

# Memorandum

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STATE OF WISCONSIN  
SUPREME COURT



*DATE:* March 6, 2013  
*TO:* Diane M. Fremgen, Clerk of the Supreme Court  
*FROM:* Chief Justice Shirley S. Abrahamson  
*RE:* To be Filed in Rule Petition 12-01:  
  
Comments Filed on Justice Roggensack's  
**2010 Proposed Calendar** for Rules Petitions

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On **June 28, 2010**, the supreme court received four comments, which are attached to this memorandum, on Justice Patience Roggensack's **2010 proposed calendar and amendment**:

1. Wisconsin Judicial Council
2. Attorney Beth Ermatinger Hanan
3. Wisconsin REALTORS® Association
4. A. John Voelker, Director of State Courts

On **June 29, 2010**, the supreme court discussed Justice Roggensack's proposed amendment to the Wisconsin Supreme Court's Internal Operating Procedures for Rule Petitions in open administrative conference. The court did not adopt Justice Roggensack's proposed amendment. The court set up an Advisory Committee on Rule Procedures consisting of:

Chief Justice Shirley S. Abrahamson  
Wisconsin Supreme Court

Justice David T. Prosser, Jr.  
Wisconsin Supreme Court

Justice Patience Roggensack  
Wisconsin Supreme Court

Attorney Dean Dietrich  
Wausau

Attorney Beth Hanan  
Former Chair of Wisconsin Judicial Council, Milwaukee

Attorney Russ Whitesel  
Legislative Council (retired), Madison

Attorney Lisa Roys  
Public Affairs Director, State Bar of Wisconsin

Attorney Adam Korbitz  
Former Government Relations Coordinator, State Bar of Wisconsin



## STATE OF WISCONSIN JUDICIAL COUNCIL

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Suite 822, Tenney Building, 110 East Main Street, Madison, WI 53703-3328 (608) 261-8290

SENT BY ELECTRONIC MAIL

June 28, 2010

Clerk of the Supreme Court  
Carrie Janto, Deputy Clerk  
110 East Main Street  
Suite 215  
Madison, Wisconsin 53703

**Re: In the Matter of Amendments to Wisconsin Supreme Court Internal  
Operating Procedures II.B.5, III.A. and III.B.5**

Dear Ms. Janto:

The pending petition to amend the Court operating procedures regarding rules petitions may affect the work of the Wisconsin Judicial Council, and therefore is of interest to the 21 volunteer members of the Judicial Council. As of this time, the Council has not discussed the original petition in detail or decided whether to take a position on any of the changes proposed therein. The Council has not seen the amended petition posted on today's date. As of this time, the Council simply wishes to describe its role in the development and amendment of Wisconsin's rules of pleading, practice and procedure in civil and criminal actions, as an aid to the Court's consideration of the pending petition.

The Wisconsin Judicial Council is charged with identifying and recommending changes which will simplify procedure and promote a speedy determination of litigation upon its merits. Wis. Stat. 5 758.13 (2)(a). The Council also recommends changes in organization, operation and methods of conducting the business of the courts that will improve the efficiency and effectiveness of the court system and result in cost savings. Wis. Stat. § 758.13(2)(g). The Council is an independent judicial branch agency with 21 designated members, including circuit court judges, a court of appeals judge and a supreme court justice. Justices have served on the Council for varying lengths of time, and in that service have offered valuable insight to matters considered by the Council, though they each have maintained a practice of abstaining from voting on matters that may come before the

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Carrie Janto, Deputy Clerk  
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Court. The Council's deliberations and ultimate work product likewise benefit from the array of perspectives and legal experience of its other elected and appointed volunteer members from the public and private sectors.

While all of the Council's work affects the business of the courts, the Council primarily produces two types of work product: legislative proposals and court rules petitions. In the past decade the Council has received requests to develop or amend procedural rules from judges, legislators, practicing lawyers, citizens, and professors. A list of Council petitions submitted to the Court over the past 10 years is attached, but note that the number of requests the Council received in that time exceeds the number of petitions ultimately submitted. A list of draft legislation submitted by the Council is also attached.

