

SUPREME COURT OF WISCONSIN

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In re Matter of Publication of Supreme Court Orders –  
creation of rules under Supreme Court Rules Ch. 80 and  
amendment of Supreme Court Rules 98.07, Publication of Rules.

No. 12-09

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Memorandum re: Justice Crooks's Motion for Reconsideration

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Justice Crooks's motion for reconsideration and Justice Roggensack's memo in support of the motion do not comply with the agreement the Court reached at its November 17, 2014 open rules conference about how to "finalize" long-pending Rule Petitions 12-07 (finance committee) and 12-09. Both rules were to be treated the same way. I have attached the transcript of the court discussion about Rules 12-07 and 12-09 at the open conference.

I shall place Rule Petition 12-09 on the agenda for the February 26, 2015 open Rules Petition conference.

In light of Justice Crooks's motion (supported by Justice Roggensack) changing the method for finalizing Rule Petition 12-09 (which was to use the same method as for finalizing Rule Petition 12-07) and in light of the Governor's proposed budget changing multiple aspects of the court system's budget, I shall place Rule Petition 12-07 relating to the finance committee on the agenda for the open Rules Petition conference on February 26, 2015.



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Shirley S. Abrahamson  
Chief Justice

11/17/14 Open Administrative Conference  
Discussion of 12-07 (Finance Committee) and 12-09 (Publication)

SSA: . . . Pat Roggensack asked that we put 12-07, which relates to the Finance Committee and the biennial budget, which has already been submitted, to be discussed first, and when she did that I asked that you pair it with Rule Petition 12-09, relating to the publication [unintelligible]. These two are being held. I would prefer to put the agenda in order so that we can get this done. I don't hear . . .

PDR: OK.

NPC: Justice Gableman's here now.

PDR: OK. Right.

SSA: Justice Gableman has arrived, has arrived.

PDR: Right, I asked that 12-07 be brought up because the court approved the petition as drafted, and that was in February of this year. It was approved 6 to 0 with the Chief Justice not voting but saying that she wanted to write. She has not written, and because it has not been published, others of the public who should have been able to take advantage of the rule were unaware of it. I talked to Julie Rich about publishing it. She said she would not do that without a direction from the court, and so I'm here to ask the court today to publish the rule, and the Chief Justice can write whenever she chooses to write, I'm certainly not standing in the way of that. Since the rule was not published, during the last biennial budget preparation, which occurred in the spring and summer of this year, no information on the budget was sent to the Finance Committee. The Finance Committee was not invited to any of the PPAC meetings where the biennial budget was discussed and prepared, and I learned about the choices PPAC made for the court after all the choices were made without having the opportunity for any input at all. When I inquired of our staff about why the information that was sent to PPAC on the biennial budget was not sent to the Finance Committee, I was told that they were directed to send it only to PPAC and not to the Finance Committee. Now if the rule had been published, it would have been available to everyone, there wouldn't have been this confusion. The court would have been able to participate in the preparation of the biennial budget as the court should participate, by receiving information early, being able to give thoughtful input at a very early stage. So I am here just to have the court direct Julie to publish Petition 12.07 [sic]. That rule was granted as drafted back in February. And so that is what I'm asking of the court today.

AKZ: If it takes a motion, I'll make that motion.

PDR: OK.

MJG: And I'll second it.

PDR: All right.

SSA: I think it's rather important that we have full, complete, and correct information. First, it is, been the typical practice here on rules that they are not published until everyone signs off, either in the majority or has written. So this is not unusual, and in fact, Rule Petition 12-09, which relates to publication of orders, was approved on a 4 to 3 vote, in, on January 15, 2013, and was circulated, it got approval of three justices and then PDR, that's Roggensack, held the order on 2/4/13, and has, that's almost a full year, has done, has not written either, and again, if you're going to publish one order without any other writing you should apply that order across the board. Now the information you've been given, all the information about the 2015-17 budget was submitted to this court. It wasn't submitted separately to the Finance Committee because there wasn't a Finance Committee because this order wasn't completed. But it was submitted to the entire court starting in March of 2014, everybody was given notice of all the hearing—I should say meetings of PPAC, you all got notice of that. Pat Roggensack came to one of those meetings; it was a very successful meeting discussion of the budget, and so that was all given. What Justice Roggensack says about that the court did not participate is, I'm sorry to say, was just not true. Everybody had the opportunity to participate in all of these preliminary and then PPAC sessions, and then the court spent the good part of a day in September reviewing the entire budget. And I believe that the entire budget that was approved was approved unanimously by this court, which is really good because it's better for the court to go into the Joint Finance Committee and the executive and legislative branches with an approved budget by the entire court. So, if you—we don't have a rule about how long you can hold an order to write, so if you want that, you should apply it across the board.

PDR: There are other thing—I didn't hold 12-09 to write, first of all. I held it because I understand there's going to be a motion for reconsideration. That's a separate concern. But we'll get to 12-09 when we get to 12-09, and if you want to make a motion on that, that certainly would be in order. I would have no problem. Right now the motion that's pending is publish Petition 12-07 which has already been approved as drafted. So just to publish what's been drafted.

SSA: You know, you say it's been approved as drafted—

PDR: It has been.

SSA: —but the draft order circulated was—we received approvals only by PDR, AKZ, and MJG. Those are the only written approvals.

PDR: OK. My understanding is that it was approved as drafted at the table, here, all of us being present.

