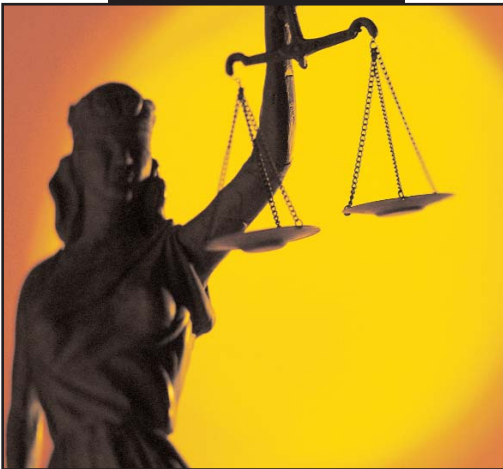


The Wisconsin Supreme Court 2007

What's at Stake for

Wisconsin?



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Wisconsin Supreme Court 2007: WHAT'S AT STAKE?

"*We Have Decided*" is the title of *The Wall Street Journal* editorial lampooning "judicial social imperialism." By merely uttering these words, courts that are no longer satisfied with interpreting the law can invoke their high authority to rewrite legislation to their liking.

In a series of landmark cases, the Wisconsin Supreme Court *has decided* to toss the business community overboard in furtherance of its own social agenda of expanding liability. They are creating law as Wisconsin's self appointed "super legislature." In doing so, they invent legal theories out of whole cloth and disregard well-established limitations on their powers.

On April 3, however, Wisconsin citizens have the opportunity to exercise their *higher* authority and decide for themselves whether to accept such judicial activism. On that date we elect a replacement for the Honorable Justice Jon Wilcox to the state's highest court. Wilcox has been a strong opponent of liability expansion who most frequently deferred to the Legislature to write the laws. The court currently has a 4-3 activist majority that could expand to 5-2 depending on the April election.

The stakes are incredibly high for the business community. All candidates must be reviewed as to how their experience and philosophy could affect the direction of the court, and Wisconsin's business climate. Under the Wisconsin Constitution only one judicial seat is allowed to appear on the ballot each year, so change takes many years and many elections.

Practicing Lawyers or a Presiding Judge? Annette Ziegler is a Judge and Experienced Prosecutor

Replacing the retiring Justice Jon Wilcox with a jurist committed to a modest role for the court — as opposed to the current judicial activism — is a challenge for the Wisconsin business community and all of our citizens. The wrong outcome in this election will likely lock in an activist judicial philosophy on the court for many years to come. Fortunately, the leading candidates provide a clear choice for those concerned over the current direction of the court.

The two leading candidates to replace Justice Wilcox are Washington County Presiding Judge Annette Ziegler and Madison immigration lawyer Linda Clifford. The third candidate, whose entry forces a February 20 primary, is Madison criminal defense attorney Joseph Sommers. However, the Office of Lawyer Regulation has filed a complaint against Sommers requesting his law license be suspended and alleging among other improprieties that he lied to the court.¹ This would appear to be an insurmountable problem for an aspiring Supreme Court justice.



Judge Annette Ziegler

Annette Ziegler was appointed to serve as Washington County Circuit Court judge by Governor Tommy G. Thompson in 1997. She previously served as a federal prosecutor and a volunteer special assistant district attorney. Ziegler is a Marquette University Law School Graduate who was the law review staff editor. She is a graduate of Hope College in Michigan, where her parents ran a hardware store. Ziegler, 42, her husband J.J., a real estate developer, and their three children make their home in West Bend.²

Judge Ziegler has presided over thousands of criminal and civil cases in court. While a circuit court judge does not often leave clues of judicial philosophy in the form of published opinions, our review of her decisions at the trial level found she was infrequently overturned on appeal.³

Judge Ziegler has said, however, that she intends to **interpret** laws and not legislate from the bench. She has stated that she believes the court has a modest role in our democracy and should defer to the Legislature.

Ziegler's Philosophy Verbatim

"I believe that a judge has a definite and modest role. The Court's duty is not to determine what the law should be or to negate laws in order to arrive at a desired outcome. A Supreme Court Justice must act with restraint. The role of the Supreme Court is to interpret the spirit and the letter of the law and to apply that law consistently, fairly and impartially. It is imperative that a Justice rely on legal precedent, the Constitution, and the language of the applicable law. In other words, a Supreme Court Justice must not legislate from the bench.