To do its work, the full Council meets once a month, between September and June. Much of the substantive work of the Council is done by committees, which meet separately and usually once each month. After a committee has reviewed and formulated a rules proposal or legislative draft, a process which can take several years depending on the extent of the changes proposed, the proposal is discussed by the full Council. The full Council decides whether to submit the proposal to the appropriate deliberative body. Occasionally, the Council decides to accept and study rules proposals as a committee of the whole.

The Council has authority to issue subpoenas and to hold hearings, *see* Wis. Stat. § 758.13(3)(c), but the Council has not exercised that authority in at least the last 10 years. Indeed, the limited budget of the Council renders extensive hearings in any budget cycle prohibitive. The Council is very mindful of soliciting stakeholder input, however, and thus keeps interested groups advised of its progress in developing rules proposals and draft legislation. Often practitioners with particular expertise serve as ad hoc members of Council committees.

In 2008 the legislature and Governor restored the Council's budget, allowing it to hire one paid staff attorney. With the critical assistance of its staff attorney, the Council has been able to increase the number of rules petitions on which it works and submits to this Court. At the same time that Council members work on proposed rule changes, however, Council members also are working on proposed legislation. A current, long-term effort to revise portions of the criminal procedure code is one example of the legislative study and drafting done by the Council. On occasion Council members may serve on legislative study committees, and Council members and staff also volunteer to submit articles and present educational programs to bar groups regarding the current work of the Council.

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On behalf of the Council, we look forward to assisting the Court with its regulatory functions as 758.13, Wis. Stat., permits, and pursuant to any internal operating rules the Court or the Council may develop.

Sincerely,



Beth Ermatinger anan, Chair  
Wisconsin Judicial Council

cc Ms. Theresa Owens (by Electronic Mail)

Attachments:

- List of rules petitions submitted by the Judicial Council in last 10 years
- List of draft legislation submitted by the Judicial Council in last 10 years
- List of WJC pending projects
- WJC current roster

## **2009-2010 Wisconsin Judicial Council & Committee Project Summary**

### **Judicial Council**

- Drafted and filed supreme court rule change petition no. 09-12, amending Wisc. Stat. § 904.085 (4) (e) to require an in camera hearing to protect potentially confidential mediation communications from being revealed in open court prior to a ruling on admissibility. The petition was approved by the court on April 27, 2010 with no amendment.
- Monitor and discuss the collaborative work between the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers, including efforts to identify perceived problems of cost and delay in the U.S. civil justice system and implement pilot projects to aid in developing possible solutions.
- Monitor and discuss the issue of compensation of court-appointed attorneys under SCR 81.
- Study and make recommendations regarding possible revisions to the Wisconsin Rules of Evidence. See Evidence & Civil Procedure summary, below, for details.

### **Appellate Procedure Committee**

- Completed its recommendations for legislative amendments to the statutes regarding presentence investigation reports. This has been a huge undertaking over the past eight years, and involved collaborative work with two different advisory committees, as well as consultations with many different stakeholders, including the Department of Justice, the Department of Corrections and the District Attorneys Association, to name a few. Committee members will continue to work through the summer to draft a detailed memorandum to present the committee's recommendations to the full Council in September.
- Commencing a new project to study and make a recommendation regarding the need for procedural rules governing ghostwriting of legal documents.

### **Criminal Procedure Committee**

- Workgroup completed a review of the draft bills received from the Legislative Reference Bureau regarding amendments to the Criminal Procedure Code, Wis. Stats. Chapters 967-975. (Members of the workgroup included Prof. Schultz, Marla Stephens and Rebecca St. John.) The workgroup prepared additional revisions and responded to all questions received from the LRB drafters. The Committee is now awaiting the final draft bill from the LRB, and will present it to the full Council upon receipt.
- Commencing a new project to study and make recommendations concerning substitution of judges in termination of parental rights cases.

### **Evidence & Civil Procedure Committee**

- Completed recommendations concerning calculation of time for appeals and requests for new trials in small claims cases. The recommendation was approved by the full Council. Attorney Southwick will draft a supreme court rule change petition over the summer for Council review, approval and filing in the fall.
- Completed a draft amendment to the discovery rules to address the discovery of electronically stored information, which was approved by the Council. The Council submitted supreme court rule change petition no. 09-01 and an amended petition. The amended petition was approved on April 28<sup>th</sup> with one minor amendment by the court.
- Continues to study and make recommendations regarding possible revisions to the Wisconsin Rules of Evidence. The Committee has completed its review of the Deadman's Statute (Wis. Stat. § 885.16), the addition of a Bias Rule, the Rule of Completeness (Wis. Stat. § 901.07), the Rule Regarding Statements of Injured Persons (Wis. Stat. § 904.12), and use of "Other Acts" Evidence (Wis. Stat. § 904.04). The Committee's recommendations regarding each rule were then forwarded to the full Council for further discussion and a final recommendation.