MJG: Yes.

PDR: Is that correct, Julie? Just—I asked Julie.

JR: My recollection is that there was this was the conference on February 5 where the court spent quite a bit of time literally drafting at the table. Several proposals were put forth. I was then directed to put the order together. My effort was to memorialize what the court agreed on at the conference. The actual final document was not at the table on the 5th but the court kind of hammered it out at the table on the 5th, and then I circulated it on the 13th, and I have—

SSA: And on 12-09 petition on the publication, that was approved and all of the changes to that publication order which where a word hither and yon were approved at the table and you held the order on 2/4 and I haven't heard, Pat, Patience Roggensack, I haven't heard a word about a motion for reconsideration. Now this was discussed, and it was in writing, and you just wrote an e-mail on 2/4 saying "I want the order held."

AWB: 2/4 of what year?

SSA: 2/4 of 2013. A year—almost two years, a year plus. And no one has made any motion for reconsideration or anything else.

PDR: Right.

AKZ: When we talk about two rules, and go back and forth and back and forth, we accomplish little. If we can take one rule at a time, and maybe that rule needs to be moved forward too, one way or the other. There isn't a pending motion for reconsideration that I know of right now.

PDR: Let me—

AKZ: That's the next issue. Having said that, let's talk about the one right now that has a motion pending. And if there needs to be approval of the language, we can verify whether you do or don't approve that language and then we can address the motion. But, it effectively undermines or silences what the vote of the court was back in February of '14 to have this wait and wait and wait and wait. And I'm not saying that's right on any petition. But what I am

saying is, let's deal with one, and then move to the next one, and then we'll end up in the exact same place on both of them. It would be nice to move it forward. I'd also note, I think we can learn from the 7th Circuit in this regard. I remember earlier this year, I think in September, we saw them issue orders that were very short form, and that essentially said the court may file opinions explaining their votes later, but here's the order so everyone knew how to proceed. And to me, when I saw that I thought, why don't we do that? And granted, we don't. We traditionally have this, if someone wants to write, it could be held up for a year, which we're getting close to at least on 12-07. It seems to me that if this were a couple of weeks, or even a shorter period of time, we could continue to go on like that but maybe when it's been February 5 that this was passed, February 13 that it was circulated, and now we sit here in a new court term still trying to get the work of the old court term out, this might be a prime occasion to do as the 7th Circuit did, issue an order, what the rule is, how it's been adopted, when it was adopted, and writings to follow. And then people can take their time, if you need more time, take as much time as you need, but it doesn't hold up the work of the court that was done back in February. It's just a thought, but it sure seems reasonable, and people have various reasons for not being able to get their writing done on a particular matter and that's fine and I respect it. And if people need more time, that's fine, too. But let's at least move the ball forward, this is [inaudible] last term, and get it off the list and get it moving forward.

NPC: Let me ask Julie, if I might, what's necessary in regard to 12-07 at this point? Have we approved the final draft? Apparently not.

JR: I need votes from the Chief Justice, or—she obviously intends to write, so, I would—typically I would wait for is a writing from the Chief Justice, approval Justice Bradley, Justice Prosser, and yourself. I have approvals from Justice Roggensack, Justice Gableman, and Justice Ziegler. We obviously don't have a specific protocol or rule guidelines that we must adhere to. There is nothing that says we can or cannot do writings to follow, there's nothing—but my—I'm going to just come out and say my clear understanding was that the court worked really hard to hammer out the language at the table. You probably recall there were breaks, and I believe you had put forth a proposal, and what—the order I circulated to the court was my best effort to memorialize what the court had agreed to at the table with 6 justices approving and the Chief Justice abstaining.

NPC: So even though we approved it 6 to 1, we still need a further vote?

JR: Typically I would get the final sign-off, A-OK from the court, before the order would issue.

SSA: The order usually says this won't go out until you hear from all seven justices.

JR: Until I have an OK.

SSA: Which is our standard order.

NPC: Is your motion then to give that final approval?

AKZ: My motion is that we, well, if you approve the language, I think you have to make that clear today, and if you don't, make that clear today, but my motion is that the matter that that was voted on, adopted, and passed back in February—

SSA: 2014.

AKZ: —that that fact, go forward, and that we have something to the effect like they do at the 7th Circuit. On February 5, '14, the court convened to discuss whatever the petition is. The petition concerning the Finance Committee. That the court took a vote, the vote was 6 to 1 abstaining. And that a Finance Committee has been formed, and that as for the person who abstained, if they wish to write, that writing will be filed in the coming days explaining that opinion. It seems to move the ball forward, because it doesn't make sense that one person can just choose not to write and then, and then essentially neuter the vote of the court. Right? Does that make sense?

NPC: It makes sense to me.

AKZ: So I—it gives due respect both ways. To whatever the vote was, and to the person who needs some time to write.

AWB: With regard to, not this specifically, but what you're proposing that we have—issue orders, “this is our bottom line; analysis to follow.” The 7th Circuit did that in a case that was very time-sensitive and they needed to get out something, one of the voting cases, as I recall—

AKZ: In all fairness, some people would think getting the budget out and having the Finance Committee be part of the process would be time-sensitive. And effectively, the Finance Committee missed the boat, right, on the entire budgeting process. It just continued the way it had in the past—

AWB: If I may, Annette—

AKZ: — so it was time-sensitive here, too.

