

**In the matter 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**

**MEMORANDUM  
IN SUPPORT OF  
PETITION  
12-**

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This proposal for rule amendments comes before the Wisconsin Supreme Court upon the petition of the Publication Review Committee. Members of the committee are Chief Staff Attorney Jennifer Andrews, Wisconsin Court of Appeals; Supreme Court and Court of Appeals Clerk Diane M. Fremgen; Ms. Susan Gray, Director of State Courts' Office, Wisconsin Supreme Court and Court of Appeals Chief Deputy Clerk Christopher Paulsen; Supreme Court Commissioner Julie Anne Rich; Ms. Sherie Sasso, Judicial Assistant to Justice Ann Walsh Bradley; Attorney Todd G. Smith, Godfrey & Kahn; and Theresa Owens, Executive Assistant to the Chief Justice. Chief Justice Shirley S. Abrahamson convened the committee in June 2012<sup>1</sup> to review rules and procedures regarding the publication of supreme court orders issued in cases and rule matters and submit its recommendations to the court in the form of a rule petition.

The Publication Review Committee proposes rules and amendments for the publication of case orders and rule orders. The committee proposes supreme court rules for Chapter 80 that set forth guidelines and publication criteria for orders issued in supreme court cases. The committee refers to these orders as "case orders." With regard to the publication of rule orders, the committee proposes changing the publications in which supreme court rule orders are made available. This petition and supporting memorandum are filed pursuant to the court's

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<sup>1</sup> Appointment letter attached to this supporting memorandum.

rulemaking and administrative authority pursuant to Article VII, § 3 of the Wisconsin Constitution.

**I. Committee's Review:**

The committee's proposal seeks to enhance access to the court's decision-making that is accomplished through court orders. The committee reviewed sources for publication of court decisions and rules and requirements relating to publication. The committee identified four sources in which supreme court opinions, orders or rules have been published:

1. official newspaper,
2. official publication designated under SCR 80.01 (Wisconsin Reports and North Western Reporter, hereinafter referred to as “official caselaw publications”),
3. State Bar of Wisconsin official publication (SCR 10.12 designates the Bar Bulletin or its successor as the official bar publication), and
4. Wisconsin Court System's web site, at [www.wicourts.gov](http://www.wicourts.gov).

Supreme court opinions, orders, and rules are not published in all four of these sources. Supreme court opinions are published in the official caselaw publications designated in SCR 80.01. The opinions are also available on the official publishers' online databases and the court system's web site. Under Supreme Court Rule 98.07 supreme court rules adopting, amending or repealing a rule, statute, or policy are published in the official state newspaper and in the official publication of the state bar of Wisconsin. Such orders have also been published in the official newspaper. All rule orders disposing of a rule petition are now available on the court system's web site.

The committee's research included review and discussion of several statutes and rules relating to the publication of court decisions: Wis. Stat. section 751.12 (publication of notice of public hearing and rule petition on pleading and practice), Supreme Court Rule Chapter 80

(Publication of Opinions), Supreme Court Rule Chapter 98 (Publication of Supreme Court Rules), Wis. Stat. Ch. 985 (Publication of Legal Notices), Supreme Court Rule 10.12 (State Bar of Wisconsin official publication), and Wis. Stat. section 809.23 (Publication criteria for Court of Appeals' opinions).

The committee also discussed the court's current publication practices regarding case orders and rule orders. The committee notes the following practices:

A. **Case Orders.**

Disposition tables. The supreme court's actions on petitions for review, petitions to bypass, certifications, and motions for reconsideration are published in the official caselaw publications and on the court system's web site at [http://www.wicourts.gov/supreme/sc\\_disptab.jsp](http://www.wicourts.gov/supreme/sc_disptab.jsp).

Per Curiam opinions. A Supreme court's dismissal of a petition for review, petition for bypass or certification that has been accepted but then improvidently granted is issued as a per curiam opinion and has not been consistently published. However, a per curiam is a supreme court opinion and therefore should be published as an opinion.