The Committee is currently studying the rules regarding a Witnesses' Character for Truthfulness (Wis. Stat. § 906.08) and Authentication of Records of Regularly Conducted Activity (Wis. Stat. § 908.03).

The Committee will also study and make recommendations regarding the following:

- Wis. Stat. § 906.09, impeachment by prior criminal conviction;
- Wis. Stat. § 907.03 or § 907.05, the disclosure of an expert witness's inadmissible bases;
- Wis. Stat. § 908.01, the definition of hearsay;
- Wis. Stat. § 908.045 (2), the hearsay exception for statements of recent perception;
- Spoliation of evidence; and  
Federal Rule of Evidence 502.

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<b>Bill No.</b>	<b>Introduction</b>	<b>Subject</b>	<b>Action</b>
2001 SB 90	March 7, 2002	1) make ch. 980 (Sexual predator commitment) and s. 971.17 (Not guilty by reason of mental disease or defect commitment) cases subject to the rules of appellate procedure set forth in s. 809.30-.32, 2) allow suppression issues in ch. 48 and 938 cases to be appealed without requiring the parties to go to trial to preserve those issues, and 3) allow the time limit for filing a petition for review in the supreme court to be tolled while a timely motion for reconsideration is pending in the court of appeals.	Referred to committee; died when the legislature adjourned on March 12, 2002.
2003 SB 364	February 17, 2004	1) make ch. 980 (Sexual predator commitment) and s. 971.17 (Not guilty by reason of mental disease or defect commitment) cases subject to the rules of appellate procedure set forth in s. 809.30-.32, 2) allow suppression issues in ch. 48 and 938 cases to be appealed without requiring the parties to go to trial to preserve those issues, and 3) allow the time limit for filing a petition for review in the supreme court to be tolled while a timely motion for reconsideration is pending in the court of appeals.	Hearing before the Senate Judiciary, Correction and Privacy Committee; Died in committee. Partially enacted by 2005 Act 434 (creating sec. 980.038 (4) to provide that appeals in Chapter 980 cases proceed under Rule 809.30).
2007 SB 418	January 25, 2008	Tolling time limit for filing petition for review in supreme court while motion for reconsideration is pending in court of appeals.	Died in committee March 21, 2008
2007 SB 419	January 25, 2008	Review of suppression rulings in ch. 938 juvenile appeals	Died in committee March 21, 2008
2007 SB 420	January 25, 2008	Appeal procedures in commitments of persons found not guilty by reason of mental disease or defect or commitments of sexually violent persons	Died in committee March 21, 2008
AB 122 (2009 WI Act 25)	March 4, 2009	Tolls the time limit for filing a petition for review in the supreme court while a timely motion for reconsideration is pending in the court of appeals.	Signed by Governor, June 19, 2009
AB 123 (2009 WI Act 26)	March 4, 2009	Specifies that appeals in Ch. 980 (sexually violent person commitment) and s. 971.17 (not guilty by reason of mental disease or defect commitment) proceedings are subject to the unified appeal procedures in Wis. Stat. ss. (Rules) 809.30 - .32.	Signed by Governor, June 19, 2009
AB 124 (2009 WI Act 27)	March 4, 2009	Allows suppression of evidence issues to be raised on appeal in Ch. 938 cases following an admission to a delinquency petition.	Signed by Governor, June 19, 2009