AWB: If I may, 'cause I started my comment with “I'm not talking about this,” but your general proposal, of that's the way that we do it, to me, that's inconsistent with my vision of what an

appellate court, particularly the court of last resort in any state, how they should operate. In an emergency situation, time-sensitive may be acceptable. I asked my clerk to do some research on this not all that long ago, a number of months ago, and very few examples of “here is our bottom line, opinion and analysis to follow” could be found in either our jurisprudence or federal jurisprudence. And I think the reason for that is this: because I don’t think that’s the way a court of last resort should be operating. Our job is to do analysis. Our job is to do careful consideration, and not just do a bottom line. One of the practical difficulties of just doing a bottom line with analysis to follow is that people maybe will write later or could write later, come up with convincing rationale and then the majority would regret that terse bottom line, here it is, analysis to follow. I guess at our essence, I see this court as a court that is obligated to provide analysis and rationale. So as to a general rule, it is inconsistent with how I think an appellate court, and especially a court of last resort, should operate and I think there’s very little precedent except in time-sensitive emergency situations.

AKZ: If I might, this is something that has an order, and the order was approved by three people, possibly, Justice Crooks and Justice Prosser, maybe even you and possibly even the Chief would consider approving the order today. But what do you do, Ann, when something is sitting since last term decided and doesn’t go out and an entire budget cycle is missed because one person wants to write? What do you do with that? You can’t continue to hold—you’re big on this—you can’t continue to silence what the court decided because one person hasn’t had the opportunity to write.

SSA: Well, maybe the thing to do is draft an order—draft a rule that says all writings on orders are to be done in X number of months. Because what you have on 12-09 is two years. So 12-07 looks like a—like a—

AKZ: You know, we shouldn’t gravitate to the lowest common denominator, whatever that is—

PDR: I think we have—

[crosstalk]

AKZ: —I suggest that perhaps we can deal with one rule at a time before we move to that one, and your argument may be well founded, but at least let’s try to deal with this order that we have out there, if it’s approved, and whether it can finally go out.

SSA: And I must correct information you have given. The Finance Committee did not miss the opportunity. Everyone on the Finance Committee including the chief judge, and they had representatives on PPAC, and the chief judge of the Court of Appeals were fully advised from the beginning in March on everything. And had there been a Finance Committee, they would

have gotten the exact same things that were given to them individually as members of this court and as they were, because that was the instructions, keep everyone advised.

PDR: That absolutely is not true, Chief Justice. I talked to our staff, after I found out that PPAC's Planning Committee, with which the Finance Committee was to meet, had met without the Finance Committee, and I asked our staff, why weren't we told of the meeting and given the information that was given to PPAC's Planning Committee and I was told by our staff that they were told not to send it to anyone but to the PPAC Planning Committee. So to say that I knew, I didn't know, the year before, of the biennial budget before, I knew, and I attended those meetings, as did other people. But if you look at what is required under the Finance Committee it says as part of the Director's budget development responsibility, the Director shall consult with the Supreme Court Finance Committee. In this regard the Director shall begin providing financial information to the Supreme Court Finance Committee as soon as responses are received regarding the budget and policy officer's request for budget proposals that relate to preparation of the court system's budget. The Director shall continue to provide information to the Supreme Court Finance Committee regarding preparation of the court system's biennial budget, the court system's operational budget, and the annual operating plan for the grants that the Supreme Court administers. None of that was done. And it wasn't done because our staff did not have this rule published where they would have access to it and know that they had a responsibility to forward the information to the Finance Committee so the Finance Committee could have some meaningful participation on behalf of the court and relay back to the court additional information that the court thought might be helpful for it to have at an earlier time than after PPAC had already done all of its decision making. Now, the decision making of PPAC I learned about this the summer and I came to the meeting in September. And PPAC works very hard and does a lot of good work for us. That's a totally separate issue than what's before us now. This rule just needs to be published and then we can all move on.

SSA: Everything that was sent to PPAC was sent to every member of this court, and to the chief judge of the Court of Appeals, and to the chief judge that's the head of the chief judges' committee. There is nothing—

PDR: It's the timing, Chief Justice, it's the timing of when things were sent. They were not sent so that the Planning Committee meeting could meet with the Finance Committee. They were not sent.

AWB: How about this as a path forward. We need to move forward.

PDR: I agree with that.

AWB: Justice Crooks says—



NPC: Forward ever, backward never.

AWB: OK. It's—Julie in her November 11 memo to us set forth the status of this, and the status of this petition is that it was voted on 6 to 1 to adopt the amended petition, and that the Chief abstained and intended to write. She—Julie circulated the draft order and she received approvals from three justices, Justice Roggensack, Justice Ziegler, and Justice Gableman, and then the Chief sent an e-mail indicating she was going to write. I don't know about others, but that—when someone says they're going to write, I sometimes wait to see what they wrote to see if there are infirmities in the majority approach of which I was one. My sense to move forward is this, and we have to move forward. Chief, can you give yourself a deadline that would be reasonable so that you can write and then this matter can be moved forward? Maybe—that's the way I see it.

SSA: I can do that, but I'm concerned if we're going to start playing games of reconsideration. Because then I would say instead of my writing, why don't we reconsider this? Now I don't think that a motion for reconsideration almost a year later, or on the next matter on the rules two years later, is timely. I think that motions for reconsideration are supposed to be made at the next meeting or at least shortly thereafter. But—so that would be my first response to you on that. But otherwise my response would be that I probably could do it during the Christmas week and—

AKZ: Can someone who abstains bring a motion for reconsideration?

