

# CRAIN'S DETROIT BUSINESS

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## Judge to rule on Wayne State board dispute in 10 days

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- Michigan Court of Claims judge plans decision on lawsuit filed against four Wayne State board members
- Board of governors voted while half of the board did not attend meeting
- University's general counsel ruled President M. Roy Wilson could be counted toward quorum



Michigan Court of Claims

Judge Cynthia Diane  
Stephens

A Michigan Court of Claims judge said she would rule in 10 days on a case over whether the Wayne State University board of governors legally voted to raise student tuition and sublease a building at a June 21 meeting that four members of the board didn't attend.

The case was filed in late June by the four Wayne State board members against the university, President M. Roy Wilson and the four other governors.

Governors led by Michael Busuito, M.D., who is one of the board members who filed the lawsuit, claimed the other board members and Wilson violated open meetings laws and lacked a quorum of five members to take a binding vote on two issues discussed at the meeting.

In an unusual procedural twist, Judge Cynthia Diane Stephens heard oral arguments for 70 minutes and then dismissed the case because she said the case filing notice did not comply with the rules of the Court of Claims. She is allowing the case to be refiled and will decide the case based on the arguments already heard.

The complaint was originally filed in Ingham County Circuit Court, but defendants Wayne State and the four governors filed a motion to request the Ingham court move the case to the Court of the Claims in Detroit.

Bill Burdett Jr., an attorney representing Busuito and the others with Howard and Howard Attorneys PLLC, said he refiled the case directly with the Court of Claims later Friday afternoon.

Todd Mendel, an attorney representing Wayne State and the other governors with Barris, Sott, Denn and Driker PLLC, was asked by Stephens whether he had any objections to having the court hearing transcript and other documents transferred to the new case. Burdett and Mendel did not object.

Stephens said she would issue a written decision in the case in 10 days after reviewing the hearing transcript and court-filed documents.

There are two equal and opposing factions of the board, one led by Busuito and the other led by Board Chair Kim Trent. They have clashed since December when three board members **voted against a three-year contract extension** for Wilson. Wilson's contract extension was approved 5-3.

In March, the board split 4-4- on whether to continue **affiliation negotiations** with Henry Ford Health System, stopping the talks. Busuito and the other three members also voted against the Henry Ford affiliation, saying that it is unfair to Wayne State and a giveaway to Henry Ford.

### **Case background**

Busuito and the other three suing board members asked the court for a temporary restraining order and preliminary injunction to halt a sublease approved in a 4-0 vote by the board in an executive session at the June 21 meeting.

The proposed lease regarded a building at 400 Mack Ave. that was intended to be used as headquarters of University Physician Group and Wayne Pediatrics, two organizations with ties to Wayne State. UPG signed a lease with the Sterling Group, the building's owners, on June 28, a UPG official confirmed.

The board also approved in a 4-0 vote a 3.2 percent student tuition increase for the 2019-20 school year.

But Busuito and others decided not to attend the June 21 meeting, issuing a statement that they would not attend the meeting to protest the fact that Anil Kumar, M.D., would not be there and therefore they would lack the votes to stop the lease and tuition increase.

Besides Busuito and Kumar, the other two members who filed the lawsuit are Dana Thompson and Sandra Hughes O'Brien. The four board members who chose to attend the meeting and are named in the lawsuit along with Wilson and Wayne State, are Trent, Mark Gaffney, Marilyn Kelly and Bryan Barnhill III.

In their original 11-page complaint, the four board members charge that the other four ignored the state's open meetings law when they held the meeting with only four members present. The fourth board member, Kumar, was on a scheduled several-week family vacation, which sources said was planned months in advance.

The lawsuit asks for the court to reverse all decisions made at the June 21 meeting.

### **Hearing highlights**

At the hearing, Burdett gave two primary arguments why Stephens should nullify the two votes at the June 21 meeting that he said was illegally held.

First, he said that the four WSU governors who voted at the June 21 violated the state's open meeting law because they held a closed executive committee meeting.

"Our position is that votes taken in closed meetings are invalid," Burdett said. "We know that was a closed meeting where a vote was taken" because Wilson signed documents outlining the votes.

But Mendel said court precedent has shown that the open meetings act does not cover public universities. Besides, he said Wayne State has been holding closed executive committee meetings the past 18 years. In fact, two years ago when Hughes O'Brien was chair, she regularly held closed door meetings where votes were taken, including ones on property leases, Mendel said.

"It is very clear. It is up to public universities to determine whether a meeting is formal (open) or informal (closed)," he said. "Wayne State has decided that all board executive committee meetings are closed to the public."