Summary of court actions on rule petitions. The clerk of the supreme court compiles an annual statistical report that includes a list of the supreme court's actions taken on rule petitions during the term. The statistical reports are available on the court system's web site at [http://wicourts.gov/supreme/sc\\_statistical.jsp](http://wicourts.gov/supreme/sc_statistical.jsp).

Publication order form. The supreme court's templates include a form developed specifically for court orders designated for publication. The form is not consistently utilized and requires the clerk of the supreme court to manually format an order that will be published. If a supreme court order is to be published, the order should be put into this format. Supreme Court

Rule 80.01 requires a public domain citation be assigned to published opinions, rules, and orders. The form provides the ability to assign a public domain citation to the order through the automated case management system. The supreme court's internal style manual will specify that this template be used for orders designated for publication.

**B. Rule Orders.**

Statistics. The supreme court issued 54 rule orders between 1995 and July 2012 in which the court denied, dismissed, referred to the petitioner or other entity for review, held in abeyance, or otherwise disposed of a rule petition. At least seven of the orders were published.

Notice of public hearings. Wis. Stat. section 751.12 mandates that a notice of public hearing and the text of the proposed rules relating to pleading, practice, and procedure be published three times in consecutive weeks in a newspaper and be published in an official publication of the State Bar of Wisconsin. In addition, Wis. Stat. section 985.02(3) requires the publishing newspaper place an electronic copy of the legal notice at no additional charge on the Wisconsin newspapers legal notice web site.

The supreme court has directed publication of notices of public hearings in the newspaper three times for section 751.12 rule petitions and at least one time for a non-751.12 rule petition. The costs associated with the publication of the notices of public hearings with the text of the proposed rule have been calculated to total: FY2010 - \$7,796.58; FY2011 - \$3,015.88; FY2012 - \$3,072.30. In 2009 the supreme court adopted guidelines for the filing of a rule petition that changed the filing format and impacted the publication costs. The guidelines provided that the petitioner file a petition that was separate from a supporting memorandum. The petition included the proposed rule amendments. This change reduced newspaper publication costs because the notice and text could be published without the supporting memorandum. The notice

states that the supporting memorandum is available on the court system's web site. Due to the publication requirements of section 751.12 the committee does not propose any changes to the publication of the notices of public hearings and text of section 751.12 rule petitions.

Publication of final rule orders. Pursuant to SCR 98.07, supreme court orders adopting, amending, or repealing a rule, statute, or policy are published in the Wisconsin State Journal and the Wisconsin Lawyer. The standard final order generally includes a paragraph as follows:

IT IS FURTHER ORDERED that notice of the amendments of [statute or rule] 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.

These orders are also published in the official caselaw publications.

## **II. Committee's Proposals:**

The committee considered these current practices in drafting its proposals, reviewed the costs associated with publication, and compared the accessibility of different resources in which the orders could be made available. The committee discussed how advancements in technology could be utilized to enhance access and continue to manage costs. The committee also discussed the availability of dispositional orders of matters before the court involving cases or rule petitions and the ability for an interested person to follow the progression of the matter from filing to disposition and locate the relevant filings and orders.

The committee's proposals in this petition are based on principles of transparency, fairness of access, accountability, judicial discretion, and cost evaluation. The committee suggests that the proposed rules encourage the publication of orders that may assist in the reasoned and orderly development of the law, advance transparency of the court's work, and enhance access, all of which promote respect for, and confidence in, the court system. The committee determined that fairness of access was also critical -- the court orders need to be

equally available. The committee strived to satisfy these criteria through its proposed rule amendments.

A. **Supreme Court Opinions.** Although SCR Chapter 80 is titled "Publication of Opinions," it does not appear to authorize or implement the publication of all supreme court opinions. The proposed new rule 80.002 requires publication of all supreme court opinions, including per curiam opinions.