Petition No.	Date filed	Subject	Court Action	Order Date
None	5/22/91	Expert Witnesses, 907.03	Remanded to Council, Closed due to inaction by Council	9/25/00
00-02	??/??/00	Appellate Procedure	Granted	4/30/01
01-04	3/12/01	Partial Publication of Appellate Opinions	Substantially Denied	12/20/01
99-07	10/30/00 (amended)	Sanctions	Denied	1/29/02
02-01	??/??/02	Court Reporters	Granted	10/31/02
01-15	??/??/01	Stipulated Reversal or Vacatur	Granted in Part, Denied in Part	1/2/03
03-03	4/2/03	Appt. of Guardian Ad Litem	Granted	1/8/04
03-02	2/12/03	Discy in CHIPS cases	Withdrawn by Judicial Council	6/11/04
04-08	9/30/04	Petitions for Review	Granted in Part, Denied in Part	7/30/08
105-06	6/15/05 6/12/06 (amended)	Depos. Outside the State	Granted	4/29/08
05-07	6/22/05	Appeals in TPR Cases	Granted w/ amendments	5/1/06
08-02	1/25/08	Citation to Unpublished Opinions	Granted w/ modifications	1/6/09
09-01	4/23/08 3/19/10 (amended)	E-Discovery	Granted w/ modification	4/27/10 (Order Pending)
09-12	10/29/09	Confidential Mediation Communications	Granted	4/29/10

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**SENT BY ELECTRONIC MAIL**

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June 28, 2010

Clerk of the Supreme Court  
Carrie Janto, Deputy Clerk  
110 East Main Street  
Suite 215  
P.O. Box 1688  
Madison, Wisconsin 53703

Re: In the Matter of Amendments to Wisconsin Supreme Court Internal  
Operating Procedures II.B.5, III.A. and III.B.5

Dear Ms. Janto:

I write concerning the first item on the Supreme Court's administrative conference schedule for tomorrow, Tuesday, June 29, 2010. The petition to revise the Court's internal operating procedures as to how the Court considers regulatory matters is of interest to me as a member of the bar, as an appellate and trial lawyer, and as someone with experience in developing and presenting rules petitions to the Court.

On my own behalf, I ask that the original petition and the amended petition posted on the Court's website this morning be considered by the Court at a public hearing, with time allowed in advance for members of the bar and the public to submit written comments. While the IOP itself is internal, if changed as proposed it will have broad effect externally.


Several aspects of the proposal concern me, including the condensed timing for submission of petitions, and time for comment and reply. I know from my personal involvement with the Wisconsin Judicial Council that the opportunity to reply to comments on petitions submitted by the Council assists the Court, and that such replies take time. Important volunteer entities like the Wisconsin Judicial Council, as well as the State Bar of Wisconsin, meet at intervals, and have limited staff resources. Giving an entity or organization from May 1 to June 15 to thoughtfully reply to comments on its own petition, or to comment on a petition filed by others, when it may only meet once in that timeframe, risks short-changing the Court's own process.

Clerk of the Supreme Court  
Carrie Janto, Deputy Clerk  
June 28, 2010  
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As an individual lawyer, I have other concerns about the proposed changes to the Court's established procedure for handling its regulatory functions. I expect that many others affected by those regulations, or who are responsible for the entities which propose such changes, similarly would like a meaningful chance to assist the Court and comment on the proposals.

Thank you for conveying this request to the Court.

Sincerely,

A handwritten signature in black ink, appearing to read "Beth Ermatinger Hanan", with a long horizontal line extending to the right.

Beth Ermatinger Hanan

BEH/js



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June 28, 2010

## HAND-DELIVERED

David Schanker, Clerk of Court  
Supreme Court of Wisconsin  
110 East Main Street, Suite 215  
Madison, WI 53701-1668

*In the Matter of Amendments to Wisconsin Supreme Court's Internal  
Operating Procedures*

Dear Members of the Court:

On behalf of its nearly 15,000 members, the Wisconsin REALTORS® Association (WRA) writes to comment briefly on the revised proposal, filed earlier today, to amend sections of the Supreme Court's Internal Operating Procedures related to petitions submitted to the Court to modify or create new rules. The Court plans to discuss this proposal at its June 29 administrative conference.

One purpose of the proposal, no doubt, is the important need to conserve the Court's resources and, in that regard, to ensure that petitions are properly framed and prepared. (They have not always been.) The proposed procedural changes would allow the Court to spend the time necessary on more complex or significant rule petitions while giving the Court's commissioners a potentially larger role in petitions that do not demand the same level of attention from the Court. As the Court knows, WRA has first-hand experience in the petition process—both as a petitioner and as a respondent. In addition, WRA has worked with the Court's commissioners and has always found their skill, professionalism, and organization impressive and very helpful.

