

SUPREME COURT OF WISCONSIN

NOTICE

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No. 13-14

In the matter of the petition to amend Supreme Court Rule 60.04.

FILED**JUL 1, 2014**

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On September 13, 2013, the Wisconsin Access to Justice Commission (Commission) filed a petition requesting the court amend Supreme Court Rule (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 obligation to perform all judicial duties fairly and impartially.

The petition is the culmination of an extensive drafting and public education process. The Courts and Administrative Tribunals Committee of the Commission created a drafting subcommittee to develop the proposed amendment. The subcommittee consisted of ten circuit court judges, three court commissioners, and two Commission members. In deciding upon the language of the proposed amendment, the drafting subcommittee studied the ABA Model Code of Judicial Conduct, a resolution passed by the Conference of Chief Justices and

Court Administrators, Resolution 2: In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Represented Litigants, 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."¹

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

¹ 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>

There was broad support 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.

On February 24, 2014, the court held a public hearing on the petition. The Honorable Margaret Vergeront, a member of the Commission, presented the petition to the court. A number of individuals appeared and spoke in favor of the petition.² The court also received and considered numerous written comments from: Attorney Gary L. Bakke; Attorney George K. Steil, Jr.; Attorney Daniel J. Hoff; Attorney Nadine I. Davy; Attorney Diane S. Diel; Attorney Susan A. Hansen; Attorney Gerald M. O'Brien; Attorney Thomas S. Sleik; Attorney John E. Danner; Attorney Sara A. Ponath; the Honorable Roderick A. Cameron, Chippewa County Circuit Court; the Honorable Richard J. Sankovitz, Milwaukee County Circuit Court; the Honorable Maxine Aldridge White, Milwaukee County Circuit Court; the Honorable Michael O. Bohren, Waukesha County Circuit Court; Fr. Bill

² The following persons appeared and spoke in support of the petition: the Honorable Daniel Koval, Municipal Judge, City of Madison; Attorney Patrick Fiedler, Axley Brynelson, LLP, President of the State Bar of Wisconsin; the Honorable Jeffrey Kremers, Chief Judge of Milwaukee County Circuit Court, Member of the Committee of Chief Judges; the Honorable Mary Kuhnmuensch, Milwaukee County Circuit Court, President of the Wisconsin Trial Judges Association; the Honorable Kathryn Foster, Waukesha County Circuit Court; Attorney Michael Gonring, Quarles & Brady, LLP; the Honorable John Anderson, Bayfield County Circuit Court; Attorney Katherine Stewart, Family Court Commissioner of Barron County and Washburn County; the Honorable Dale Pasell, La Crosse County Circuit Court; and the Honorable Lisa Stark, Wisconsin Court of Appeals, Dean of the Wisconsin Judicial College.

Ribbens; Kristy P. Moran, Advocate, Barron County Domestic Abuse Project; Elizabeth Hanson, Legal Advocate, People Against Domestic and Sexual Abuse of Jefferson County; John Pfleiderer, Executive Director, Family Services of Beloit; Frances M. Price, Legal Advocate, Christine Ann Domestic Abuse Services, Inc.; Wendy Gehl, Legal Advocate and Staff Supervisor, Harbor House Domestic Abuse Programs; Braden Bayne-Allison, Vilas County Outreach Coordinator, Tri-County Counsel on Domestic Violence and Sexual Assault; Kory Kleinschmidt, Legal Advocate, The Women's Community, Inc.; Jeffrey C. Unger, member of the Wisconsin Access to Justice Commission; Committee of Chief Judges, by the Honorable Mary K. Wagner, Chair; Wisconsin Court of Appeals judges, by the Honorable Richard S. Brown, Chief Judge; End Domestic Abuse Wisconsin, by Patti Seger, Executive Director; Friends of Abused Families, Inc. of Washington County, by Attorney Courtney L. Meyer, Lisa Krenke, Executive Director, and Melissa Emberts, Legal Advocate; Legal Action of Wisconsin, by John F. Ebbott, Executive Director; State Bar of Wisconsin, by Patrick J. Fiedler, President, and by George C. Brown, Executive Director; Portage County Legal Aid Society, Inc., by Melissa Dalkert, President; Solutions Center Shelter and Support Services of Fond du Lac, by Lindee Kimball, Executive Director; Wisconsin Association of Judicial Court Commissioners, by Alice Rudebusch, President; Wisconsin Family Court Commissioners' Association, by Sandra K. Grady; Wisconsin Judicare, Inc.; Wisconsin Municipal Judges Association, by the Honorable Scott R. Letteny, President; Wisconsin Trial Judges Association, by the Honorable Mary M. Kuhnmuensch, President; and Wisconsin Counties Association, by David Callender,

Government Affairs Associate. All urged this court to adopt the petition.

