

STATE OF WISCONSIN
SUPREME COURT

In re:

PROPOSED AMENDMENTS TO
WISCONSIN STATUTE § 904.085 (4) (e).

**MEMORANDUM IN SUPPORT OF
PETITION OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER AMENDING
WIS. STAT. § 904.085 (4) (e)**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

October 29, 2009

INTRODUCTION

The Wisconsin Judicial Council respectfully petitions the Supreme Court to amend WIS. STAT. § 904.085 (4) (e) to provide that the hearing contemplated in this section be held *in camera*.

This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

DISCUSSION

When the Wisconsin Supreme Court created WIS. STAT. § 904.085 by Supreme Court Order 93-03 in 1993, it recognized that confidentiality was necessary to achieve "...candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly, and voluntarily settled."¹ To that end, with limited exceptions, oral and written communications made in mediation are not subject to discovery, and are inadmissible as evidence.²

The exception in question, subsection 904.085 (4) (e), specifically refers to "...an action or proceeding distinct from the dispute whose settlement is attempted through mediation."³ Under this subsection, the ban on admissibility of communications made in mediation can be lifted to admit evidence in another case if the court finds it is necessary

¹ WIS. STAT. § 904.085 (1).

² WIS. STAT. § 904.085 (3).

³ WIS. STAT. § 904.085 (4) (e).

to “...prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceeding generally.”⁴

In order for a judge to determine whether or not the requisites for lifting the ban exist, evidence must be presented to the court. Such evidence is often in the form of oral testimony, due to the nature of the mediation process. If evidence is presented or open court testimony is taken in regard to communications made during mediation, the confidentiality of the information has been compromised before the court renders a decision regarding its admissibility. While the court may have an inherent power to proceed *in camera*, expressly incorporating such a requirement will clarify this issue, improving judicial efficiency by potentially avoiding further disputes between the parties.⁵

The legislature has repeatedly recognized the value in using *in camera* hearings to protect information that may ultimately be found confidential or privileged.⁶ *In camera* hearings are used to determining whether a confidential informer can supply certain testimony.”⁷ They are used to review pupil records to determine whether the records can

⁴ *Id.*

⁵ Although WIS. STAT. § 757.14 requires “[t]he sittings of every court shall be public and every citizen may freely attend the same...”, this court has specifically recognized that taking certain evidence *in camera* does not violate section 757.14 or 757.70 (providing for public trials and requiring that hearings before court commissioners shall be public). *State ex rel. Ampco Metal, Inc. v. O’Neill*, 78 N.W.2d 921, 273 Wis. 530 (1956).

⁶ These examples are meant for illustration only, and are not an exhaustive list of all statutes requiring or permitting *in camera* hearings.

⁷ WIS. STAT. § 905.10 (3) (b).

be used for purposes of impeachment.⁸ *In camera* hearings are endorsed by the legislature to review evidence in sensitive matters such as child placement⁹ and guardianships.¹⁰ The legislature also acknowledges the value of *in camera* proceedings in criminal discovery disputes, providing that “[e]ither party may move for an *in camera* inspection by the court of any document required to be disclosed...”¹¹

Wisconsin courts also recognize the value of *in camera* proceedings. For example, they are regularly employed as an appropriate means of resolving disputes involving a claim of privilege.¹² The use of *in camera* hearings has even been recognized in disputes under Wisconsin’s open records law.¹³

Granting the modification sought by this petition will guarantee that the statutory policy of confidentiality in mediation, which in many cases is the reason people mediate rather than litigate, is preserved absent a compelling reason.

CONCLUSION

The granting of this petition will close a gap in the protections intended for communications in mediation which are critical to settlement. The amendment preserves

⁸ WIS. STAT. § 118.125 (2) (f).

⁹ WIS. STAT. § 48.396 (5) (c).

¹⁰ WIS. STAT. § 54.21 (3) (c).

¹¹ WIS. STAT. § 971.123 (6m).

¹² See *Dyson v. Hempe*, 140 Wis.2d 792, 805-06, 413 N.W.2d 379 (Ct.App.1987); *State v. Munoz*, 200 Wis.2d 391, 399-400, 546 N.W.2d 570 (Ct.App.1996); *Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2000 WI App 59, 233 Wis.2d 609, 617-618, 608 N.W.2d 694; *Lane v. Sharp Packaging Systems, Inc.*, 2002 WI 28, 251 Wis.2d 68, 113, 640 N.W.2d 788.

the intended confidentiality until the court has determined that the prerequisites to disclosure have been met.

Therefore, the Wisconsin Judicial Council respectfully requests that WIS. STAT. §904.085 (4) (e) be amended as set forth in the petition filed herewith.

Dated October 29, 2009.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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¹³ *State ex rel. Savinski v. Kimble*, 221 Wis.2d 833, 586 N.W.2d 36 (Ct.App. 1998).