PDR: No, you have to be part of the majority to bring a motion for reconsideration.

SSA: Then I'll ask somebody in the majority to do that if that's the—I think this is a lot of game-playing here, and if that's going to be the game. But I can probably get it done during the Christmas week so I probably can have it done by the first week in January. Which is pretty good.

AWB: OK. Why don't we take, take that, and move forward. I—for my approach, that's not too far from now. And I really think it's a bad idea for, this is decision, more opinions to follow, you know, they are reproduced, and actually does tie in to publication, you know, they can be published and that is our publication petition which is the one that we've also been discussing, which has been laying fallow for almost two years without any movement forward. So I think it's a bad idea to say this is our bottom line, analysis and opinion to follow, it's a bad idea for any court, particularly this court, I think let's move on, let's get a deadline, and let's get this out.

SSA: Let me tell you that with, in this budget cycle, that everybody, most of these people got all of these documents before in any budget cycle but in this budget cycle, everybody got the materials. It was very interesting in seeing who responded, but one of the things, and this is Pat Crooks proposed a different rule, encompassing the same concepts as in the rule that was ultimately passed but one that would not be accepted by—was not accepted by the court. If you remember, that rule said and the Finance Committee should consult with PPAC. That was not adopted. Well, one thing I learned when I was watching for this in this budget cycle was, the whole court should have been present at the discussion with PPAC. PPAC has representation from a lot of stakeholders that don't sit at this table. And they have information we do not have. And their discussion in amendments to some of the budget papers were extremely, extremely helpful. And that's one of the things on, if there is reconsideration we should look at that again because it works if you work with PPAC. That's what I think. And the draft order here says nothing about working with PPAC. Nothing at all. And everything dealing with PPAC the court got full notice of, including what they wanted to do. And I'm sorry but Patience has confused PPAC and some of its subcommittees.

PDR: PPAC's Planning Committee is the one that deals with the budget. I'm not confused in the least. I attended the full meeting of PPAC in September, but the Planning Committee meets before that. And it's that Planning Committee that the Finance Committee met with in the previous biennial budget, and it was those meetings that no notice was given to anybody on the Finance Committee.

SSA: Only—not only wasn't it given to the Finance Committee, it wasn't given to anybody, other than members of that subcommittee. But it sounds to me like that should be part of this rule, and that's one of my comments.

MJG: I think the point just discussed by Justice Roggensack and the Chief Justice points out one of the fundamental facts that no one is addressing here because we're not really talking about the substance of the motion, which had been passed 6 to 1. But I think I've counted no less than four times that the Chief Justice has indicated in one variation or the other that all members of the court had comparable access to information with PPAC. That may be true, but what it doesn't address is the fact that not all members of the court have information on an equal footing or have equal information or equal access to the information about the budget. And so we find ourselves in a circular pattern of discussion, and that is that the court, most of us, do not have access to the comprehensive substance of the information surrounding the creation or substance of the budget, but yet we are asked to vote and approve on it. And I have strongly considered abstaining from the votes, but I haven't thus far because of the need to simply—if everyone did that, we'd get no budget done. And there doesn't seem to be the will on this court of enough members to actually get anything done to ensure that we all have equal footing when it comes to access to information. And so it makes me very nervous when I continue to hear, well, the court approved

the budget, the court approved—the court had no choice but to approve *a* budget, because a budget has to be completed. But it has to be said, and everyone sitting at this table knows that it's true, that not all members of this court have access to the same information about the budget, nor are we permitted to independently go forward to seek such access. We've seen some examples, which don't have to be discussed in open conference, of members of this court trying to get information and being blocked by the individuals who nominally work for the court but take their direction from one member of the court, not from all, but that calls up a whole host of issues. So I just want to make it very, very clear and transparent that when we say the court has approved the budget, of course we had to approve *a* budget, but the substance—the substantial foundation of the original motion which serves as the basis for this discussion stems from the fact, the awareness, that not all of us have equal access to information about the budget. And so, our only—my only choice as I see it is to either abstain from voting or, for the interest of getting *a* budget out, vote for a budget that I am less than confident I am wholly apprised of. And so here we are. I think the time has come, Justice Prosser, you've been silent throughout this, I would ask what your view of the motion made by Justice Ziegler, and if she's seeking to amend it to include the provision of opinions to follow, I certainly think the time has come for that and so I would second that amended motion.

AKZ: Let me—give me just a minute. While I'm listening to you talk I'm thinking of a practical way to try to meet everyone's needs. The Chief believes that she will write in or by December. Let's work off a publication date. And if the publication date is January 1, for example, we could agree that the order issues in that publication date, if the writing's received it can go along with it, and if the writing isn't received, then it goes and it says "writings to follow." That accommodates everyone's needs, right? And moves the matter forward. So, I would—

SSA: I wouldn't take January 1. I said I'd do it during the Christmas week and it would be ready the first week in January. So I pick the 15th.

AKZ: Well, I don't—when would this have to go?

JR: Well, it—I was trying to recall whether the court has ever indicated whether they consider this a 751.12 matter, which means that it deals with pleading, practice, and procedure. If that is the case, 751.12 petitions can only have effective dates of January 1 or July 1. Those are matters that address court pleading, court practice, and court procedure.