The court discussed the petition at an open rules conference on May 27, 2014. The court discussed how a judge may facilitate the ability of all litigants, including self-represented litigants, to be fairly heard in a manner consistent with the judge's obligation to perform all judicial duties fairly and impartially. The court discussed the proposed amendment in the context of appellate courts and in criminal proceedings. The court noted that the specific practices listed in the proposed new Comment to SCR 60.04(1)(hm) are simply examples and are not exclusive, and that inclusion of these practices in the Comment does not obligate a judge to employ them.

Justice Patience Drake Roggensack expressed concern about the scope and impact of the proposal. The court discussed whether certain language could be added to better clarify the court's understanding that the proposal is not intended to change the law or impose new obligations on judges. Justice David T. Prosser requested that the court evaluate the impact of the rule, and the court discussed possible strategies for such a review. After some further discussion, the court voted 6:1 (Justice Roggensack dissenting) to approve the petition and adopt the proposed rule, subject to the understanding that it would be revised consistent with the court's discussion.

The majority of the court agrees that the Wisconsin Code of Judicial Conduct, SCR Ch. 60, should be amended 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 obligation to perform all judicial duties fairly and impartially. We commend the Commission for bringing this petition and thank the many interested persons who took the time to advise the court of their support for the proposed amendments.

IT IS ORDERED that 60.04 (1) (g) of the Supreme Court Rules is amended to read:

SCR 60.04 **(1)** (g) ~~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.~~ A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding except that:

IT IS FURTHER ORDERED that 60.04 (1) (h) of the Supreme Court Rules is amended to read:

SCR 60.04 **(1)** (h) A judge shall dispose of all judicial matters promptly, and efficiently ~~and fairly~~.

IT IS FURTHER ORDERED that the first paragraph of the Comment to 60.04 (1) (h) of the Supreme Court Rules is amended to read:

Comment

In disposing of matters promptly, and efficiently ~~and fairly~~, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should

not feel coerced into surrendering the right to have their controversy resolved by the courts.

IT IS FURTHER ORDERED that 60.04 (1) (hm) of the Supreme Court Rules is created to read:

SCR 60.04 **(1)** (hm) 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.

IT IS FURTHER ORDERED that a Comment to 60.04 (1) (hm) of the Supreme Court Rules is created to read:

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.

IT IS FURTHER ORDERED that the Comment to SCR 60.04 (1) (hm) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that the effective date of this order is July 1, 2014.

IT IS FURTHER ORDERED that that the amendment adopted pursuant to this order shall apply to proceedings commenced after the effective date of this rule and, insofar as is just and practicable, proceedings pending on the effective date.

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.

IT IS FURTHER ORDERED that notice of this amendment to 60.04 of the Supreme Court Rules be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 1st day of July, 2014.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 DAVID T. PROSSER, J. (*concurring*). I approve Petition No. 13-14, to amend Supreme Court Rule (SCR) 60.04, with reservations. Although the petition has been modified by the court, it still presents some serious concerns.

¶2 A distinguished list of judges, attorneys, and law-related organizations has supported and promoted the petition, and they have offered a persuasive rationale why circuit court judges, court commissioners, and municipal judges need assurance that they may reasonably "facilitate" or "exercise discretion" to "ensure" that pro se litigants are "fairly heard" in Wisconsin courts. The petition not only provides assurance that such discretion will not violate ethical rules but also provides guidance by enumerating specific techniques for judges to "facilitate" such discretion.

¶3 My concerns with the petition involve (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. Some of these concerns were not adequately addressed by the proponents of the petition. The court understands that if the rule has unintended consequences, the court will be held responsible, not the proponents. That is why the court has called for a review of the rule in three years.

¶4 To assist the future review, this concurrence will attempt to articulate my observations and concerns.

SCOPE OF THE RULE

¶5 Supreme Court Rule 60.04(1) contains general principles and is broadly worded. New paragraph (hm) is part of the rule's very broad scope.

a. Paragraph (hm) applies to all Wisconsin courts: municipal courts, circuit courts, the court of appeals, and the supreme court.

b. Paragraph (hm) applies to all types of cases, civil and criminal; to hearings and trials; and to appeals and extraordinary writs.

c. Paragraph (hm) applies to cases in which all parties are represented by counsel. Thus, it is not limited to cases involving pro se litigants.

¶6 Once one understands the scope of the rule, one begins to appreciate that the full implications of paragraph (hm) are not yet known.