B. **Case Orders.** The committee proposes new rules governing orders issued in appeals, reviews, and proceedings before the supreme court. For the purpose of this rule petition the committee refers to these orders as case orders. New Supreme Court Rule 80.003(1) proposes that some types of supreme court orders be published: orders on reconsideration that contain further explanation, clarification, or modification of the court's opinion; orders on recusal that resolve a bona fide and substantial request for recusal or disqualification of a justice; and orders disposing of any appeal, review, or proceeding that contain significant discussion or explanation of the grounds for disposition. Proposed SCR 80.003(2) sets forth publication criteria for orders other than those specified in subsection (1) that the court may wish to publish. Examples of such other orders may include orders addressing a motion to file an amicus brief, motion to intervene, or orders related to lawyer regulation matters.

The committee also drafted comments to new Rule 80.003 to explain its perspective on the publication rule. For example, the committee views an order and any concurrence or dissent as one document and recommends that one should not be published without the other. The relevant comment provides that "a concurrence or dissent is considered part of the order to which the publication criteria apply." If an order falls within rule 80.003(1) or meets the publication criteria under rule 80.003(2), the order and any concurrence or dissent is published. Similarly, if

a concurrence or dissent falls within rule 80.003(1) or meets the publication criteria under rule 80.003(2), the order and any concurrence or dissent is published. The committee recognizes the court does not typically adopt comments to the rules and recommends the proposed comments be published to provide guidance in interpreting the rule.

Rule 80.003(3) sets forth the process by which the court or justice would decide whether an order should be published under this rule.

The proposed rule further provides that case orders shall be published in the official caselaw publications, including the official publishers' online databases, and on the court system's web site.

The Supreme Court's Style Manual and the Clerk of Court's Publication Manual may have to be updated to be consistent with rules adopted by the court.

C. **Rule Orders.** The committee proposes an amendment to the supreme court rule governing publication of courts orders adopting, amending, or repealing a rule, statute, or policy to eliminate publication in the official state newspaper.

In reviewing SCR 98.07 and publication procedures, the committee identified an opportunity to update and enhance access to rule orders as well as recognize a cost savings. The proposed amendment would continue current practice of making rule orders changing a rule, statute, or policy available in a State Bar resource, the court system's web site, and the official caselaw publications but would eliminate publication in the official newspaper.

The costs to print final rule orders amending, adopting, repealing, or dismissing in the official newspaper have been calculated to total: FY2010 - \$3,095.75; FY2011 - \$6,434.28; FY2012 - \$3,875.97. In addition, court staff time is spent preparing and forwarding the orders to the newspaper, maintaining financial records on the transaction, and filing the proof of

publication in the rule petition record. The committee recommends eliminating publication in the official newspaper for the additional reason that such publication does not provide easy access beyond the publication date. Once the newspaper publication is archived, retrieval is complex.

The committee noted that the State Bar of Wisconsin includes the court's rule orders free of charge in the Wisconsin Lawyer, which is the State Bar's official publication under SCR 10.12. Obviously there are costs associated with the production of this print publication. The State Bar staff has indicated to the committee that a bar committee is evaluating its publication needs and considering an electronic publication format. The committee is proposing a rule amendment that allows flexibility to the State Bar to publish the rule orders in an electronic newsletter, web site, or other State Bar issued resource.

The committee would further amend SCR 98.07 to provide for publication of rule orders adopting, amending, or repealing a rule, statute, or policy on the court system's website. This proposal reflects the court's current practice and the committee recommends the court continue to post all rule orders on the court system's web site. The committee emphasizes that this amendment is not intended to bar the current practice of posting of court orders denying, dismissing, referring to the petitioner or other entity for further review, or otherwise disposing of, a rule petition on the court system's web site. The proposed comment to the rule clarifies that all orders disposing of a rule petition will be posted on the court system's web site.