When was asked about the closed executive committee meetings held for years that he attended, Busuito said he Hughes O'Brien and the other board members were given bad information from Lessem about the validity of those meetings.

"We are trying to shut down this kind of behavior from happening in the future," said Busuito, adding that it is just unfair that non-elected board members can be counted just as elected board members for the purposes of votes.

However, at one point in the presentation by Burdett, Stephens interjected that her reading of the open meetings act indicates "it does not apply."

Governor Marilyn Kelly, a former Michigan Supreme Court justice, also said after the hearing that the state's high court has ruled that the open meeting act does not apply in these situations.

Burdett said his second reason to nullify the June 21 vote is Lessem's opinion that counting Wilson as the fifth board member when he is not a voting member of the board is incorrect.

"If the state Constitution mean that ex-officio members of the board are elected then we have one too many board of governors," said Burdett, adding there are eight, not nine, members on the board. By extension, he said the University of Michigan and Michigan State University also improperly have nine board members.

Burdett also cited a second provision in Robert's Rules of Order that discusses counting ex-officio members toward a quorum. "There is a second category in Roberts that talks about not abusing a quorum by having small numbers of people" present for votes.

Mendel said the second provision in Robert's Rules only applies "if you don't fit in the (first) category," meaning it only applies if you aren't an ex-officio member of the board. In other words, he said because Wilson is an ex-officio member of the board, Robert's Rules counts him as part of a quorum.

In conclusion, Mendel said: "I ask (the court that) this matter be settled in the board room, not the court room. "The plaintiffs boycott, and they called it a boycott, did not work. (Please) deny the injunction."

### **June 19, 21 board meetings**

At the June 21 meeting, the Wayne State board met in a closed executive session meeting, not open to the public, and approved a two-year lease with an option to buy the old Hospice of Michigan building in Detroit, across the street from the Detroit Medical Center campus.

Trent previously told Crain's that the other three board members who were absent from the meeting knew about some of the issues of the proposed lease because they were briefed on it on June 19. While the board had considered the purchase of the old Hospice of Michigan building in the past, the lease arrangement with an option to purchase was a new proposal.

Suspecting the three board members might not attend the Friday meeting, Barnhill requested a legal opinion from Louis Lessem, the university's general counsel, on whether a quorum of the eight-member board could be called if there were only four members present. Lessem concluded that Wilson could be counted toward the quorum.

Lessem based his three-page opinion on that Wilson, as an ex-officio board member and not allowed to vote, could be counted toward a quorum of five members. He cited the Michigan Constitution of 1963 that simply specifies the board is to "elect a president under its supervision" and describes the president as "an ex-officio member of the board without the right to vote."

Wayne State's bylaws also recognize the president the same way. There is no language in the state constitution or university bylaws on whether the president can be counted toward a quorum.

However, Lessem adds "since the president is defined as a member of the board (ex-officio) by the bylaws and constitution, the president may be counted for purposes of determining whether a quorum of the board is present."

Finally, WSU bylaws defer to Robert's Rules of Order when questions arise about specific provisions. Robert's states that "if the ex-officio member of the board is under the authority of the (board)" such as an employee, "there is no distinction between him and the other board members."

In oral arguments, Burdett cited another provision in Robert's Rules that appeared to suggest that it would be improper for meetings to be held and votes take if too few members were present.

But Lessem concluded in his opinion that since Wilson is the president and an employee of Wayne State and appointed by the board that "he is to be counted in determining if a quorum of the board is present."

The lawsuit said that opinion is wrong for a variety of reasons. "The plain purpose of quorum is to ensure sufficient voting members are present, so it is nonsensical to count a nonvoting, unelected ex-officio member for that purpose," the complaint said.

The University of Michigan has a [provision in its bylaws](#) (Sec. 1.04. Quorum, revised February 2002) that prohibits ex-officio members from being counted toward a quorum. "A quorum for business will be five voting members of the board, participating in person or by conference telephone or video conference," according to the bylaws.

At the hearing Friday, Mendel said the board's executive committee needed to vote on the proposed lease and the tuition on June 21 for timing reasons because WSU needed a decision on the tuition by July 6 to administrate it for the fall.

"Let's step back. The plaintiffs purposely boycotted the meeting. They did it because they didn't want to lose a vote. Boycott is the word they have used," Mendell said.

Wayne State officials also have said UPG also needed answers so it could complete negotiations on its lease with Sterling Group, which it did seven days after the June 21 vote. The tuition increase is going through WSU processing channels for fall implementation. The next regularly scheduled board meeting wasn't until later September. WSU officials said emergency board meetings could be held, but Trent

said scheduling would be difficult because many board members have arranged for vacations this summer.

Inline Play

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