AWB: My sense is, Julie, with regard to that, I don't recall that we ever discussed this. You, as is set forth in your agenda and your memos and the other items here, you tell us in your memos, generally, or let me put it a little more diplomatically: You advise the court if you think it's a 751.12, and you do that regularly and did not do it here. That would accord with my

understanding of what would be a pleading and practice petition, and procedure. That is, when I say “procedure,” we’re talking about *civil* procedure, we’re not talking about operating procedures—

JR: Correct.

AWB: —and so this would not be a 751.12 and it’s never going to raise or you’ve never alluded to that.

JR: Yeah, I was trying to work through because this matter does have quite a long history and there’s been a lot of discussion. My initial instinct is that this is not a 751.12.

SSA: No. If it’s a 751.12, the court has never had hearings on this. And that would be required. The court had open administrative conference for discussion but no hearing. Just look at the agenda—

JR: And when I drafted this back in February, it is drafted for effective the date of the order. So I think this can go when the court says it can go. I don’t think we’re constrained by 751.12. I always need to double-check that before, because I would not want to make a mistake, because we must adhere to that, but in this instance I agree with Justice Bradley that when we talk about court procedure we’re not talking about matters like this. We’re talking about the rules of appellate procedure.

SSA: Otherwise we would have had to have a hearing.

JR: Right.

SSA: There was no hearing on this.

AKZ: When should the publication be?

JR: You tell me. I can—

AKZ: Any date?

JR: Effective the date of the order. When you tell me the order’s ready to go, we can get it out within days, if not less.

DTP: What’s the publication date for this book?

JR: I would have to check with the Clerk's Office. We get periodic requests from them where they upload whatever has been posted to the court website, and it's—to my knowledge there's not a specific date, necessarily. I'd have to check with the LRB on that. But it doesn't have to be printed for it to be effective. It will be on the court website as soon as the order issues and it will have that effective date. Sorry if I seem like I'm hedging. I just don't want to get it wrong.

AKZ: I think there's some appeal to picking a date by which the order goes out with or without the writing. It will have been almost a year since the passage of the rule. If we wait until January it's one month shy of one year. So let's pick a date, live with it, and move on. That's reasonable.

NPC: Well, this was taken up on the 5th of February of '14. How about we agree that the publication date will be the 15th of February of '15?

AKZ: Why that long?

PDR: Why that long?

NPC: Because we're waiting for a writing and we want to look at the writing and see if it changes any vote.

AKZ: Patience, it's your petition.

NPC: You know, I'm not trying to delay the effectiveness of this, but that wouldn't—would that not get you into the new budget cycle OK?

PDR: What I believe will happen is that the Chief Justice will write, and someone will hold it to consider her writing, and it won't be published on the 15th. So is your suggestion that whatever, it gets published on the 15th—

NPC: Yes.

PDR: —and those who want to consider the separate writing further do that at a later time, or whatever?

NPC: I'm trying to come up with a definitive date—

PDR: Right.

NPC: —and that would be the 15th of February. Which is our anniversary.

PDR: Hey, there you go, that's got to be a good date.

NPC: That's why I—my wife would love that.

[laughter]

PDR: OK. Well—

[laughter]

AWB: Happy anniversary, hon. This is your present. The order of the Finance—

[laughter]

MJG: To be clear, Justice Roggensack and Justice Crooks, I think what Justice Crooks as I understand it just did is provided an answer to Justice Ziegler's question, which is, what is the date certain on which publication will occur, if the writing is in, it will be included, if the writing is not in, the 7th Circuit—

AKZ: Any writing. Any writing. We don't start this process over if someone says, "Now I want to write."

PDR: That's right. That it gets published—it's just a drop-dead date?

MJG: I was just about to go—

NPC: Yeah, I intend it to be a definitive date.

MJG: All righty.

PDR: OK.

MJG: That is contemplated.

AKZ: Any writing.

MJG: Yes. Any writing. The writing we've been talking about. And so if it's not in, then the 7th Circuit procedure is followed, writings to follow, and if it is included, then it goes out the door on February 15.

AKZ: That's a friendly amendment. I accept it.

MJG: Pat?

NPC: That's my intention.

PDR: I would be very happy for a date that's certain, and nothing is going to change the certainty of the date.

MJG: It's a friendly amendment.

AKZ: And I accept it.

MJG: And I second it.

DTP: Well, let me ask, suppose we adopt this friendly amendment and then adopt the rule, if we have to do anything more, theoretically could I vote for reconsid—move for reconsideration?

PDR: I think it would still be published on the drop-dead date is my understanding, but yes, you can move for reconsideration after that time if you like, but that won't stop the publication. That's my understanding of what Pat was setting up. So no further activities would stop the publication, but you could move for reconsideration and the court could reconsider it and change its mind just as it has the ability to do.

DTP: Even if I had four votes?

PDR: If you had—four votes to stop it on the 15th? If we're going to do that kind of work at this court, we might as well forget these hearings, David. We might as well forget these hearings. So I would hope that people—that you won't have four votes to stop something we've agreed on today.

DTP: Well, I understand, I basically support the rule, I don't intend to move, but I'm asking if someone in the majority moved and had four votes.

PDR: I think four votes is the control of the court, and if the court does, what four votes say, the court should do. I mean, that's my understanding of our constitutional provisions is that this court operates by the vote of four when seven sit.

AKZ: But it's a rule until the reconsideration would change that. It would be published and be—

DTP: Until there are four votes.

