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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. 12-04

In the matter of Amendments to Wisconsin Supreme Court Internal Operating Procedures II.A. and III.B.

FILED

MAY 4, 2012

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

The Supreme Court, on its own motion, has considered the advisability of amending its Internal Operating Procedures. This matter came before the court on Justice Patience Roggensack's proposal to amend the Wisconsin Supreme Court's Internal Operating Procedures regarding the court's open administrative conferences.

The court considered this matter at an open administrative conference held on Monday, February 27, 2012. The court adopted the proposed amendments on a 4-3 vote. Chief Justice Abrahamson, Justice Bradley, and Justice Crooks dissented.

IT IS ORDERED that effective the date of this order:

SECTION 1. Supreme Court Internal Operating Procedure II.A. is amended to read:

A. Court Schedule

Subject to modification as needed, in the spring of each year the court sets a schedule for its decisional process for each month from September through June. During each month the chief justice may schedule oral arguments, decision conferences, and administrative conferences on the agreed-upon calendar. Any changes in court dates need unanimous approval.

~~Administrative matters~~ Filed rules petitions are discussed at open conference as they ~~arise~~ may require. No matter, except filed rules petitions, shall be on the agenda for or discussed in open administrative conference unless a majority of the court gives prior approval in closed conference or by email for the placement of that matter on the open conference agenda.

SECTION 2. Supreme Court Internal Operating Procedure III.B. (intro.) is amended to read:

~~Subject to par. g, after the~~ After a public hearing is held the court meets in open conference in the Supreme Court Hearing Room to discuss the merits of and act on the rules petition. The court also holds open conference on other administrative matters if a majority of the court has given prior approval in closed conference or by email for the placement of such administrative matter on the open

conference agenda. The following provisions apply to the open conference on rules petitions:

SECTION 3. Supreme Court Internal Operating Procedure III.B.1. is amended to read:

1. *Notice.* The court gives notice prior to the conference as promptly and as widely circulated as feasible. Written notice of the conference is mailed to persons who appeared at the public hearing, filed material with the court in the matter or made a written request to the clerk of the court for notice of conference. If the court schedules the conference to be held immediately following the public hearing, notice of the conference is given in the order setting the rules petition for public hearing.

SECTION 4. Supreme Court Internal Operating Procedure III.B.6. is amended to read:

6. *Adjournment.* If the court does not complete discussion of the rules petition at the conference, it adjourns the conference to a specified date or a date to be determined. If not adjourned to a specific date, notice of an adjourned conference is given pursuant to par. B.1.

SECTION 5. Supreme Court Internal Operating Procedure III.B.7.a. and b. are amended to read:

a. An open conference is not held when it appears that only non-substantive aspects of the rules petition will be discussed.

b. Upon vote of the majority in open court, the court may discuss and act on the rules petition in conference closed to the public.

SECTION 6. Supreme Court Internal Operating Procedure III.B.7.c. is repealed.

IT IS FURTHER ORDERED that notice of these amendments of the Wisconsin Supreme Court Internal Operating Procedures be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 4th day of May, 2012.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, C.J. *(dissenting).* Today, Justices Prosser, Roggensack, Ziegler, and Gableman join to adopt Justice Roggensack's proposal to move open

administrative conferences behind closed doors. As a result, the public is shut out from the public's business.

¶2 In 1999 the Wisconsin Supreme Court, the first in the country, proudly opened its deliberative conferences on administrative matters to the public.[1] We acted in recognition that the Wisconsin Constitution requires the Wisconsin Supreme Court to do more than decide cases. This Court has the constitutional responsibility and authority to administer the entire judicial system of the state.[2]

¶3 Administrative conferences should be open to the public, as Justice Crooks explained, because administrative decisions "have a profound effect on the citizens of Wisconsin and their court system" and "citizens should have the ability to see just how and why those decisions are made."[3]

¶4 You may ask, as Justice Bradley repeatedly asked during the court's open public discussion of Justice Roggensack's proposal: "What is the public policy, what is

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[1] In 1995 the court opened its deliberations on rules petitions to the public. We believe we were the first in the country.

[2] Wis. Const. Art. VII, sec. 3(1): "The supreme court shall have superintending and administrative authority over all courts."

[3] See Justice Crooks and Justice Bablitch, April 4, 1999, proposal to open administrative conferences. The proposal was adopted. The full release of their proposal is attached hereto.

a good public policy reason, to exclude the public from this process?"[4] Why shut out the public?

¶5 Justices Roggensack, Ziegler, and Gableman each gave a different justification for closing administrative conferences. When Justice Gableman asked Justice Prosser for his opinion on the matter, Justice Prosser replied: "I think it would be better if I did not speak." He spoke no more. He cast his vote in favor of the proposal.

(1) Justice Roggensack claims that closed administrative conferences will help the court release opinions more promptly;

(2) Justice Gableman claims that Wisconsin is an outlier; that other states do not have open administrative conferences; and that we should follow their practice; and

(3) Justice Ziegler claims that the court's image is tarnished when the public can witness the court's discussions.

