

SUPREME COURT OF WISCONSIN

No. 12-11

**In the Matter of the Creation of a Judicial
Code Review Committee**

FILED

DEC 21, 2015

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On December 27, 2012, then-Chief Justice Shirley S. Abrahamson filed a petition asking the court to create a committee to review the Wisconsin Code of Judicial Conduct, chapter 60 of the supreme court rules.

The court discussed this petition at an open administrative rules conference on January 22, 2013, and voted to solicit public comment. Written comments were received from the Wisconsin Department of Justice, the Wisconsin Trial Judges Association, and the Wisconsin Judicial Commission, all favoring a review of the Judicial Code. The court again discussed the petition and the responses received at subsequent open administrative rules conferences on February 28, 2013, and April 12, 2013. The court adjourned further discussion so materials could be prepared comparing the Wisconsin Code of Judicial Conduct to the American Bar Association Model Code so the court could better assess the scope of a comprehensive review of the Judicial Code.

The court next discussed the matter at its December 6, 2013 administrative rules conference. Certain members of the court raised the question of whether the matter was proper subject of a rules conference. The matter was held and then-Chief Justice Abrahamson indicated she intended to file a rule petition intended to resolve that concern. On December 9, 2013, then-Chief Justice Abrahamson filed rule petition 13-17, In the Matter of the Creation of Supreme Court Rules 60.001, 60.002, and 60.003 Relating to a Judicial Code Review Committee.

At an open administrative rules conference on November 16, 2015, Justice Annette Kingsland Ziegler moved to discuss, together, three pending rule petitions: this petition; Petition 13-17; and Petition 15-01, In the Matter of the Review of the Office of Lawyer Regulation. Justice Ziegler then moved for dismissal of these three petitions on the grounds that they are improper subject matter for a rules petition.¹ After some discussion, the court voted 5:2² to dismiss the petitions. The court expressly noted that its decision to dismiss the petitions did not preclude the court from appointing a committee to undertake a review of either the Judicial Code or the Office of Lawyer Regulation. Therefore,

¹ The motion was seconded by Justice Michael J. Gableman.

² Justices Shirley S. Abrahamson and Ann Walsh Bradley dissented.

IT IS ORDERED that rule petition 12-11, In the Matter of the Creation of a Judicial Code Review Committee, is dismissed.

Dated at Madison, Wisconsin, this 21st day of December, 2015.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). Both Rule Petition 12-11 and Rule Petition 13-17 propose the creation of a Judicial Code Review Committee to review the Wisconsin Code of Judicial Conduct and Supreme Court Rule 60, and to make recommendations to this court for modifications to the Wisconsin Code in light of substantive revisions and additions to the American Bar Association recommendations³ and developing law and codes of other states.

¶2 Five justices dismiss the Petitions on previously unheard-of grounds, namely that the subject matter of the Petitions is not the creation of a rule.

¶3 The dismissals of these Petitions and Rule Petition 15-01 (which I discuss in a separate dissent) are probably the first times in the history of rule making by this court that this inventive ruse has been used to dismiss a proposal that several justices view as troublesome.

¶4 Rule Petition 12-11 was filed on December 27, 2012, and Rule Petition 13-17 was filed on December 9, 2013. Rule Petition 13-17 replaces Rule Petition 12-11. Because of their similarity and overlap, I will refer to the two Petitions together as "the Petition."

¶5 The Petition was well-received. The Judicial Commission (charged by the legislature with investigating

³ The American Bar Association has played an instrumental role in establishing standards for judicial conduct for over 80 years.

misbehavior by judicial officers)⁴ advised the court on February 22, 2013, that it "unanimously agreed to recommend a comprehensive review of the Wisconsin Code of Judicial Conduct, SCR Chapter 60."

¶6 The Wisconsin Trial Judges Association advised the court on February 15, 2013, that it "agrees that the time is ripe for a comprehensive review of the Wisconsin Code of Judicial Conduct" and recommended that the Committee "include members of both the Trial Court and the Court of Appeals."

¶7 On February 5, 2013, Deputy Attorney General Kevin St. John wrote the court saying that if the court chooses to create such a committee, the Department of Justice requests that the Wisconsin Attorney General select a lawyer member to serve on the committee.

¶8 Nevertheless, five justices voted to dismiss the Petition on November 16, 2015, without seeking further comment.

¶9 First I'll address the ploy these five justices employ to dismiss the Petition. Then I'll discuss the substantive issue that apparently is so troubling to the five justices that they seek to avoid creating a committee to update the Code of Judicial Conduct.

¶10 The five justices claim that the Petition does not present a proper subject for a rule.

¶11 Nevertheless, neither Justice Annette Ziegler (the movant to dismiss the Petition), nor Justice Michael Gableman

⁴ Wis. Stat. § 757.85(1)(a).