SSA: Well, that—I'm sorry, are you done?

DTP: Well, I just—I'm kind of interested in what the rules are, it seems to me Justice Crooks has made I think an extremely constructive suggestion, I think it's a fair suggestion, for the Chief, giving her an opportunity to write. I think there's some reservations that there's an opportunity to disrupt the process further, and I'm trying to pin down whether that's true or not. Suppose the court unanimously thought, my goodness, the Chief has made an incredible point here, we do need to fix something. Are you saying that we don't have the ability to do that?

PDR: No, the court operates by the vote of four. I think the court always has the authority to do what it thinks is appropriate by the vote of four. I don't think there's anything that you can do to obviate that. Nor would I really want to, David.

DTP: No, all right, so—

SSA: You've got two answers, David. One is the order gets published and the reconsideration is afterwards. Or, the order isn't published and the reconsideration is taken. Now, I have no intent to do any of that, but we'll see.

MJG: My understanding is he received one answer to the one question he asked which is, may the vote of four do something to change the writing, stop a writing from going out, or stop any court action. And it seems to me the answer is no different here than it would be in any other matter to come before the court which is the vote of four is what it takes

DTP: The way—the way I interpret this is if we go forward here, there would be a substantial time still for a writing—

PDR: A substantial time is correct.

DTP: —but there we would, assuming that this rule will be published, I guess online and in a future book, it wouldn't be in 2015, it would have to be in 2016, but basically the die is cast. Now, if there was a completely valid suggestion the majority of the court thought required a little change in the wording and somehow there were four votes to do that, it would probably not necessarily affect publication but affect the wording of what is published. I would be—I would be quite surprised if there were four votes to kill the whole rule.



AKZ: Well, there were 6 votes for it and 1 vote that wasn't a vote, it was an abstention. So—I would think we're largely on the same page. We've had this for— over the course of two court terms, and it was passed, not just first seen but passed, last February. I would think we should move forward on the rule that we passed and the materials that were—

DTP: With the understanding of the situation I think I perceived, I'm prepared to vote.

JR: Can I—

SSA: Is your understanding, Dave, that four votes can stop the content?

AKZ: The only motion pending is that this rule be published on February 15, 2015. That's the motion. That's it.

JR: I have a clarification question. I want to make sure that I understand this. If—if on February 13, four justices e-mail me and say "Hold the order," what do I do?

MJG: I think the order has to be held.

NPC: 'Tain't going to happen.

PDR: I agree with that.

JR: I just—I'd like to have it on the record. Thank you.

[crosstalk]

PDR: Four controls the court.

AKZ: If there are any outstanding writings, then it just says "writings to follow."

JR: Got it.

SSA: All right. Well, I just want the same rule applied when we get to 12-09, which has been pending for two years. And we'll see how that happens. One vote at a time. We'll get to the next vote. You have to always consider the consequences of your votes and the applications thereof. OK. And we don't have four votes, and they'll—the votes will be taken after—before February 15.

PDR: We—OK, we're going to vote now on what we're going to do, the motion that's pending. Right now.

MJG: A motion was made.

PDR: Right. I'd like to call the question and have a vote.

SSA: Just one minute. Do we have four votes, which I think we do, for the content of the petition that was circulated by Julie?

PDR: Yes, I think we had 6 votes, actually, for the content.

AKZ: I don't think Ann voted.

PDR: Oh.

AKZ: And Shirley didn't vote.

PDR: I thought Ann did.

[crosstalk]

AWB: As I indicated, Julie's memo of November 11 set forth the status, and the status was as of November 11 and I think as of our entry into this room today, three people had approved the order circulated, four had not, the Chief had e-mailed a request and intent to write on this. And then—so there were four votes outstanding, three votes in, as of this morning. That's the status as we approach this vote.

PDR: Well, hopefully the motion will take care of everything, because it's to publish it as circulated by Julie, and the friendly amendment by Justice Crooks that that is to occur on February 15, 2015, so our vote today should take care of any—care of any confusion about what people are voting on.

AKZ: In addition, Dave Prosser and Pat Crooks [unintelligible].

PDR: I know, but I think we should take a vote on the motion, and then that will encompass everything and there won't be confusion from anybody about what they voted for or didn't vote for.

NPC: Julie, would you be sure to note that February 15 is our anniversary?

[laughter]

JR: I can put it in the order.

SSA: What year? How many years?

NPC: Oh, my goodness. 51 years ago.

JR: Congratulations.

PDR: Very good, Pat Crooks.

NPC: See, I remembered—

AWB: I hope you're right.

[laughter]

NPC: Oh, yes.

AWB: Not to worry, your wife probably doesn't watch this.

PDR: OK, well, let's call the question and then we can move on.

JR: This goes without saying, but typographical errors, corrections to names, spelling, we always reserve the right to make those kind of very minor, technical, nonsubstantive changes.

SSA: You sound concerned. Any other problems?

[laughter]

JR: No. Being careful.

SSA: All right. Everybody understand the motion? February 15 is publication date of the content of the petition circulated by Julie on January 13, 2014.

AWB: I intend to vote in favor of this, but again, the reason I held off, and I don't know why the others held off, but it is, as we say in the law with a double negative, not unusual to wait to see

what a separate writing has to offer, and so I will vote to move this matter forward, but I do look forward to reading the separate writing.

