

#65



3 pages



DANE COUNTY  
DISTRICT ATTORNEY  
ISMAEL R. OZANNE

VIA HAND DELIVERY

June 9, 2011

Mr. A. John Voelker  
Acting Clerk  
Wisconsin Supreme Court  
PO Box 1688  
Madison WI 53701-1688

**RECEIVED**

JUN 09 2011

CLERK OF SUPREME COURT  
OF WISCONSIN

RE: *State of Wisconsin, et al. v. Circuit court of Dane County, et al.*  
Case No. 2011AP765-W  
L.C. Case Number 2011CV1244 (Dane County)

*State ex rel. Ismael R. Ozanne v. Jeff Fitzgerald, et al.*  
Case No. 2011AP613-LV  
L.C. Case Number 2011CV1244 (Dane County)

**Senator Miller's Motions Requesting Judicial Notice and Supplemental Briefing**

Dear Mr. Voelker:

Please accept this letter memorandum as my response to the motion filed by Respondent Senator Mark Miller. I join that motion and ask the court to take Judicial Notice of the Senate and Assembly Journals for the Special Sessions that occurred on March 9, 2011. I write further to explain my concurrence in Senator Miller's motion.

At oral argument this Court asked several questions regarding the Wis. Stat. §19.84 (6) and its application to this case. In my response, I argued this subsection was not applicable. I argued Wisconsin Statute §19.87 controls. Other parties also responded to questions about the application of Wis. Stat. §19.84 (6). If the court is inclined to grant the Petition for Supervisory Writ or recast the matter as an Original Action *publici juris* and reach the merits regarding whether the Open Meetings Law was violated, these questions justify granting Respondent Senator Miller's motion for two reasons.

First, none of the Defendants in L.C. Case Number 2011CV1244 raised this issue in the circuit court. It was not part of the case below. No party presented evidence on this statute or its application to the facts. No party briefed or argued the impact of Wis. Stat. §19.84 (6) in the circuit court. Moreover, Petitioner(s) did not rely on this statute in either of the Petitions pending before this Court. This is a new issue to the case.

Second, the possible application of this statute highlights the potential existence of many more disputed facts; including facts not developed in the record below:

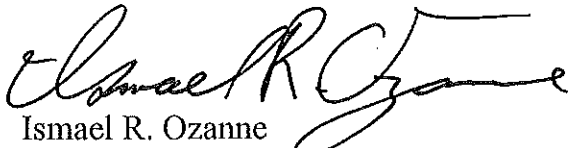
1. Did Senate Clerk Robert Marchant rely at all upon this statute when convening the Joint Committee on Conference (JCC)? His testimony supports the inference that he did not.
2. Was the JCC a “subunit” of a parent governmental body at the time it was convened? In other words, was the JCC really a subunit of the Assembly? Under Joint Rule 3, the JCC is not a subunit of the Senate. A similar question arises with respect to the Assembly.
3. Depending on the above answer, did the JCC convene during a lawful meeting of the parent body?
4. Did the meeting of the JCC occur during a “recess” of a parent governmental body?
5. Did the meeting of the JCC occur immediately after a session of a parent governmental body?
6. Were the Senate or Assembly in General or Special Session, or simply in a “Skeletal Session;” and does it matter?
7. Exhibits “A” and “B” attached to Respondent Senator Miller’s motion raise this question of fact: how is it the Assembly knew there was going to be JCC meeting at 2:03 PM (Exhibit “B”) before Senator Scott Fitzgerald announced the meeting between 4:03 and 4:06 PM in the Senate (Exhibit “A”).
8. Does this mean the decision to have a JCC, during which Substitute Amendment 1 was adopted (removing of all fiscal items from the bill), was made well before 4:06 PM? If so, what is the significance of this finding as it relates to the issues now before this court?
9. Do the answers to these questions impact the decision as to whether the Open Meetings Law applies to the Legislature or the extent to which a court may enforce the Open Meetings Law against the Legislature?

Because the potential impact of Wis. Stat. § 19.84 (6) was not raised in the circuit court, the current circuit court record will likely not provide a conclusive answer to at least some of these questions. Unless this Court concludes that Wis. Stat. § 19.84(6) has no legal significance whatsoever in its decision, I believe that additional fact-finding would be necessary for any party to accurately and fully argue their positions to this Court

I also believe that the issues raised by the Court's questions further militate against recasting the Petition for Supervisory Writ to an Original Action *publici juris*. The potential impact of Wis. Stat. § 19.84 (6) highlights the existence of materially disputed facts that should be resolved before this Court considers this case in an Original Action.

Thank you for your consideration of this response.

Sincerely,



Ismael R. Ozanne  
Dane County District Attorney

- cc: Atty. Susan Crawford (*representing Mark Miller*)
- Carlo Esqueda, Dane County Clerk of Courts
- Atty. Robert Jambois (*representing Peter Barca*)
- Atty. Jina Jonen (*representing WI Education Association Council*)
- Atty. Steven Kilpatrick (*representing Michael Huebsch, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Joint Committee on Conference, Wisconsin State Senate, Wisconsin State Assembly*)
- Atty. Kurt Kobelt (*representing WI Education Association Council*)
- Atty. Maria Lazar (*representing Michael Huebsch, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Joint Committee on Conference, Wisconsin State Senate, Wisconsin State Assembly*)
- Atty. Eric McLeod (*representing Michael Huebsch*)
- Atty. Joseph Olson (*representing Michael Huebsch*)
- Atty. Tamara Packard (*representing Mark Miller*)
- Atty. Lester Pines (*representing Mark Miller*)
- Atty. Roger Sage (*representing Douglas LaFollette*)
- Atty. Michael Screnock (*representing Michael Huebsch*)
- Atty. Kevin St. John (*representing Michael Huebsch*)
- Atty. Marie Stanton (*representing Maryann Sumi*)
- Atty. Dean Strang (*representing Maryann Sumi*)