(who seconded the motion to dismiss the Petition), nor any other justice even attempted to respond to my question asking how a "rule" is to be defined so that we can test the proposed Petition against the definition.

¶12 Definitions of the word "rule" exist and might be applied to the Petition. The Petition fits all these definitions.

¶13 One: Supreme Court Rule 98.01(2) defines "rule" for purposes of chapter 98, entitled "Adoption and Publication of Supreme Court Rules," as follows: "'Rule' means an SCR rule or a supreme court rule under section 751.12 of the statutes." Supreme Court Rule 98.01(3) defines SCR and SCR rules as follows: "'SCR' or 'SCR rule' means a supreme court rule not adopted under section 751.12 of the statutes and which is contained within SCR chapters 10 to 99." The Petition was proposed as an SCR rule to be placed within SCR chapter 60.

¶14 Two: "Rule petition" and "Rule" are defined in rule proposals dated November 28, 2012, January 23, 2013, and August 2, 2013, submitted by Justice Patience Roggensack amending Rule Petition 12-01.⁵ Rule Petitions 12-11 and 13-17

⁵ Rule proposals submitted by Justice Patience D. Roggensack are available at <http://www.wicourts.gov/scrules/1201.htm>.

fit into the definition of "rule" in Rule Petition 12-01 (in the original and as amended) without any difficulty.

¶15 Patience Roggensack's proposal defines "rule petition" as follows:

1.02(5) "Rule petition" consists of a petition to create, amend or repeal a rule, a supporting memorandum, and a cover sheet.

¶16 Patience Roggensack's proposal defines "rule" as follows:

1.02(4) "Rule" includes the following categories of rules promulgated by the supreme court:

(a) Rule relating to pleading, practice and procedure that does not affect a substantive right of parties.

(b) Rule relating to the administration of the courts.

(c) Rule relating to regulatory matters, including governance of the State Bar, admission to the State Bar, governance of lawyers, and governance of judges (emphasis added).

¶17 Rule Petitions 12-11 and 13-17 fit within this definition of "rule." The rule proposed in Petitions 12-11 and 13-17 relates to a regulatory matter, namely the governance of judges.

Rule Petition 12-01 was filed in the form of a report by the Wisconsin Supreme Court Advisory Committee on Rule Procedure. This committee, of which both Justice Patience Roggensack and I were members, reviewed and provided recommendations on the court's rule making process. Included in the report was a section defining various words and phrases. Justice Patience Roggensack filed her own proposals in response to Rule Petition 12-01 to amend some of the procedures proposed by the Advisory Committee; Justice Patience Roggensack accepted the substance of the definition of "rule" and "rule petition" in the Advisory Committee's report.

¶18 Three: The definition of "rule" adopted by the legislature for agency rules is informative. That definition is as follows:

Wis. Stat. § 227.01(13). "Rule" means a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" includes a modification of a rule

¶19 The Petition at issue easily fits into the legislative definition of a rule.

¶20 If these three definitions of "rule" (as well as common sense) are not convincing that the five justices are way off-base in their objections to the proposal as not being a proper subject for a rule, consider the following.

¶21 Numerous court committees have been created by a rule and appear in the Supreme Court Rules (SCRs). These committees were created at least since 1990 (and some earlier), including, for example, the Supreme Court Finance Committee (SCR 70.125); the Planning and Policy Advisory Committee (SCR 70.14); the Wisconsin Lawyers' Fund for Client Protection (SCR 12.04); the Public Interest Legal Services Fund Board (SCR 13.01-.02); the Access to Justice Commission (SCR ch. 14); the OLR Preliminary Review Committee (SCR 21.07); the OLR Board of Administrative Oversight (SCR 21.10); the Board of Bar Examiners (SCR chs. 30-31); the Judicial Education Committee (SCR ch. 32); the Municipal Judge Education Committee (SCR ch. 33); the Judicial

Conduct Advisory Committee (SCR ch. 60 Appendix); and the Security and Facilities Committee (SCR 68.05).

¶22 If the subject matter of the Petition at issue is not the proper subject of a rule, what is?

¶23 I turn now to the substantive merits of the Petition. This court has been discussing a revision of the Code of Judicial Conduct since before 2008. The court has observed developments in judicial conduct codes across the nation. Thirty-three states have now revised their judicial codes as a result of the ABA's revised code, and 12 states have established committees to review their judicial codes. Wisconsin is one of only five states that have not revised the Code of Judicial Conduct or established a committee to revise the code.⁶

¶24 After examining developments as of 2008, on June 25, 2008, at an open administrative conference, the court approved the creation of a committee to revise the Wisconsin Code of Judicial Conduct. In May 2009 the court approved a mission statement for a review committee⁷ and solicited persons interested in serving on such a committee.

