
**In re Matter of the creation of Supreme Court
Rules 60.001, 60.002, and 60.003 relating to
a Judicial Code Review Committee**

**MEMORANDUM IN
SUPPORT OF PETITION
13-17**

This memorandum in support of petition 13-17 comes before the Wisconsin Supreme Court upon the petition of Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court to create supreme court rules relating to a committee to review the Wisconsin Code of Judicial Conduct, Supreme Court Rule Chapter 60, every ten years.

I am submitting a revised petition and memorandum to avoid any further unnecessary debate about or vote premised on whether my original petition 12-11 is in correct petition format. The revisions to the original memorandum of petition 12-11 are set forth below in italics.

Under petition 12-11 the Wisconsin Judicial Commission and Wisconsin Trial Judges Association filed comments in support of a comprehensive review of the Wisconsin Code of Judicial Conduct, Supreme Court Rule Chapter 60. Both comments are attached for reference in Appendix A.

A review of the Wisconsin Code of Judicial Conduct based on the substantive additions and revisions to the American Bar Association's (ABA) Model Code of Judicial Conduct that were adopted in February 2007 by the ABA's House of Delegates and thereafter is appropriate.

Following the ABA's adoption of a revised model code 2007, many states began the process of looking at that new model code and making decisions about whether it should be adopted and in what form. Twenty eight states (28) have completed a review process and approved a revised judicial code based the ABA's 2007 revision.

At the 2012 Judicial Conference and at judicial education seminars, Executive Director James C. Alexander had recommended a review of the Wisconsin Code of Judicial Conduct because much has changed since 1990. A review committee created by this court will be able to take advantage of the other states' studies of the model code and final reports and recommendations for judicial conduct rules. A review at this time would afford the committee and the court with the benefit of the deliberations and comments of dozens of states. In addition, the history of the ABA commission's proposals for 2007 model code and comments are readily available on the ABA's Web site.¹ We have in the past adopted and adapted the ABA Model Code because similarities in judicial conduct provisions across the country provide guidance to the Wisconsin Judicial Commission and this court with interpreting the rules. All of this information contributes significantly to the understanding and interpretation of the provisions in the code.

The American Bar Association has played an instrumental role in establishing appropriate standards for judicial conduct for over 80 years. In response to increasing public and professional concern about the behavior of judges, the ABA promulgated the Canons of Judicial Ethics in 1924 containing 36 provisions that were distributed nationwide for courts to use in adopting state standards. The canons were not originally intended as a basis for disciplinary actions but these basic ethical guidelines have gradually shifted from recommendations to mandatory standards governing judicial conduct. Many states have adopted them as substantive rules governing all aspects of judicial conduct. The ABA changed the canons to the Model Code format in 1972 and revised the Model Code in 1990. The ABA amended the model code on

¹ This site, http://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project.html, contains the archives of the work of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct from 2003-2007.

August 6, 1997, August 10, 1999, and August 12, 2003, and revised the code again in 2007 and 2010.²

This court has conducted reviews of the state judicial code previously. The Beilfuss-DeWitt Committee conducted a comprehensive review of the code. The Fairchild Commission reviewed code provisions governing political and campaign activity of judges and candidates for judicial office. A brief history of their work is set forth below.

Beilfuss-DeWitt Committee: On July 1, 1996, this court repealed and recreated Supreme Rule Chapter 60 and adopted provisions of the ABA's 1990 Model Code.³ The revised Wisconsin Code of Judicial Ethics was culmination of work commenced in 1985 when the court created the Code of Judicial Ethics Review Committee. Retired Chief Justice Bruce F. Beilfuss chaired the committee charged with reviewing the Wisconsin code and making recommendations for its revision. The review committee, chaired by Attorney Jack DeWitt following the death of Justice Beilfuss, filed its report and recommendations May 11, 1987. Then the committee and court learned that the American Bar Association, whose 1972 Code of Judicial Conduct had served as the basis for the review committee's recommendations, was conducting a study of the model code. Consequently, the court withheld further action on the review committee's report pending the outcome of the ABA study and directed the review committee to consider and make any revisions to its recommendations that might be necessitated by ABA action on the model code.