¶6 All three claims are wrong-headed and totally unsubstantiated. Justice Crooks characterized the closing of administrative conferences as "tragic."

[4] A video of the court's open administrative conference at which the court discussed and voted on Justice Roggensack's proposal is available at www.wiseye.org. The video is part 1 of 3 of the court's February 27, 2012 Open Administrative Conference, available at www.wiseye.org in the "video archive" under "Supreme Court: Open Administrative Hearings and Meetings."

¶7 (1) The Claim: Closed Administrative Conferences Promote Prompt Publication of Opinions. This claim challenges logic and is disproved by court statistics.

¶8 Obviously, administrative matters, and the court's responsibility to discuss and decide them, will not disappear if these matters are not discussed in open public conference. As a result of Justice Roggensack's proposal, administrative matters will simply be discussed in a different forum, in secret rather than in public.

¶9 Moreover, each proposed administrative matter may be subject to court discussion (and a vote) regarding whether it should be placed on the agenda for an open, public conference. Thus, administrative matters may take more time, rather than less time, when discussed in closed conference.

¶10 Furthermore, statistics from the last 13 years disprove this claim. The statistics demonstrate that the court is doing less work (authoring fewer opinions) and taking a longer time to get its work done, despite spending less time on administrative matters.[5]

¶11 During the 1999-2000 term (August 1, 1999 - July 31, 2000), the court held 19 open administrative

[5] The number of opinions is the number of authored opinions, not per curiams such as those issued in judicial and lawyer discipline cases, which are typically drafted by court commissioners. Consolidated or companion cases in which one authored opinion was released for multiple cases were counted as one opinion.

conferences. It issued 81 opinions and only 26 percent (21 opinions) were published after June 30, in the last month of the term.

¶12 During the 2000-01 term, the court held 17 open administrative conferences. It issued 89 opinions and 35 percent (31 opinions) were published after June 30.

¶13 A comparison of these two terms to the court's last two terms is striking.

¶14 During the 2009-10 term, the court held fewer open administrative conferences (14). It also issued fewer opinions (58). Yet, 59 percent of those opinions (34 opinions) were published after June 30.

¶15 Similarly, during the 2010-11 term, the court held even fewer open administrative conferences (12). It issued fewer opinions (57). Yet, 44 percent of those opinions (25 opinions) were published after June 30.

¶16 The statistics demonstrate that the number of open administrative conferences has nothing to do with the number of cases the court hears and decides or the court's ability to publish its authored opinions promptly.

¶17 Given the lack of a logical explanation for how discussing administrative matters in open, public conference delays our opinions, the data are unsurprising.[6]

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[6] A chart displaying the number of opinions issued, the number of open conferences, and the number of opinions released after June 30 for each term from 1999-2000 through 2010-11 is attached to this opinion.

¶18 The way to get our opinions issued more quickly is simple. The justice to whom the opinion is assigned needs to circulate a draft opinion to the court promptly after oral argument and then circulate requested changes promptly, as well as dissenting and concurring opinions.[7] It is ironic that often some justices who speak most forcefully for more prompt issuance of opinions are the very justices who are slow in circulating their writings.

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[7] Justice Roggensack released information at the public hearing about how many months elapsed between the circulation of certain draft opinions and the publication of those opinions. Justice Roggensack reported: "To give you an example of some of the things that occurred in the 2009-10 term, a case, Ehlinger, was held for 8.5 months after it was circulated. E-L Enterprises was held for 7 months after it was circulated. Carter was held for 7 months after it was circulated. And many other cases were held for 6, 5, 4 months." Justice Roggensack gave information about other cases also.

I was surprised by these statements (which I have not checked for accuracy) because this information about dates of circulation of draft opinions, dates of re-circulations of corrected drafts, and dates of declaration and circulation of concurrences and dissents (and revisions thereof), all of which occur between circulation and release of opinions, has been considered confidential internal information regarding closed opinion conferences. Believing this kind of information was confidential, I requested the court (at open administrative conference) to release this information after the end of each term. I could not get four votes to agree to this practice.

I now assume that my view about confidentiality is incorrect. Releasing information about how long it takes each justice to circulate draft opinions after opinions are assigned and the revisions thereto would help the public understand the workings of this court.

¶19 I have consistently and frequently advocated, both in closed conferences and on agendas for open public conferences, the need to abide by the existing deadlines for circulating opinions, to shorten the deadlines we now have, and to impose deadlines for circulating draft writings regarding rules petitions and disciplinary matters. I shall continue to keep trying to accomplish these goals for the people of the state.

¶20 (2) The Claim: Wisconsin is an Outlier in Holding Open Administrative Conferences. Another claim, particularly advanced by Justice Gableman, is that "in the 13 years, the nearly 13 years that this court has been doing it, no court in the United States, no court in this country has seen it wise to emulate our practice."