⁶ See State Adoption of Revised Model Code of Judicial Conduct, American Bar Association Center for Professional Responsibility, available at http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html. This report lists Wisconsin as having established a committee to review the Code of Judicial Conduct.

⁷ The mission statement is as follows:

The mission of the Committee to Study the Code of Judicial Conduct is to conduct a comprehensive review of the Wisconsin Code of Judicial Conduct including examining the American Bar Association's 2007 Model

¶25 Following further discussion at an open conference on April 28, 2010, the court abruptly reversed course. A 4-3 majority of the justices voted not to proceed with such a committee.⁸

¶26 The cause of the change of course? Petitions for amending the Code of Judicial Conduct were being filed seeking new rules relating to recusal of justices and judges on the grounds of campaign financing.⁹

¶27 Effective July 7, 2010, over strenuous objection, these four justices adopted verbatim recusal rules proposed by the Wisconsin Realtors Association and Wisconsin Manufacturers and Commerce.¹⁰ Justice Ann Walsh Bradley wrote a dissent, joined by Justice N. Patrick Crooks and me.

Code of Judicial Conduct as revised, other proposals for changes to Wisconsin's code, and developing law and codes of other states, and if warranted, to make recommendations for modifications to the Wisconsin Code of Judicial Conduct.

⁸ Justices Prosser, Roggensack, Ziegler, and Gableman voted in favor of the motion not to proceed. Justices Ann Walsh Bradley N. Patrick Crooks, and I voted against the motion.

⁹ See Rule Petitions 08-16, 08-25, 09-10, and 09-11 on the Court's website at <http://www.wicourts.gov/scrules/petitionarchive.htm>.

¹⁰ The two recusal provisions adopted by the four justices read as follows:

SECTION 1. 60.04(7) of the Supreme Court Rules is created to read:

60.04(7) Effect of Campaign Contributions. A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful

¶28 The four justices' concern that a review of the Code of Judicial Conduct might entail a review of the campaign finance recusal rules is real. Wisconsin is notorious across the country for its judicial recusal rules. Several of these justices have been asked to recuse themselves because of campaign financing. The Center for Public Integrity gave Wisconsin a failing grade of "F" in Judicial Accountability.¹¹ The Center for American Progress gave Wisconsin an "F" grade on its recusal rules.¹² Other states have not fared well in these reports either.

campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.

SECTION 2. 60.04(8) of the Supreme Court Rules is created to read:

60.04(8) Effect of Independent Communications. A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication (collectively, an "independent communication") by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

¹¹ See Wisconsin gets D grade in 2015 State Integrity Investigation, Ctr. for Pub. Integrity, available at <http://www.publicintegrity.org/2015/11/09/18562/wisconsin-gets-d-grade-2015-state-integrity-investigation>.

¹² See State Judicial Ethics Rules Failed to Address Flood of Campaign Cash from Lawyers and Litigants, Ctr. For Am. Progress, available at <https://www.americanprogress.org/issues/civil-liberties/report/2014/05/07/89068/state-judicial-ethics-rules-fail-to-address-flood-of-campaign-cash-from-lawyers-and-litigants-2/>.

¶29 To illustrate the present concern in Wisconsin about the recusal rules and the State's reputation as a result of the recusal rules, a committee of reserve judges was being formed at the Wisconsin Judicial Conference¹³ in November 2015 to draft a rule petition to modify Wisconsin's recusal rules.

¶30 Dismissal of the Petition does not mean that the court cannot or will not create a committee to revise the Code of Judicial Conduct. Dismissal of the Petition does mean, however, that discussions and decisions about the formation and the work of any committee will be done by the justices behind closed doors. Although the justices implied that the topic would be placed on a closed conference agenda, no timeline was forthcoming.

¹³ SCR 70.15 provides in relevant part as follows:

(1) There is constituted the judicial conference of Wisconsin, which consists of the justices of the supreme court, the judges of the court of appeals, the judges of the circuit court, reserve judges, three municipal court judges designated by the Wisconsin municipal judges association, one circuit court commissioner designated by the family court commissioner association, one circuit court commissioner designated by the judicial court commissioner association, and one judicial representative of a non-Public law 280 tribal court and two judicial representatives of Public Law 280 tribal courts designated by the Wisconsin tribal judges association.

(2) The conference shall meet once each year in regular session and may call any special meeting.

¶31 The Code of Judicial Conduct is of great importance to the court, the judges, the bar of the state, and the public. I will try to keep the bench, the bar, and the public generally informed about what progress (or lack thereof) is made in the appointment of a committee or revisions to the Code of Judicial Conduct. I intend to seek, as much as I can, open discussion of the Code of Judicial Conduct.

¶32 For the reasons set forth, I dissent from the dismissal of the Petition.

¶33 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissent.