² The current model code is available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_mjc_final_for_website.authcheckdam.pdf.

³ Rule order 95-05, In the Matter of the Amendment of the Supreme Court Rules: SCR Chapter 60 -- Code of Judicial Ethics, July 1, 1996, available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=87583> (eff. Jan. 1, 1997). The court further amended the rules in an order issued on December 20, 1996. See Rule order 95-05 available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=1036>.

After the ABA adopted a revised Code of Judicial Conduct on August 7, 1990, the review committee filed a revised report on October 15, 1991, and the court held a public hearing on March 17, 1992. Upon consideration of the presentations made at that hearing and the material filed with the court, the court declined to adopt the proposed revision of the Code of Judicial Ethics.⁴

In 1995, in response to the petition of the Wisconsin Committee of Chief Judges, the court undertook a re-examination of the review committee's proposal. Following lengthy and intensive consideration and revisions to that proposal, the court determined that a revised Code of Judicial Conduct should be adopted for the guidance and regulation of the conduct of Wisconsin judges.

Fairchild Commission: On March 7, 1997, this court created the Commission on Judicial Elections and Ethics. Judge Thomas E. Fairchild, U.S. Court of Appeals for the Seventh Circuit, chaired the commission charged with reviewing the provision of the Wisconsin Code of Judicial Conduct addressing political and campaign activity of judges and candidates for judicial office. On June 4, 1999, the commission filed its final report. The commission's report proposed the retention or revision of specified provisions of the Wisconsin Code of Judicial Conduct. On October 29, 2004, the court amended the Wisconsin code.⁵

Proposal for Judicial Code Review Committee: This memorandum is filed in support of the rule petition to create a committee to review the Wisconsin Code of Judicial Conduct,

⁴ In the Matter of Review of the Code of Judicial Ethics, SCR Chapter 60, 169 Wis.2d xv (June 24, 1992) ("The court has decided to retain the Code of Judicial Ethics as currently set forth in chapter 60 of the Supreme Court Rules.")

⁵ Rule petition order 00-07, In the matter of the Amendment of Supreme Court Rules: SCR Chapter 60, Code of Judicial Conduct – Campaigns, Elections, Political Activity, Oct. 29, 2004 (eff. Jan. 1, 2005), available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=939>. See Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010), cert. denied, 131 S. Ct. 2872 (2011).

Supreme Court Rule 60. The petition sets forth the proposed charge of and guidelines for a committee to conduct a review of the Wisconsin Code of Judicial Conduct.

The proposed membership of the Judicial Code Review Committee represents a diverse group from the legal profession, *judiciary*, business, academic institutions, and community organization active in governmental affairs. The committee will be supported by reporters to assist with meetings, research, compilation of information, and drafting of any proposed revisions to the code. Dean Joseph Kearney of the Marquette Law School and Dean Margaret Raymond of the University of Wisconsin Law School have expressed a willingness to assist in recruiting one or more faculty members to serve as a reporter. The committee's report and any recommendations for changes would be filed with this court within eighteen months of the committee's first meeting.

I am submitting this revised petition and memorandum to avoid any further unnecessary debate about or vote premised on whether my original petition 12-11 is in the proper format for being considered in an open rules conference. My original petition 12-11 was filed on December 27, 2012 and discussed by the supreme court at an open rules conference on April 12, 2013. At that conference Justice Patience D. Roggensack, Justice Annette K. Ziegler, and Justice Michael J. Gableman asserted petition 12-11 was not in the format of a rules petition and should not be considered at an open rules conference.⁶ Nevertheless, the supreme court directed Commissioner Julie Anne Rich to work with an intern over the summer to prepare a comparison of the Wisconsin Code of Judicial Conduct and the 2007 ABA Model Code of Judicial Conduct.