SSA: I'll vote for it so I can move to reconsider, which is a Dave Prosser move.

AKZ: Some would call it a senior move. Around the conference table.

NPC: If only Jon Wilcox was here.

[laughter]

PDR: I'd like to call the question so we can give Julie a final answer.

SSA: Does anyone else have anything to say? Any other questions? Those in favor of the motion?

JR: Unanimous.

SSA: We'll now move to 12-09 [unintelligible] and this one had a petition drafted, submitted, we had a public hearing on this, and a discussion on this in open conference, a draft order which was substantially the same as the petition, and every change to the draft order was approved by a separate vote of that petition, and when it was drafted was circulated on 1/29, I approved it, Justice Ann Walsh Bradley approved it, Justice Crooks approved it, and then PDR wrote to hold the order 2/14/13, that's two years ago, and has never been heard from since on any writing or anything else.

PDR: Right, I didn't hold it to write and I didn't declare a writing. I held it because it was my understanding that some members of the court who were in favor of it had concerns about the statement on page 4 of the order, paragraph 3, "publication," and that statement says, "A majority of the participating members of the court shall determine whether an order issued by the court satisfies the publication criteria under this rule." Then the problem began. "However, if a justice who authors a concurrence or a dissent determines the concurrence or dissent satisfies the publication criteria under this rule, then the order and the concurrence or dissent shall be published." And it was that latter sentence which I think has caused some concern in discussions because the majority of the court can always decide what to publish and the rule gives a lot of discussion to how you go about doing that. But here, one justice can countermand the decision of the court if that sole justice decides a concurrence or dissent satisfies the publication criteria. Now there have been times when people on this court have written concurrences or dissents and those concurrences or dissents were very – used very harsh language and in some instances even name calling of other justices, and the court would now be in the position of permitting things

that don't look favorably on the court to be published if one justice decided they should be published, even though the majority of the court decided it was not in the public's interest or the court's interest to publish that particular document, so it was just that part that was of concern, not the entire rule.

SSA: Well, it seems to me the point is you should write and then the court can decide whether or not it's going to join that writing or not, and if we should reverse it. But here, it's two years later and you're making that observation now and it seems to me that's the thing that you dissented on when we were hearing this, and it doesn't make sense to me, so I would suggest that you have until February 15 to write and if you write before that and you get four votes that agree with you, then we have to do something else. But it strikes me it's time to write.

AKZ: Just to clarify, you're not intending to write by February 15 on the last rule. You're writing by January 1st.

SSA: I didn't say January 1st. I said --

AKZ: Over Christmas is what you said, so you're right, you didn't say January 1st.

SSA: Right, I'm going to write with enough time for you all to read it and decide whether you want to join it or not join it, so you'll have time. But you don't really care, because if I don't get it in, you're gonna publish it anyway. But I will --

AKZ: But with all due respect, I mean the whole purpose that Pat Crooks' amendment was accepted was to give people plenty of time to read your writing --

SSA: Absolutely. Absolutely.

NPC: Can I ask a question of clarification on what you just read us?

PDR: Yeah.

NPC: Does this mean in a situation where the majority of the court has said the rule doesn't get published, that one justice dissenting or concurring can override that and have everything published?

PDR: That's right. That's correct.

NPC: Why would we do that?

PDR: Well, that's my – that was the discussion that came about after we had a vote on this.

NPC: I mean, if we believe in the rule of four, why would we do that?

PDR: I certainly would not do that. I don't think it's appropriate to do.

AKZ: I don't think people thought—

PDR: I don't think people thought through it when the rule was presented.

AWB: I have part of the transcript. We discussed this issue.

PDR: Well, we may have, but --

?: No, we didn't discuss –

NPC: I have to tell you my recollection of what we discussed a year and a half ago or two years ago is not crystal clear. That's why I'm asking for clarification.

AKZ: You know what? You just have to decide if this is the order you want.

SSA: This is not the time for this.

PDR: Why not?

SSA: The problem is that if there is a member of the court who disagrees, and Justice Ruggensack disagreed with this, then they write, and then the court can read it and make a decision. It is not the time for reconsideration of that order now because you can't remember. I checked it out and this –

AKZ: Did everybody approve this?

PDR: No, everybody didn't –

AKZ: I mean, that's where we started on the last one, who had approved it.

MJG: Right.

SSA: No, it's the same thing.

AKZ: Right, I mean if people have approved this order, then that's one thing, but if the order has yet to be approved by the majority in order to fine tune it, then --

SSA: It was approved by the majority at --

PDR: Three people according to Julie approved it.

SSA: No, the vote was 4-3 at conference.

AKZ: At the table, but just like the last rule with all due respect there was a vote 6-1 at the table and we even drafted it at the table, but you came in here today saying only three people had approved the order. So my question is the same. How many people have approved once they saw this order on paper.

PDR: Three.

?: Four

SSA: Four.

AKZ: Okay.

PDR: Well, all right.

AKZ: Justice Crooks, you seem to have some question about whether you approved this copy you're looking at.

NPC: No, I'm sure I approved it, but I approved it now being concerned about the point that was made.

SSA: And I think then it should be written. This is not the time for doing that and then we then will look at it again on the basis of a writing.

