

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. 12-07

In the matter of the amendment of Supreme Court Rules 70.03 and 70.12(1)(c)3. and the creation of Supreme Court Rules 70.12(5), 70.12(6) and 70.16, relating to the Supreme Court Finance Committee

FILED**FEB 16, 2015**

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On July 6, 2012, Justice Patience Drake Roggensack filed a rule petition proposing the amendment of Supreme Court Rules (SCRs) 70.03 and 70.12(1)(c)3. and creation of SCRs 70.12(5), 70.12(6), and 70.16, to codify the establishment of a supreme court finance committee.¹

On August 3, 2012, Chief Justice Shirley S. Abrahamson filed a memorandum and supporting documentation in response to the petition. Chief Justice Abrahamson referred to a written proposal relating to formation of a finance committee that was submitted to the court by A. John Voelker, Director of State Courts, on or about December 23, 2011. On September 11, 2012, Chief Justice Abrahamson filed proposed

¹ The petition had origins in a draft revision to Supreme Court Internal Operating Procedures I.A (Administrative), introduced on or about January 18, 2011. The court discussed the proposal at a February 4, 2011 open conference, unanimously approved formation of a finance committee with the understanding that the ensuing rule petition would be required. The draft Internal Operating Procedure was discussed and considered as part of this petition.

rule language that would implement procedures for a finance committee as described in A. John Voelker's December 23 proposal.

On September 19, 2012, the court made a preliminary determination in open administrative conference to solicit public comment on the petition. A letter to the interested parties was sent on October 18, 2012.

On November 30, 2012, the court received written comments from the Honorable Juan Colas, in his capacity as Vice-Chair of the Policy and Planning Advisory Committee (PPAC), opposing the rule petition; on December 5, 2012, from the Honorable William Dyke, on behalf of the Committee of Chief Judges, requesting an amendment to the proposal; and on December 3, 2012, a statement from A. John Voelker.

On December 10, 2012, Justice Roggensack filed an amended rule petition, noting two changes.² On December 14, 2012, Chief Justice Abrahamson filed comments to the amended petition.

The court discussed the matter at open conference on January 15, 2013. The court held the matter to afford Justice Roggensack the opportunity to respond to Chief Justice Abrahamson's and Justice Ann Walsh Bradley's comments and to questions raised during the court's discussions.

On August 28, 2013, Justice Roggensack filed a memorandum providing a procedural summary, responding to the alternative rule

² The amended petition (1) deletes the phrase "at the end of each quarter, i.e." in SCR 70.12(6), simply specifying the finance committee would meet in March, June, September, and December, and (2) adds the phrase "or his or her designee" to SCR 70.16, thereby accepting the amendment suggested by Chief Judge Dyke in a September 2012 letter.

proposal, and concluding that formation of a finance committee, as proposed in Amended Rules Petition 12-07, was not unconstitutional.

The court discussed the matter again at open conference on January 21, 2014. The court discussed, *inter alia*, constitutional considerations, the anticipated role of the finance committee, and how the finance committee may interact with others involved in the court system's various budgeting processes. The court considered another version of a rule offered by Justice N. Patrick Crooks that would pertain to development of only a biennial budget. The open conference ended without a formal vote on the petition.

Following that discussion, several justices exchanged e-mails, indicating their understandings of the outstanding issues and seeking consensus. These e-mails were made a part of the public record on the petition.

On February 5, 2014, the court discussed the matter at an open conference again. Chief Justice Abrahamson summarized her understanding of the written exchanges among the justices and formally noted Justice Roggensack's decision to withdraw the draft amendment to the Internal Operating Procedures from the proposal under consideration. After discussion, with justices stating their understandings of the petition, the court voted 6:0 to approve and adopt the amended petition, as drafted, with Chief Justice Abrahamson abstaining from the vote and stating her intent to write. Therefore,

IT IS ORDERED that, effective the date of this order, the Supreme Court Rules are amended as follows:

SECTION 1. 70.03 of the supreme court rules is amended to read:

SCR 70.03 DIRECTOR; BUDGET. The director of state courts shall have the responsibility and authority for development of the budget for the court system for submission to the supreme court for final approval. As part of the director's budget development responsibility, the director shall consult with the supreme court finance committee. In this regard, the director shall begin providing financial information to the supreme court finance committee as soon as responses are received regarding the budget and policy officer's request for budget proposals that relate to preparation of the court system's biennial budget. The director shall continue to provide information to the supreme court finance committee regarding the preparation of the court system's biennial budget, the court system's operational budgets, and the annual operational plan for the grants that the supreme court administers.

