

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 12-09

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

FILED**AUG 7, 2015**

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On September 7, 2012, the Publication Review Committee, convened by Chief Justice Shirley S. Abrahamson, filed this petition with the court.¹ The petition proposes some changes and additions to Supreme Court Rule (SCR) Chapter 80, designed to govern publication of supreme court orders and opinions issued in cases, and amendments to SCR 98.07, which governs publication of orders in rule matters. The court discussed this matter at its open administrative conference on September 25, 2012, and voted unanimously to schedule a public hearing on the petition. The public hearing was held on January 15, 2013. The petition was presented by Diane M. Fremgen, Clerk of the Wisconsin Supreme Court, as a representative of the Publication Review Committee. Ms. Fremgen advised the court of proposed changes

¹ Effective May 1, 2015, Patience Drake Roggensack succeeded Shirley S. Abrahamson as Chief Justice of the Wisconsin Supreme Court. This order reflects the justices' respective titles at the time the events described herein occurred.

to the draft language designed to respond to a written comment submitted by the Office of Lawyer Regulation (OLR). The OLR noted that, pursuant to SCR 22.23, the supreme court's disposition of a private reprimand or dismissal of a disciplinary proceeding is not published. In response, the Publication Review Committee recommended adding the phrase "unless otherwise provided by law" to proposed SCR 80.003 to encompass opinions and orders exempted from publication by law. Ms. Fremgen further advised the court that the Publication Review Committee did not object to a modified amendment to SCR 98.07 proposed in writing by the State Bar of Wisconsin's Communications Committee.

Attorney Nilesh Patel, Chair of the State Bar's Communications Committee, attended the hearing together with State Bar staff members and testified in support of the petition, explaining the basis of the proposed alternate language to SCR 98.07. Attorney Todd Smith, a member of the Publication Review Committee, also testified, presenting comments and feedback he received from the State Bar's Appellate Practice Section.

At the court's ensuing open conference, the court discussed the matter. In addition to accepting the proposed revisions to the petition, the court voted to: (1) add a comment to SCR 98.07 confirming that these amendments to SCR 98.07 shall be consistent with the requirements of Wis. Stat. § 751.12; (2) require that the Clerk of the Supreme Court advise the court at regular intervals of the practical effect of these rule changes; (3) review the rule changes in three years; and (4) strike the word "policy" from proposed SCR 98.07. The court considered deleting the final sentence

in proposed SCR 80.003(3)(a), but voted to retain this language.² A majority of the court then voted to adopt the petition with the aforementioned amendments.³ The matter was then held. The petition was discussed again on November 17, 2014, and the court voted to release the rule order at a certain date. However, Justice N. Patrick Crooks expressed reservations about the final sentence in proposed SCR 80.003(3)(a). On January 30, 2015, Justice Crooks formally sought reconsideration of the rule, joined by Justice Patience Drake Roggensack. Chief Justice Abrahamson filed a response and the court voted to hold the matter for further discussion.

The court discussed the proposal on February 26, 2015. The discussion focused on the final sentence of proposed SCR 80.003(3)(a), which stated: "However, if a justice who authors a concurrence or dissent determines the concurrence or dissent satisfies the publication criteria under this rule, then the order and concurrence or dissent shall be published." Justice Crooks expressed concern that this language deviates from the court's usual principle of following the "rule of four" with respect to deciding whether publication will occur. Justice David T. Prosser argued in favor of retaining the language, to ensure that minority opinions and perspectives will be available to the public.

² Chief Justice Abrahamson and Justices Bradley, Crooks, and Prosser voted to retain the language. Justices Roggensack, Ziegler, and Gableman would have deleted this sentence.

³ Chief Justice Abrahamson and Justices Bradley, Crooks, and Prosser voted for the petition. Justices Roggensack, Ziegler, and Gableman opposed adoption of the petition.

Justice Michael J. Gableman moved to adopt the petition, as amended, thereby deleting the language at issue. The court voted to adopt the revised proposal.⁴ Chief Justice Abrahamson then stated she would write. Therefore,

IT IS ORDERED that, effective date of this order, the supreme court rules are amended as follows:

SECTION 1. Chapter 80 (title) of the Supreme Court Rules is amended to read:

SCR CHAPTER 80

PUBLICATION OF OPINIONS AND ORDERS

SECTION 2. 80.002 of the Supreme Court Rules is created to read:

SCR 80.002. Supreme Court Opinions. All supreme court opinions shall be published in the official publications designated in SCR 80.01.

SECTION 3. 80.003 of the Supreme Court Rules is created to read:

SCR 80.003. Supreme Court Orders. (1) Unless otherwise provided by law, a supreme court order shall be published if the order meets any of the following criteria:

(a) The order disposes of any appeal, review, or proceeding before the supreme court and contains significant discussion or explanation of the grounds for disposition.

(b) The order resolves a motion for reconsideration of a supreme court opinion and contains further explanation, clarification, or modification of the court's opinion.

⁴ Justices Crooks, Roggensack, Ziegler, and Gableman voted in favor of the amendment. Chief Justice Abrahamson and Justice Bradley opposed the motion. Justice Prosser abstained.

(c) The order resolves a bona fide and substantial request for recusal or disqualification of a justice.

(2) Unless otherwise provided by law, orders of the supreme court other than those in sub. (1) may be published if the order meets one or more of the following criteria:

(a) The order concerns a legal, factual, jurisdictional, or procedural issue of significant public interest or importance.

(b) The order contains significant discussion or explanation of the state constitution, or any law, statute, or court rule.

(c) The order enhances access to or transparency of the court's work to the general public.

(3) PUBLICATION. (a) 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.

(b) The authoring justice of an order issued by a single justice shall determine whether the order satisfies the publication criteria under this rule.

