that the evidence was insufficient to support a claim that essentially alleged that Rajek had negotiated and entered the plea on his client's behalf without the client's authorization.

On appeal, Rajek has acknowledged that his standard fee agreement did not contain some of the required notices, although he asserts that their omission was a mere technical violation of the advanced fee alternative rule. He asserts that in two of the representations at issue, there was no real fee dispute with his client, and he therefore had no obligation to resolve anything with the client concerning his fee. With respect to the fourth representation, Rajek challenges the referee's finding that he did not adequately communicate with the client, relying on the referee's comment that he found Rajek's testimony to be more credible than the client's testimony in some respects.

The OLR urges the court to affirm the referee's finding of violations on five of the six counts alleged in its amended disciplinary complaint.

The Supreme Court is expected to determine whether the referee's findings in support of the rule violations are adequately supported by the evidence. If the supreme court affirms the findings of violations on all or some of the five counts, it will also determine the appropriate level of discipline to be imposed.

WISCONSIN SUPREME COURT
NOVEMBER 11, 2013
10:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Dane County Circuit Court, Judge Juan B. Colas, presiding.

2012AP2067

[Madison Teachers, Inc. v. Scott Walker](#)

This certification from the Court of Appeals, District IV, examines the constitutionality of various statutory changes made by 2011 Wis. Act 10 and 2011 Wis. Act 32, more commonly referred to respectively as the collective bargaining law and 2011-13 state budget.

The Court of Appeals wrote: "We certify this appeal because of its sweeping statewide effect on public employers, public employees, and taxpayers and because of the need to clarify and develop law relating to associational rights and the home-rule authority of municipalities."

A decision by the Supreme Court is expected to determine whether the changes in public employee collective bargaining enacted in Act 10 and Act 32 comply with a number of provisions in the Wisconsin Constitution. This, in turn, will provide guidance to public employers and employees regarding the current nature of public-sector collective bargaining and employer/employee relations.

Some background: The plaintiffs in this action are Madison Teachers, Inc. and one of its members, and Public Employees Local 61, a labor union representing employees of the city of Milwaukee, and one of its members.

The plaintiffs filed a complaint contending that certain provisions of the Municipal Employment Relations Act (MERA), as amended by Act 10 and Act 32, violate the constitutional associational and equal protection rights of the employees they represent. They contend the legislation creates similarly situated, but differently treated, classes of employees, namely, municipal employees who choose to associate with a certified agent and municipal employees who do not. They also argue that the Act 10 and Act 32 amendments impermissibly limit their rights to associate and speak to state and local governments.

The state argues on behalf of Gov. Scott Walker and defendants James R. Scott, Judith Neumann and Rodney G. Pasch of the Wisconsin Employment Relations Commission (WERC). It says that because collective bargaining is a statutory right, not a constitutional right, the legislature was free to change the requirements and parameters of public-sector collective bargaining.

According to the state, Act 10 does not impose any restrictions on any public employee's right to speak, assemble, or petition the government and, therefore, does not infringe on any associational rights of public employees. As to the equal protection claim, the state takes the position that there is no violation because all public employees are treated equally with respect to constitutionally protected associational rights.

Siding with the plaintiffs, the circuit court declared the following statutory provisions unconstitutional in an order dated Sept. 14, 2012:

- The provision prohibiting collective bargaining between municipal employers and the certified representatives for municipal general employee bargaining units on all subjects except base wages. Wis. Stat. § 111.70(4)(mb)1.
- The provisions limiting negotiated base wage increases to the increase in the Consumer Price Index, unless a higher increase is approved by voter referendum. Wis. Stat. §§ 111.70(4)(mb)2., 66.0506, and 118.245.
- The provisions prohibiting “fair share” agreements that previously required all represented employees to pay a proportionate share of the costs of collective bargaining and contract administration. Wis. Stat. § 111.70(1)(f) and the third sentence of Wis. Stat. § 111.70(2).
- The provision prohibiting municipal employers from deducting union dues from the wages of municipal employees. Wis. Stat. § 111.70(3g).
- The provision requiring annual recertification elections of the representatives of all bargaining units, requiring 51 percent of the votes of the bargaining unit members (regardless of the number of members who vote), and requiring the commission to assess costs of such elections. Wis. Stat. § 111.70(4)(d)3.

On Oct. 22, 2012, the circuit court denied the state’s motion for stay pending appeal. On March 12, 2013, the Court of Appeals denied the state’s motion for relief pending appeal. It concluded that the circuit court had acted within its discretion in denying the stay. Because of the statewide implications of the case, the Court of Appeals subsequently certified the appeal to the Supreme Court, which accepted review on June 14, 2013.

On Oct. 21, 2013, while the appeal was pending in the Supreme Court, the circuit court issued an oral order granting a motion filed by a group of non-party movants and holding the defendant WERC commissioners in contempt. In addition to arguing the merits of the constitutional issues, the WERC commissioners have also asked the Supreme Court to stay the circuit court’s Sept. 14, 2012 and Oct. 25, 2013 orders during the pendency of the appeal. The movants then sought permission to intervene in the appeal pending before the Supreme Court or to participate in oral argument on the issue of the stay of the circuit court’s Oct. 25, 2013 order.

On Nov. 8, 2013, the Supreme Court denied the motions of the non-party movants to intervene and to participate in oral argument in the Supreme Court. Its order also denied the motions of two insurance companies to intervene and to participate in oral argument on the stay issues. The court extended the standard amount of oral argument time to 45 minutes for the defendants-appellants and 45 minutes for the plaintiffs-respondents.

Thus, the Supreme Court may decide initially whether to stay one or more orders of the circuit court while it considers the merits of the appeal, or it may wait to address the stay issue until it issues a decision on the merits. The Supreme Court is ultimately expected to issue a decision on the merits that could resolve whether the challenged portions of Act 10 and Act 32 violate a number of provisions in the Wisconsin Constitution.

This decision on the merits also may clarify the test for determining whether Wis. Stat. § 62.623, which was created by Act 10 and Act 32, violates Wisconsin’s Home Rule Amendment, Wis. Const. art. XI, § 3(1). Wis. Stat. § 62.623 prohibits First Class cities (currently only Milwaukee) from paying its employees’ contributions to the city’s retirement system. The Court of Appeals said a decision on this issue also may determine whether § 62.623 violates the constitutionally protected right of parties to contract with each other.