Finally, the committee recommends that only rule orders adopting, amending, or repealing a rule, statute, or policy be published in the official caselaw publications. The committee's rationale includes the fact that these rule orders change a rule, statute, or policy and therefore notice is necessary. The committee did distinguish rule orders adopting, amending, or

repealing a rule, statute or policy from rule orders otherwise disposing of a rule petition. The rule orders that deny, dismiss, refer, or otherwise dispose of, a rule petition do not change existing statutes, rules or policies and should not be published in the official caselaw publications. The committee notes that all rule orders are readily available on the court system's web site. An interested person may find the rule petition, all related filings, and the court's disposition on the court system's web site. As part of a recent web site redesign the supreme court developed a series of web pages that contain current information about the status of pending rule petitions. The web pages include an archive that provides access to rule petitions, court orders and audio of public hearings starting in the fall of 2004. Most responses filed after March 1, 2011 are also available. The web pages serve as a resource and they enable any interested person to identify in one place all potential rules on which the court has been working. The committee also noted that the court's discussion and decisions on rules are held in open administrative conference and are available on Wisconsin Eye and are archived on the web pages.

The Publication Review Committee respectfully submits this rule petition and supporting memorandum for the court's consideration.

Dated this 7<sup>th</sup> day of September, 2012.

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On behalf of the Publication Review  
Committee, submitted by  
Theresa Owens, Executive Assistant



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CHAMBERS OF  
CHIEF JUSTICE SHIRLEY S. ABRAHAMSON

June 29, 2012

[Name and email of Committee Member]

RE: Publication Review Committee

Dear [Name of Committee Member]:

As you know, I am appointing a Publication Review Committee and I thank you for agreeing to serve on it. This committee will review the supreme court's practices regarding the publication of supreme court orders issued in cases and rule petitions in the official state newspaper, Wisconsin Lawyer (an official publication of the State Bar of Wisconsin), regional and state case law reporters (North Western Reporter, Wisconsin Reports), online legal research services (Westlaw, LexisNexis), and the court's website ([www.wicourts.gov](http://www.wicourts.gov)). The committee will provide me with a rule petition recommending rules to govern the supreme court's publication process, which I intend to file it with the court for the usual processing of rule petitions.

On Thursday, June 28, 2012, the supreme court discussed issues related to the publication of supreme court orders at its open administrative conference. More specifically, members of the court indicated concern over consistency and cost. I noted that the supreme court does not typically address publication as a separate issue. For example, rule orders issued under Wis. Stat. § 751.12 or Supreme Court Rule 98.07, may simply include a standard paragraph addressing the requirements of publication under those rules. A review of a number of orders indicates a single policy is not necessarily applied consistently. Another issue discussed at the open administrative conference was the cost associated with publication in the various print and online publications. I think we should strive for publication rules that would provide consistency and would provide the framework under which the court, the clerk's office, and the commissioners could enhance operations in an efficient and cost effective manner.

Enclosed is a current list of committee members. I welcome your suggestion of other persons who may be helpful in this endeavor.

Theresa Owens, Executive Assistant to the Office of the Chief Justice, will chair and staff the committee. You may contact her at 608-261-8297 or [Theresa.Owens@wicourts.gov](mailto:Theresa.Owens@wicourts.gov). Please do not hesitate to communicate with either one of us.

It is anticipated that the committee will meet this summer, and I hope it can have a rule petition at the end of the summer or early fall. Again, thank you for your willingness to participate on this committee.

Sincerely,

Shirley S. Abrahamson  
Chief Justice

SSA/tmo

Enclosure

cc: All committee members  
Justice Ann Walsh Bradley  
Justice N. Patrick Crooks  
Justice David T. Prosser, Jr.  
Justice Patience Drake Roggensack  
Justice Annette Kingsland Ziegler  
Justice Michael J. Gableman  
A. John Voelker, Director of State Courts