SECTION 2. 70.12 (1) (c) of the supreme court rules is renumbered 70.12 (1m), with all following subdivisions 1.-6. appropriately renumbered as paragraphs (a)-(f).

SECTION 3. 70.12 (1m) (c) of the supreme court rules, as renumbered, is amended to read:

SCR 70.12 **(1m)** (c) A review of all requests from all components of the judicial branch by the director of state courts and the supreme court finance committee and a final decision by the director, after consultation with the supreme court finance committee.

SECTION 4. 70.12 (5) of the supreme court rules is created to read:

SCR 70.12 (5) The supreme court finance committee shall participate in gathering and sharing budgetary information with the supreme court, in regard to the preparation of the court system's biennial budget, the court system's operational budgets, and the annual operational plan for grants that the supreme court administers.

SECTION 5. 70.12 (6) of the supreme court rules is created to read:

SCR 70.12 (6) The supreme court finance committee shall meet at least four times per calendar year. When practicable, such meetings shall occur in March, June, September, and December of each year. Meetings may be held by teleconferencing.

SECTION 6. 70.125 of the supreme court rules is created to read:

SCR 70.125 SUPREME COURT FINANCE COMMITTEE. The supreme court finance committee is a standing committee of the supreme court. The supreme court finance committee is comprised of the chief justice, two additional justices elected by members of the supreme court, the chief judge of the court of appeals, and the chief of the chief judges of the circuit court judges or his or her designee. The director of state courts, the court's chief budget and policy officer, and the deputy director of state courts for management services shall staff the supreme court finance committee.

IT IS FURTHER ORDERED that notice of these amendments to the supreme court rules be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the

Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 16th day of February, 2015.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, C.J. A unanimous decision by the seven justices on February 4, 2011, to create a finance committee became a long, involved, four-year saga, ending (for the moment) with the publication of this order on February 16, 2015.

¶2 I initially voted in favor of creating a finance committee. As the proposal evolved I had reservations about various details. Several details were changed. On February 5, 2014 the court voted on the rule petition. I abstained from voting and declared that I would write. Here is my writing.

¶3 The full chronicle is available on the court website rules page (www.wicourts.gov) at the tab relating to supreme court rules; on audio recordings of open conferences; and in the archives of Wisconsin Eye. I will recite only a few key events which, from my perspective, are instructive for the future.

¶4 On February 4, 2011, at an open administrative conference and by a unanimous vote, the court established a finance committee in concept. We agreed on limited aspects of the concept. We agreed that the membership of such a committee would be the chief justice, two justices elected by the court, the chief judge of the court of appeals and the chief of the committee of chief circuit court judges. We also agreed that the purpose of the finance committee would be to gather information for the court so that the court would have more

information earlier in the budget formation process. The court did not delegate decision making authority to the finance committee.

¶5 Discussion demonstrated that the original proposal for a finance committee (which was not adopted) conflated the biennial budget process and the operational budget process and that the court needed more information before it could make any further decisions about the function of the finance committee with regard to the biennial budget, the operating budgets and grants, and the relationship of the finance committee to other entities involved in the formation of the court budget and finances.

¶6 The members of the "finance-committee-in-concept"³ were to propose a rule that the court could consider to govern a finance committee.

¶7 The finance committee members met on October 10, 2011.⁴ John Voelker, then the Director of State Courts, submitted information to the members of the finance committee about the budget process and operational budgets, along with a proposal regarding the finance committee's role. The Director's proposal

³ The members were Justices Roggensack and Gableman (elected by the court), Chief Judge Brown of the court of appeals, Chief Judge Foust, and me as chief justice.

⁴ A transcript of the meeting is on the court website's rule page.