*I believe that because of the country we live in, we are afforded the ability to be activists in our daily lives... from the products we buy to the ballots we cast. Activism, however, does not belong on the bench. A conservative activist is just as dangerous as a liberal activist. Neither forwards the proper role of the judiciary. The court should be the least negotiable branch of government; however, it also maintains the fewest checks and balances within its organization. As a result, a Justice must have the humility and commitment to realize that while the position is extremely important, the Court operates within a system of precedent. In no other way can the three branches of government preserve the rights and liberties we all value."*⁴

Madison Lawyer Linda Clifford Writings Reveal Activist Tendencies

Linda Clifford, who is a shareholder in the law firm La Follette, Godfrey & Kahn, specializes in immigration laws and other civil and administrative litigation and appeals. She has handled at least one immigration case with the American Civil Liberties Union.⁵

Clifford graduated in 1974 from the University of Wisconsin Law School where she was a member of the board of editors of the *Wisconsin Law Review*.

Clifford has never served as a judge.

Having no judicial experience generally poses a problem in assessing judicial philosophy, but Ms. Clifford has hardly been ambiguous in that regard. In an interview with wispolitics.com, she stated her philosophy as "liberal."⁶

She has also been forthright on how she would decide on an important case that likely will end up before her if elected to the Supreme Court. While judicial cannons preclude judicial candidates from giving their views on legal issues that they might have to render a decision upon, there is no such prohibition before an attorney registers as a candidate.

In 2004, before she registered as a Supreme Court candidate, Clifford co-signed a letter to the Legislature that in effect lays out legal arguments as to why a proposed state constitutional amendment to ban same-sex marriages violates the federal constitution.⁷ That letter reveals the same kind of judicial activism that has resulted in many of the rulings that confront industry in Wisconsin today.

Clifford's — or any other candidate's — position on same-sex marriage is not relevant. However, in this instance it is set forth in a way that articulates her judicial philosophy quite clearly.

The letter reads like a legal brief, with case citations, but Clifford's arguments are not advancing the rights of her client — they espouse her personal legal philosophy that the federal constitution somehow provides a fundamental right to same-sex marriage.

The controversy over what is called Defense of Marriage Amendment (DOMA) has resulted in legal challenges in many of the more than 40 states that have, to date, enacted such legislation or constitutional provisions. There is every reason to expect that Wisconsin's constitutional version of a Defense of Marriage Amendment will end up before the Wisconsin Supreme Court. In fact, a lawsuit seeking taxpayer-funded benefits for same-sex university partners is headed to the high court on appeal.

Since Wisconsin voters amended the state constitution to ban same-sex marriage with a 60 percent vote in November, any challenges to that amendment will center on whether it violates the federal constitution. Clifford's decision to invalidate the amendment is virtually certain.

Policy aside, what is probative here is Clifford's legal philosophy and the lack of deference to the democratic process that gave rise to the amendment. Typical of judicial activists, she finds a fundamental right in the constitution under equal protection that coincidentally coincides with her personal beliefs. By comparison, the Washington Supreme Court upheld that state's version of the Defense of Marriage legislation holding:

*In reaching this conclusion, we have engaged in an exhaustive constitutional inquiry and have **deferred to the legislative branch as required by our tri-partite form of government**. Our decision accords with the substantial weight of authority from courts considering similar constitutional claims.*

*It is important to note that the court's role is limited to determining the constitutionality of DOMA and that our decision is not based on an independent determination of what we believe the law should be.*⁸

Clearly, Clifford's legal arguments in her letter to the Legislature demonstrate a willingness to set aside laws, and even voter-approved constitutional amendments, based on her personal philosophy. It is this judicial activism that resulted in the Wisconsin Supreme Court overturning caps on medical malpractice claims, restricting limits on punitive damages, and establishing the "guilty-until-proven-innocent" standard for manufacturers.

A review of Clifford's campaign reports also raises flags in that it includes a long list of plaintiff's lawyers. While that support may simply reflect her husband's business colleagues, it may reflect like-mindedness on the role of the court. Linda Clifford's husband, Keith Clifford, is an award-winning medical malpractice lawyer who served as president of the state association representing personal injury lawyers.

The Problem of Emerging Judicial Activism

In the final analysis, Wisconsin can ill afford another Supreme Court justice that deems the court's role is to invalidate duly enacted legislation and even constitutional provisions based on a social re-engineering rationale. Whether the target is constitutional amendments, medical malpractice caps or tough sentencing guidelines for criminals, the result will be the same — judicial activism that created our current litigation mess in Wisconsin.

The choice confronting Wisconsin this spring is a choice we will live with for at least 10 years, and maybe more as our state has a strong tradition of re-electing justices once they get on the bench. The question is: A modest judge or an activist lawyer who has never served on the bench?