¶7 To illustrate, I wondered what effect the paragraph would have on courts, including the supreme court, in evaluating postconviction motions filed under Wis. Stat. § 974.06. Did the original petition create an aspiration that postconviction motions would be treated less rigorously in the future "to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard"? What about motions to withdraw pleas? What about motions under Wis. Stat. § 806.07 seeking relief from judgments? Articulation of these concerns caused the court to add the phrase "consistent with the law and court rules," so that paragraph (hm) now reads in part: "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." (Emphasis added.) In other words, the paragraph is not intended to change substantive law. Nonetheless, it is expected to change court practice.

¶8 Because of the scope of the rule, it should be obvious that the "[r]easonable steps that a judge may take in the exercise of. . . discretion" will have to be adjusted to the context in which they are considered. For example, not all litigants are going to be able "to adopt their pleadings as their sworn testimony."

¶9 The petition moves a sentence—"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 law"—from SCR 60.04(1)(g) to SCR 60.04(1)(hm). In the former SCR 60.04(1)(g), the sentence was followed immediately by the sentence: "A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding except that:". This sentence is followed by six enumerated exceptions.

¶10 The petition uncouples the sentence remaining in SCR 60.04(1)(g) (before the exceptions) from the sentence that is moved to SCR 60.04(1)(hm). The implications of this change in relation to ex parte communications are not entirely clear.

¶11 The "reasonable steps" that a judge may take under paragraph (hm) appear much more substantial than the steps that court staff may take under SCR 70.41. Whether this

inconsistency has any meaning in the long term remains to be seen.

EXPECTATIONS FOR JUDGES

¶12 In the original petition, newly created paragraph (hm) included this sentence: "It is consistent with this rule for a judge to make reasonable efforts to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." (Emphasis added.) The COMMENT to paragraph (hm) began, "A judge should exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard." (Emphasis added.) The PREAMBLE to SCR Chapter 60 explains that "The use of 'should' . . . in the rules is intended to encourage . . . specific conduct and as a statement of what is . . . appropriate conduct but not as a binding rule under which a judge may be disciplined." "Should" is defined elsewhere in court rules as "directory only, not mandatory, and connotes a duty or obligation to pursue a goal or objective." SCR 70.41(1)(e) (emphasis added).

¶13 Justice Roggensack expressed concern that some judges are not as enthusiastic about paragraph (hm) as the proponents of the petition and that these judges ought to retain discretion not to apply the rule. The court responded by inserting the word "may" into paragraph (hm), striking the "It is consistent with this rule" language. The court also substituted "may" for "should" in the COMMENT.

¶14 Although these changes were intended to preserve a judge's discretion whether to engage in the conduct paragraph

(hm) suggests, the paragraph is likely to create expectations on the part of some litigants. After all, the COMMENT refers to "A judge's responsibility to promote access to justice;" paragraph (hm) speaks of "reasonable efforts . . . to facilitate;" and the COMMENT then adds "Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to" the nine possibilities enumerated in the COMMENT.

¶15 The new COMMENT will be printed in future editions of Wisconsin Supreme Court Rules and with the Supreme Court Rules published in the back of the Wisconsin Statutes. It would be naive to think that litigants and attorneys will not become familiar with the new list of judicial options, and they may expect an explanation of why the court has not used a requested option to assist a litigant inasmuch as this court has already described these as "reasonable steps."

¶16 The revision of SCR 60.04(1) should provide protection to judges who reasonably use the options outlined in the COMMENT. It remains to be seen what will happen when a judge declines to use a requested option.

IMPACT ON THE PROFESSION

¶17 The legal profession is going through difficult times. The state's two law schools have reduced the size of their classes, in large part because some of their graduates have not been able to find remunerative legal employment. Many law firms have downsized.

¶18 What effect will paragraph (hm) have on the practice of law? Will it accelerate pro se litigation, with economic

consequences for the legal profession? Will some litigants question why they hired an attorney if the court is seen as providing assistance to an unrepresented, or even a represented, adversary? Several attorneys expressed the view that they don't mind some court assistance to pro se litigants because their clients must pay for their attorney's time while the pro se litigant gets his or her act together. Wasted time can be expensive. This view has merit, but I doubt that it is universal.

¶19 The proponents assert that all the techniques enumerated in the COMMENT are already authorized by law. That may be true. However, they have never before been compiled in one place and officially described as "reasonable steps." Clearly, the proponents believe that pro se litigants "may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination."

CONCLUSION

¶20 The judiciary should not be afraid of change. It must be willing to adapt to new circumstances. This is why I voted for the petition. Nonetheless, voting for a rule change without thinking about the possible consequences of the change is not the kind of endorsement that the times require.

¶21 For the foregoing reasons, I respectfully concur.

¶22 I am authorized to state that Justice PATIENCE DRAKE ROGGENSACK joins this concurrence.