(with rule language) was amended by a unanimous finance committee and submitted to the court on or about December 23, 2011.⁵

¶8 On July 6, 2012, ignoring and not commenting on the December 23, 2011 proposal submitted to the court by the director and finance committee, Justice Patience D. Roggensack filed her own different proposal for a finance committee and an amendment to the Internal Operating procedures providing, among other things, that the finance committee would review expenditures exceeding \$3,000.⁶

¶9 The court sought comments about the July 6, 2012, proposal from its usual long list of persons. The court voted, with Justice Bradley dissenting, not to hold a public hearing.

¶10 In retrospect, I believe we erred. The court should have had a public hearing. At the very least, the court should have invited academics and practitioners to educate us about internal control over financing in government entities, non-governmental organizations, and business corporations. I personally met with two knowledgeable persons and found the conversations very useful.

⁵ See my comment filed Sept. 11, 2012, and the Director's comment filed on Dec. 3, 2012.

⁶ The Justice amended the petition on December 10, 2012 to include two amendments.

¶11 Discussions among the justices and written comments ranged from state constitutional to practical concerns.⁷

¶12 The proposal of the director and finance committee with its informative material were never considered. In retrospect, I conclude that this omission was a mistake. The material would have provided the court with valuable insight.

¶13 On December 3, 2012, the Planning and Policy Advisory Committee (PPAC) wrote the court to register its opposition to the proposed rule by a vote of 14-4, with 1 abstention.⁸ PPAC explained its position as follows:

With the information before it, the committee found it difficult to determine if creating the Supreme Court financing committee is appropriate. Committees such as this are usually identified using a deliberative process where a problem is identified, studied, and several solutions presented for consideration. PPAC opposes this petition until further information is gathered as to why this committee is needed and what alternatives are available.

¶14 PPAC's opposition to the petition has special significance for two reasons. First, a prime mission of PPAC is its mandatory involvement in budgetary matters (as well as its involvement in the administrative structure of the court). PPAC has been involved in budget matters since its formation on

⁷ The committee of chief circuit court judges observed that the finance committee's proposed review of expenditures of over \$3,000 "may be quite time consuming."

⁸ I did not attend the portion of the PPAC meeting addressing the petition and did not comment on the petition at the meeting.

December 20, 1990. Second, PPAC has a diverse membership with extensive and varied experiences in the court system, which no other single group provides.

¶15 PPAC is an extraordinarily diverse group of 26 people representing many (if not most) of the stakeholders in the judicial system, including 13 circuit court judges elected by judges of the circuit courts, a municipal court judge elected by the Wisconsin Municipal Judges Association, a court of appeals judge selected by the court of appeals, two persons selected by the board of governors of the state bar, a public defender, a prosecutor, a clerk of court, a court commissioner, and a court administrator.⁹ More importantly, PPAC has three non-lawyer members, one of whom is an elected county official. Numerous people attend PPAC meetings, including staff of the court system and individuals affiliated with the Wisconsin Counties Association and the State Bar of Wisconsin.

¶16 With regard to PPAC's mission, the Supreme Court Rules governing PPAC provide that PPAC "shall be kept fully and timely informed by the director of state courts about all budgetary matters affecting the judiciary to allow it to participate in

⁹ SCR 70.14(1). In those instance where the chief justice has appointing power, my practice has been to appoint persons nominated by various entities or persons. Thus, for example, I appoint the elected county official nominated by the Wisconsin County Association; a defender nominated by the Director of the State Public Defenders Office; a prosecutor nominated by the President of the District Attorney's Association; and a clerk of court nominated by the President of the Clerk of Court Association.

the budget process."¹⁰ The Rules also direct PPAC to "appoint a subcommittee to confer with the supreme court and the director of state courts in the court's review of the budget."¹¹ This subcommittee is composed of several PPAC members as well as non-PPAC members. In practice, PPAC's subcommittee reports to PPAC and PPAC reports to the supreme court and the director. In addition, PPAC is explicitly directed to "assist the supreme court and director in evaluating the administrative structure of the court system."

¶17 In retrospect, I conclude that the court should have met with PPAC to discuss its concerns and work out the relationship between PPAC and the finance committee.

¶18 On January 15, 2013, the finance committee petition was held in abeyance at the request of Justice Roggensack, who wished to file a comment. The comment was filed eight months later on August 28, 2013, and is available on the website. I renew my oft-stated request that the court should set timelines for writings on rules petitions.