A Review of How We Got to this Point

In recent decisions, the Wisconsin Supreme Court ignored clear statutory provisions so it could expand the scope of punitive damages; found the Legislature acted “irrationally” to eliminate statutory limits on non-economic medical malpractice damage awards; and, formulated a new “risk contribution” theory to hold manufacturers liable without proof of fault. These decisions created a litigation windfall for the plaintiff's bar at the expense of Wisconsin's manufacturers and health care professionals.

The implications for Wisconsin's business climate are well established. With several strokes of their pens, the court reversed the bipartisan pro-jobs, pro-growth policies and perceptions painstakingly nurtured in recent years. WMC successfully urged the Legislature to overturn the series of bad court rulings, but those bills were vetoed.

National business groups and publications are unfortunately taking note:

- ❑ Wisconsin was ranked 23rd in 2006 by the U.S. Chamber's Institute for Legal Reform Harris Poll — down from 10th two years earlier — and likely to fall again this February.
- ❑ The National Association of Manufacturers study, conducted by the Pacific Research Institute, ranked Wisconsin #30.
- ❑ A recent Forbes ranking of Best States to do Business placed Wisconsin 42nd for regulatory climate, including tort climate.
- ❑ *The Wall Street Journal* dubs Wisconsin as “Alabama North.”

With respect to the atrocious *Thomas* decision's risk contribution theory, leading Wisconsin law firms concluded:

There can be no question that Thomas' significant expansion of the risk-contribution theory will have drastic, perhaps staggering, consequences for Wisconsin industry and commerce in all manner of products and bulk materials.⁹

[Thomas] is a decision by the Wisconsin Supreme Court that could dramatically expand liability for manufacturers under the state's products liability law, placing Wisconsin decidedly out of step with the rest of the country.¹⁰

What is at Risk is more than our Business Climate

There is more at stake here than our business climate. The court has upset the delicate balance between the branches of Wisconsin government by rendering the Legislature irrelevant on policies that pique their interest.

Federal Appeals Court judge and former Wisconsin Supreme Court Justice Diane S. Sykes noted that the import of these watershed cases “can scarcely be overstated.” They “mark a dramatic shift in the court's jurisprudence, departing from some familiar and long-accepted principles that normally operate as constraints on the court's use of its power: the presumption that statutes are constitutional, judicial deference to legislative policy choices, respect for precedent and authoritative sources of legal interpretation, and the prudential institutional caution that counsels against imposing broad-brush judicial solutions to difficult social problems.”¹¹ We could not conjure up a more severe indictment of the court.

The court found that it is acceptable to impose liability on innocent companies if it furthers social policy objectives. No matter how laudable, the court has clearly overstepped its role. Beyond the inequities of “legislating” such social costs upon blameless businesses, the court's underlying rationale — to further their views of social justice — has no bounds. No law, or citizen-approved constitutional provision, has a safe haven before such an activist court.

1 In the Matter of Disciplinary Proceedings against Joseph L. Sommers; Office of Lawyer Regulation Complainant (Case Code 30912; Filed Nov. 17, 2006). <http://www.wispolitics.com/1006/070103sommers.pdf>

2 Judge Annette Ziegler for Wisconsin Supreme Court web site; About Judge Ziegler. <http://www.judgezieglerforsupremecourt.com/about.php>

3 A Lexis review of State of Wisconsin Court of Appeals/Supreme Court decisions of cases originally decided by Circuit Court Judge Annette K. Ziegler found that of possibly relevant civil cases, Judge Ziegler was reversed only twice, with another reversed in part.

4 Judge Annette Ziegler for Wisconsin Supreme Court web site; Judicial Philosophy. <http://www.judgezieglerforsupremecourt.com/philosophy.php>.

5 *Ryan Clancy vs. Office of Foreign Assets Control of the U.S. Department of Treasury, et al*; Complaint for Declaratory and Injunctive Relief (May 26, 2005).

6 Clifford was up-front about her philosophy in an interview with WisPolitics, saying she's "been a Democrat all of my life. My political philosophy would be considered liberal."

7 Clifford Aims for '07 Supreme Court Election Monday; WisPolitics; November 14, 2005: <http://blogs.wispolitics.com/legal/2005/11/clifford-aims-for-07-supreme-court.html>

8 Letter to Members of Wisconsin Legislature by various attorneys stating such “denial of access to the laws violates the federal constitution's guarantees of equal protection.” <http://www.wispolitics.com/1006/070109CliffordLetter.pdf>

9 *Heather Andersen, et al vs. State of Washington*, Supreme Court of the State of Washington (Decision filed July 26, 2006).

10 Quarles & Brady (July 2005).

11 La Follette, Godfrey & Kahn (July 2005).

12 Reflections on the Wisconsin Supreme Court, Diane S. Sykes, Hallows Lecture, Marquette University, Law School (Mar. 7, 2006).