⁶ Justice Roggensack is reported as telling Wisconsin Public Radio reporter Gilman Halsted: "A rules petition is one that when granted, results in the creation of either a Supreme Court rule or a statutory rule. The petition will not. It's a little like putting a label on this and calling it a rules petition—putting stripes on a donkey and calling it a zebra." WPR News Release, April 15, 2013 at www.wpr.org (last looked at on May 28, 2013). See also Wisconsin Supreme Court Open Rules Conference (April 12, 2013, Part 2 of 2, 1:14:08-1:15:36), available at <http://www.wiseye.org/> under Video Archive, Supreme Court: Open Administrative Hearings and Meetings.

Commissioner Rich's work was discussed at an open rules conference on December 6, 2013. At this conference at least two justices asserted that the original rule petition 12-11 was not in the proper form. At this open rules conference four justices, Justice David T. Prosser, Justice Patience D. Roggensack, Justice Annette K. Ziegler, and Justice Michael J. Gableman voted against the motion to appoint a judicial review committee.

No Supreme Court Rule defines a rule or a rules petition or the format for a rules petition. The format of my original petition 12-11 is similar to other rule petitions considered by the court in open rules conference including Rule Petition 08-17, Petition for Creation of Access to Justice Commission and Rule Petition 12-01, Wisconsin Supreme Court Advisory Committee on Rule Procedures Report and Recommendations.⁷

Furthermore, the proposal of the Advisory Committee on Rule Procedures and Justice Roggensack's proposed amendment thereto (neither of which have been adopted by the court) have defined "rule" and "rule petition" as follows.

A "rule" is defined, Rule 1.02(4), as including the following categories of rules promulgated by the supreme court: rules relating to pleading, practice, and procedure; relating to the administration of the court; and relating to regulatory matters, including the governance of judges.

A "rule petition" is defined, Rule 1.02(5), as consisting of a "a petition to create, amend or repeal a rule, a supporting memorandum, and a cover sheet"⁸ and "when granted, results in the creation of either a supreme court rule or a statutory rule."

⁷ The original rule petitions 08-17 and 12-01 did not reference supreme court rule numbers. The court assigned a supreme court rule chapter to rule petition 08-17 in the final order.

⁸ Wisconsin Supreme Court Guidelines for Rules Submissions; Wisconsin Supreme Court Advisory Committee on Rule Procedures, Report and Recommendations: Supreme Court's Rule Making Function (May 2011).

My original petition 12-11 satisfies the definition of a rule and a rules petition. A supreme court rule number could have been assigned to my original rule petition once adopted. Nevertheless, I am submitting this revised petition and memorandum to avoid any further unnecessary debate about or vote premised on the form of the original petition 12-11. After all, the real point is that a proposal relating to the revision of the Wisconsin Code of Judicial Conduct should be considered in open, public conference. The public, lawyers and the judges of the state have a significant interest in this matter. Revision of the Wisconsin Code of Judicial Conduct should not be done behind closed doors, shutting out the public, lawyers, and the judges.

APPENDIX A

STATE OF WISCONSIN IN THE SUPREME COURT

**In re Matter of the creation of
A Judicial Code Review Committee**

The Wisconsin Trial Judges Association agrees that the time is ripe for a comprehensive review of the Wisconsin Code of Judicial Conduct. Further, that in the event the Wisconsin Supreme Court approves the creation of a Committee to engage in a review of the Wisconsin Code of Judicial Conduct, that the Wisconsin Trial Judge Association believes that it must include members of both the Trial Court and the Court of Appeals.

Dated this 15th day of February, 2013.

Hon. Mary M. Kuhnmuensch
President, Wisconsin Trial Judge Association
On behalf of our members

STATE OF WISCONSIN
JUDICIAL COMMISSION

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February 22, 2013

Diane Fremgen
Clerk of Supreme Court/Court of Appeals
110 East Main, Suite 215
P.O. Box 1688
Madison, WI 53701

Re: Rule Petition: 12-11 - In the Matter of the Creation of a
Judicial Code Review Committee

Dear Ms. Fremgen:

At its meeting on today's date, the Wisconsin Judicial Commission unanimously agreed to recommend a comprehensive review of the Wisconsin Code of Judicial Conduct, SCR Chapter 60.

Thank you.

Very truly yours,

James C. Alexander
Executive Director

JCA/lb