¶21 So what? "Everybody else is not doing it" is simply not a reason, by itself, to discontinue a practice. Wisconsin is the only state in the country to offer a diploma privilege (instead of a bar examination) to graduates of its two in-state law schools. Nebraska is the only state with a unicameral legislature. Should Wisconsin or Nebraska abandon its unique practice simply because no other states "emulate our practice?" Given the opportunity recently, this Court refused to strike down the diploma privilege.

¶22 A 50-state survey is not necessary, but according to the National Center for State Courts, Wisconsin was not

the outlier Justice Gableman claimed it was.[8] Indeed, the Supreme Court of Montana has had open administrative conferences since about 2003.

¶23 In any event, the soundness of this court's practice to hold open administrative conferences does not hinge on the practices of other state courts. Open administrative conferences are the right thing to do, in keeping with Wisconsin's long-standing, proud tradition of open government.

¶24 (3) The Claim: The Court's Image Suffers as a Result of Open Conferences. A final argument in favor of closing administrative conferences, advanced by Justice Ziegler without any evidence in support, is that "we do harm to ourselves as an institution" by conducting administrative conferences in public. This is the first time any such charge has been voiced in the 13 years of open administrative conferences.

¶25 No doubt some of our public discussions are more productive than others, and some of our public discussions are more respectful and more collegial than others.

¶26 Shutting out the public is not a solution to the court's problems of inappropriate conduct or poor image. In fact, open conferences give the court a valuable

[8] See Jason Stein & Bruce Vielmetti, Wisconsin Supreme Court Votes To Close More Discussions to Public, Feb. 27, 2012, available at http://m.jsonline.com/140648093.htm.

opportunity to demonstrate its ability to perform its work properly.

¶27 If the justices struggle with being respectful and collegial in public, why should we, or the public, expect our behavior to be better behind closed doors? I am more inclined to believe that a watchful public eye provides an incentive to justices to act respectfully and in a collegial fashion.

¶28 The way to stop harming the court as an institution is for justices to behave appropriately in public and in private.

* * * *

¶29 In 1999, the justices of this court proudly adopted the proposal of Justices Crooks and Bablitch to open our administrative conferences to the public. We did so because we realized it was a mistake to make decisions that have a "profound effect on the citizens of Wisconsin and their court system" behind closed doors. I continue to believe, as the court believed in 1999, that "the citizens should have the ability to see just how and why those decisions are made."

¶30 Justices Prosser, Roggensack, Ziegler, and Gableman have failed to advance any legitimate, logical, or persuasive reason for excluding the public from the court's administrative conferences. Nevertheless, by the vote of four justices, the more than five million people of this

state who pay the justices' salaries and the costs of the judicial system are shut out.

¶31 No good comes from secrecy in governmental affairs. Sunshine is the best disinfectant. I shall continue to work for openness and accountability in the court's work.

¶32 For the reasons set forth, I dissent.

¶33 I am authorized to state that Justices ANN WALSH BRADLEY and N. PATRICK CROOKS join this dissent.

At our conference on April 20, 1999, we will propose that all administrative conferences be open. Closed conferences on matters such as personnel can be closed only upon majority vote of the justices. We will further propose that all items on the administrative agenda be noticed 7 days in advance of the conference.

If we open our administrative conferences, we believe we will be the first court in the country to do so.

Administrative decisions, some significant, some insignificant, can have profound effect on the citizens of Wisconsin and their court system. We believe the citizens should have the ability to see just how and why those decisions are made.

administer the entire court system. The justices, meeting in conference, spend approximately one or two days a month, sometimes more, on this duty. It is a duty carried out mostly hidden from public view. We want to change that.

To be sure, some of our administrative conferences are held in the open. A few years ago, the Wisconsin Supreme Court in an unprecedented move, opened up its conferences when debating proposed administrative rules.

But rule conferences are just the tip of the iceberg. We do far more in our administrative capacity than debate supreme court rules.

Routinely, our director of state courts, J. Denis Moran, comes to our conferences and spends time discussing with us everything from the location of the new state law library to budgetary concerns to new programs being instituted in the court system.

In the past year and one-half, we spent literally hundreds of cumulative hours debating issues dealing with our lawyer disciplinary system. We debated, and eventually passed, changes in that system that we believed would better improve how we regulate the lawyers of this state.

We also spent days internally debating, and eventually passing, proposed internal administrative procedures.

We did it all behind closed doors. In retrospect, that was a mistake.

It is time to change that.

1999 Term – Present
Number of Opinions Issued, Open Conferences &
Percentage of Opinions Released after 6/30 Each Term

Term	Opinions Issued	No. of Open Conferences	Opinions released after 6/30
1999-2000	81	19	21 (26%)
2000-2001	89	17	31 (35%)
2001-2002	83	14	25 (30%)
2002-2003	88	10	37 (42%)
2003-2004	83	9	21 (25%)
2004-2005 (first term with 5/31 deadline)	92	8	29 (32%)
2005-2006	79	11	23 (29%)
2006-2007	62	6	24 (39%)
2007-2008	65	15	24 (37%)
2008-2009	57	13	23 (40%)
2009-2010	58	14	34 (59%)
2010-2011	57	12	25 (44%)