While WRA is not opposed to the proposal, it has two concerns sufficiently significant to warrant comment. First, no organization wants to lose the ability to have the Court itself preside over a public hearing on a rule petition with which it is involved. A public hearing before a commissioner may be appropriate in some cases, but it will not always be a substitute for a public hearing before the Court. To address this concern, WRA respectfully requests that the Court consider incorporating into any new rule a provision preserving the ability to appear before the full Court. For example, the Court could add a provision after proposed rule 6 that allows the party filing a rule petition to request a hearing for cause shown and that the hearing be held before the Court. That language could read:

David Schanker, Clerk of Court  
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7. Also by June 15 at 5:00 p.m., the petitioner may file a request with the court that it refer the rule petition to the judicial council, or schedule a public hearing on the rule petition before a court commissioner or before the full court. The court will take the request into account in its deliberation at the rules conference (see *infra* paragraph 10)<sup>1</sup> and, for cause shown, itself preside over a public hearing on the rule petition.

Second, the Court may consider incorporating a provision that allows flexibility to deviate from the deadlines included in the proposal. The strict January 10 deadline may create the undesired effect of discouraging parties from filing a petition due to a deadline missed for reasons beyond the control of the party. Such language could be included in proposed rule 1.

The petition process takes an extraordinary amount of the Court's time. Yet, whether the subject is the definition of the practice of law or changes to the Code of Judicial Conduct, the rules themselves can affect much of the state's population and in ways that cases and appellate decisions do not. In the same vein, the Court's petition hearings—where virtually anyone can appear—and its open conferences give the public access, insight, and confidence in the judicial system. WRA certainly supports rule changes streamlining the process and conserving the Court's resources, but we urge careful consideration of any change that would narrow either the access or openness that are hallmarks of the petition process today.

As always, WRA appreciates the opportunity to comment and is available to answer any questions the Court may have or provide any additional information the Court may request.

GODFREY & KAHN, S.C.

  
Hannah L. Renfro

cc: Theresa Owens (via e-mail)

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<sup>1</sup> Should the Court incorporate a new paragraph into the proposal, the paragraph currently numbered 9 would be 10.

# Memorandum

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STATE OF WISCONSIN  
DIRECTOR OF STATE COURTS



*DATE:* June 28, 2010  
*TO:* Supreme Court Justices  
*FROM:* A. John Voelker  
*SUBJECT:* Rules petitions process amendments

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On behalf of the Director of State Courts Office, I would like to offer the court some observations on the proposed "Amendments to Wisconsin Supreme Court Internal Operating Procedures on Rule Petitions". I make these observations from the perspective of the various court offices and court committees that routinely submit rules petitions to the court. These issues, raised by staff, deal primarily with the details of the proposed changes and may or may not be significant from the Court's point of view.

The procedure sets a long lead time for comments and responses, but does not set the time by which the court commissioner or the full court must make a decision on a petition. Assuming the court intends to address most petitions by the end of the term following the hearing, the time frame for even routine petitions will run 18 months from submission to effective date, and anything decided after April 30 will run two years due to publication requirements.

Many rules petitions are brought in response to new statutes, changes in appellate case law, or other changing conditions. Setting a single window for submission, and then building in an extended decision period, may hamper the ability of court administration to respond as quickly as it needs to. "Emergency" petitions could become the rule rather than the exception.

The petition leaves unanswered a variety of questions about the role of the commissioner you may also want to consider. What are the criteria for referring a petition to the commissioner rather than to the court? May the petitioner object to the commissioner as an appropriate hearing officer? How long does the commissioner have to make a decision? Is it a final decision, subject to appeal, or is it a recommendation to the court? What input will the petitioner and other interested persons have after the commissioner makes a decision?

The procedure may also want to address the intended effect on petitions that have already been filed.

As you know, petitions have been submitted over the last few years by the Committee of Chief Judges, the Planning and Policy Advisory Committee, the CCAP Steering Committee, the WCCA Oversight Committee, the Records Management Committee, the Committee to Improve Court Interpreting, the Board of Bar Examiners, and the Office of Lawyer Regulation. I have not had a chance to solicit comments from these groups about the proposed process. If you would like me to solicit comments from these groups, let me know.