(c) An order designated to be published under this rule shall include a statement, "This order will be published pursuant to rule ____." This statement will be removed upon publication.

(4) Orders published under this rule shall be published in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's Web site.

SECTION 4. The following Comment to Supreme Court Rule 80.003 is created to read:

COMMENT

1. A supreme court order published under this rule may include orders that provide a scholarly critique of an existing law, statute, or rule or a new interpretation, clarification, or criticism of an existing provision of the state constitution, statute, or court rule.

2. A concurrence or dissent is considered part of the order to which the publication criteria apply.

3. Publication rules under this chapter govern court orders issued in appeals, reviews, or proceedings before the supreme court. Publication rules governing court orders issued on rule petitions are set forth in Supreme Court Rule Chapter 98.

4. Supreme court opinions include authored and per curiam opinions.

5. A supreme court order includes an order issued by this court including a single justice of this court.

SECTION 5. 98.07 of the Supreme Court Rules is amended to read:

SCR 98.07 Publication of rules orders. All orders of the supreme court adopting, amending or repealing a rule or statute shall be published in the official ~~state newspaper promptly after adoption~~ publications designated in SCR 80.01, including the official publishers' online databases, and by the state bar of Wisconsin in its official publication and on the Wisconsin court system's Web site. The State Bar of Wisconsin shall provide notice of such orders.

SECTION 6. The following Comment to Supreme Court Rule 98.07 is created to read:

COMMENT

SCR 98.07 shall be applied with reference to Wis. Stat. § 751.12 which provides, *inter alia*, that rules promulgated pursuant to Wis. Stat. § 751.12 shall not abridge, enlarge, or modify the substantive rights of any litigant.

All supreme court orders disposing of a rule petition will be available on the Wisconsin court system's Web site.

IT IS FURTHER ORDERED that the Comments to SCR 80.003 and SCR 98.07 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that notice of the creation of SCR 80.002 and SCR 80.003 and of the amendment to SCR 98.07 shall be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's Web site. The State Bar of Wisconsin shall provide notice of this order.

IT IS FURTHER ORDERED that the rule changes adopted pursuant to this order shall apply to all proceedings commenced after the effective date of this rule and, insofar as is just and practicable, in all proceedings pending on the effective date.

IT IS FURTHER ORDERED that three years after the effective date of this order, the court shall schedule a conference to review these rules.

Dated at Madison, Wisconsin, this 7th day of August, 2015.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*concurring in part and dissenting in part*). I join the adoption of the publication rules proposed in Rule Petition No. 12-09 as amended. The diverse representative committee did an excellent job studying the publication issue and proposing a creative rule.

¶2 I dissent, however, from the court's deletion of the final sentence in proposed SCR 80.003(3)(a). The final proposed sentence (now deleted) states: "However, if a justice who authors a concurrence or dissent determines the concurrence or dissent satisfies the publication criteria under this rule, then the order and concurrence or dissent shall be published."

¶3 I would retain this final sentence for the reasons Justice Prosser stated in open conference: to ensure that minority opinions and perspectives will be available to the public.

¶4 His reasoning is important. For example, Justice Prosser has written thoughtful dissents to the court's denials of petitions for review or petitions for supervisory writs. See, e.g., Koll v. DOJ, No. 2008AP2027, unpublished order (Oct. 14, 2011); State ex rel. Nelson v. Wis. Supreme Court, No. 2013AP153-W, unpublished order (_____, 2015). Although I do not agree with his dissenting positions in these matters, he raises issues that should, in my opinion, be available to the public. Furthermore, my concurrences in Koll and Nelson explain the processes of this court and call for change. These too I hope may prove to be important public information.

¶5 If the denial of a petition and the dissent and concurrence thereto are not published, they are not, as a practical matter, available to anyone but the litigants. After the orders are issued they are not readily locatable or accessible to the public, the bar, researchers, and even members of the court.

¶6 Furthermore, the final sentence in the proposed SCR 80.003(3)(a) is needed to counteract recent court practices that have the effect of curbing minority views. The most significant is the new procedure for circulating and mandating opinions adopted by a divided (4-3) court on September 25, 2014. In adopting this new procedure, regrettably (in my opinion) the majority did not give notice to or seek comments from the bench, bar, or public, and did not consult the practices of other state courts.

¶7 I have set forth the new procedure verbatim in my concurrence in State v. Gonzalez, 2014 WI 124, ¶¶25-40, 359 Wis. 2d 1, 851 N.W.2d 584 (Abrahamson, C.J., concurring).

¶8 The new procedure departs from our longstanding procedure for collegial discussion of draft opinions in several important ways that marginalize minority views. As we all know, concurrences and dissents are part of a continuing dialogue about developing legal issues, and may (sometimes sooner, sometimes later) become the majority view.

¶9 Starting in September 2014, draft opinions (whether majority or minority) cannot be discussed at any court conference. For conference discussion of a draft opinion, a

vote of four justices is required. No single justice can hold the release of an opinion for any reason; a vote of four justices is required to hold the release of an opinion. After initial written comments by justices, members of the majority have tended to discuss the draft opinion and revisions thereof among themselves; they have not involved the minority in these discussions. Furthermore, in certain circumstances a majority opinion may be released without being accompanied by a concurring or dissenting opinion; the drafted concurring or dissenting opinions must be released at a later date. These provisions, as well as the short time periods allowed for separate writings, are unwelcoming to concurrences and dissents.

¶10 For the reasons set forth, I write separately to dissent to the court's deletion of the final sentence in proposed SCR 80.003(3)(a).

¶11 I am authorized to state that Justice ANN WALSH BRADLEY joins this concurrence/dissent.