JR: This was a controversial provision and it was discussed and --

AWB: I don't have the full transcript right in front of me, but I believe I have it in my office, and it was discussed at length. This was probably the hot --

JR: I would say there were certain justices who felt that it was their constitutional obligation if they had a strong position on a particular issue to make that public and in writing and that they

should have the prerogative of publishing that opinion for the public, even if it differed from the majority. And that was the position that carried at the table. The draft order was not before the court but, once again, the draft order that was circulated memorialized the vote which was 4-3 – it was not unanimous – at the table.

(unintelligible)

JR: Walking into the courtroom today, the Chief Justice, Justice Bradley, and Justice Crooks approved this draft order.

SSA: And Justice Prosser just approved it.

JR: And Justice Prosser just approved it here.

SSA: So you have four votes and if you want to change it, then I think you write. That's the purpose of it and then we can deal with it.

PDR: Okay, that's fine. To move it along I'll accept that – I will have it written and out to everyone. So I'll write.

NPC: And then we get a chance to vote whether or not we agree with you.

PDR: That's correct. That's right.

NPC: So we could – I'm troubled at this point, and I probably was troubled two years ago or whenever it was, but if, for instance, if we read your writing and agree with you, we could then register that at that time.

PDR: That's correct.

SSA: That is our standard rule.

AWB: That's the same thing that applies to the prior one.

SSA: And I said I would do that.

JR: And in complex orders, we have indicated 4-3 as to certain provisions when it was important to members of the court to document their feelings on a particular provision.

DTP: I didn't understand what you just said. Could you please say that again?



NPC: My understanding is – I'm troubled by what we did. Okay? I approved it. I understand that. I'm troubled now reflecting on the rule of 4 and thinking that the rule of 4 wouldn't apply here and so my understanding is once Justice Roggensack writes and if she writes against this provision, I would have a chance at that point to register my concern by joining her, by agreeing with her, or not. Is that correct?

AKZ: Presumably that's the purpose of a writing, just like –

NPC: Right.

AKZ: -- the Chief Justice hopes to persuade six people when she writes on the last rule.. Pat's hoping to persuade some people, maybe just one person when she writes on this one.

NPC: And what appeals to me doing it this way is that we're being consistent, which we're not always able to do.

DTP: Well, I want to explain, for the record, why I voted the way I did. I find myself frequently in the minority on this court. I found myself in the minority on this court for a good part of the last 17 years. Okay. When a majority of the court decides to make a rule that we're bound by, it seems to me that a member of the minority ought to have the ability to say why they don't favor that rule, why they disagree with that rule, why they think that rule is a mistake. That's part of freedom of expression in our constitution that ought to exist in the court itself. That sometimes people in dissent write in a way that is not collegial – that's a fair criticism, and I think it reflects on the author of the dissent and not on the integrity of the process. So I'm concerned about the integrity of the process, about the openness of the process, and that's why I voted the way I did and I think that's why you voted the way you did.

NPC: Well, I think the points you're making are very valid. I think the – I await the writing of Justice Roggensack, but I think your points are certainly very valid and I – you know, I – I know I voted the way I did originally. I know I'm now somewhat troubled by that vote, but I want to see what everybody has to say.

DTP: I just happened, this morning, before I came to work, stumble on a book that I had acquired years and years ago. It is a book by Walter Ripman, famous columnist for the New York Times. And it was a book about freedom of the press. All I read was the first paragraph and what Walter Ripman wrote in the first paragraph of this book was that the first newspaper published in the United States, published I think in the – somewhere in Massachusetts. The second issue was suppressed. Okay? Now, I'm going to read that book to see how the integrity of the press has perhaps been compromised over the years. But right from the beginning, the

press, which we recognize is so important, has been subject to suppression from time to time. I'm not voting for that. I'm just simply not voting for that.

NPC: I was just going to say, if I could respond to what David had to say for just one minute. David, one of the things – one of the people that I've always admired was John Adams, and as you know, John Adams was a strong supporter of the alien and sedition acts, which directly relate to what you're talking about. So I certainly appreciate that there are two sides to this, and I'm sure all seven of us will weigh carefully what Justice Roggensack has to say.

PDR: David, I would never write anything suggesting that any justice on this court couldn't write anything he or she chose. Never. That's not what I'm talking about at all. We are always free to do that and it is available publicly when we do that. This is a different question that's presented by the motion. But I'll do my best to try to set out the differences for you as I write.

DTP: Well, if writings are not published, they certainly have less availability to people. Now, I want you – I want every member of this court to hold Dave Prosser responsible, or responsible for collegial or non-personal attacks on other justices. I want to argue on the merits of the issues, and if I fail to do that, in your view, ever, call me on it.

NPC: I will.

DTP: Call me on it.

NPC: I will.

DTP: Okay. But – and I think everybody else who writes dissents ought to be held to the same standard.

SSA: But published anyway.

DTP: But published anyway.

SSA: I agree with that, and this relates to not rules orders but to other orders of this court, so preliminary review orders, petition orders, every other order that the court puts out that deals with an adjudication. And the court gets to vote on it, and anyway, write, and then we can look at it. All right. We're done with that? Okay.

DTP: Chief Justice, I know we have a lot of important matters on the schedule, and I don't want to disrupt anything, but I wonder if it would be possible to take up Rule Petition 14-02, simply because we have people in the audience who have been here, not only a long –

SSA: Since 8:15 this morning.

DTP: Yes, but some of these same faces, these are the usual suspects who have been here in other hearings.

SSA: I totally agree with you, Dave, and I was going to suggest that unless there's an objection, we should do that.

1:12:48