¶19 On February 4, 2014, Justice Crooks, hoping to get a unanimous vote for the creation of a finance committee, offered a rewording of Rule 12-07 drafted by a member of the court staff. The proposal created SCR 70.125 to provide as follows:

SCR 70.125 Supreme court finance committee.

¹⁰ SCR 70.14(4).

¹¹ SCR 70.14(6).

(1) The supreme court finance committee, a standing committee of the supreme court, shall consist of:

- a. The chief justice of the supreme court and two other justices elected by the supreme court.
- b. The chief judge of the court of appeals.
- c. The chair of the chief judges committee or his or her designee.

(2) Staffing for the committee shall be provided by members of the director's staff responsible for the budget.

(3) The supreme court finance committee shall participate in gathering and sharing of budgetary information with the supreme court as follows:

- a. Biennial Budget: Be kept fully and timely informed by the Director of all budget proposals submitted as part of the court system's biennial budget process and work in conjunction with PPAC to review all submitted budget proposals.
- b. Operational Budgets: Review draft annual operating budgets prior to final decision by the director.
- c. Grant Operational Plan: Review draft annual operational plan for grants that the supreme court administers.

¶20 This proposal, in my opinion, clearly and concisely stated the proposal for a finance committee in one section and better clarified the relationship of the finance committee to the director and to PPAC. From my perspective, it is regrettable that this proposal did not muster majority support, let alone unanimous support.

¶21 I continued to believe that the finance committee proposal that was inexorably moving to adoption had several flaws: It would not successfully accomplish its goal of keeping

the justices better informed about the budget. It failed to clarify the finance committee's responsibility to report to the court, the relationship of the finance committee to the director, the interaction the finance committee would have with PPAC, and the function of the finance committee with regard to operational budgets and grants administered by the court.

¶22 As a result of what had become a rule petition of epic proportions, I paid special attention to the formation of the 2015-2017 biennial budget to try to address the issues that were raised during deliberations on the petition.

¶23 I tried to use the formation of the court system's 2015-2017 biennial budget to accomplish two goals: (1) Increase the information transmitted to all justices (and members of the finance committee) during the budget preparation cycle beginning in the spring of 2014; and (2) Try to treat the finance committee as if it were established to test how it would function. Thus, for example, members of the finance committee and the justices were sent the same voluminous information about budget proposals as was distributed to members of PPAC and were invited to attend the PPAC budget meeting. Members of the subcommittee attended and the subcommittee's recommendations were discussed, modified, and adopted.

¶24 My goal was to enable justices to participate earlier in the budget process and to get a sense of the discussions that take place at PPAC budget meetings. Justices might get a fuller understanding of the diverse and divergent views on budget proposals, without being overburdened. One justice objected

that she had not been notified of the meeting of the PPAC subcommittee.

¶25 In retrospect, I conclude that although overloading the justices with budget materials runs the risk of burying them with information, it is a risk that should be taken. Furthermore, justices should, at a minimum, attend the PPAC budget meeting to hear PPAC's discussion of the recommendations of the subcommittee. Perhaps a recording or transcript of the PPAC meeting could be prepared for the justices who do not attend the PPAC meeting. The members of PPAC are thoroughly versed on the budget and the various viewpoints expressed at the PPAC meeting were very impressive indeed.

¶26 Our biennial budget formation process is guided by the idea that there is incalculable value in hearing many voices, culminating in PPAC's final consideration of the budget proposal for the court's review.

¶27 These voices should be heard, in my opinion, by as many justices as possible.

¶28 In adopting the 2015-2017 biennial budget proposal in September 2014 after lengthy discussion, the court adopted PPAC's recommendations with two modifications.

¶29 On October 1, 2014, the court forwarded its proposal for the 2015-2017 biennial budget to the executive and legislative branches. The internal preparation phase of the 2015-2017 biennial budget was then completed.

¶30 The biennial budget is now in its next phase. On February 2, 2015, the executive branch submitted its proposed 2015-2017 biennial budget to the legislature for consideration.

¶31 The rule does not provide responsibilities for the finance committee after the court adopts its biennial budget proposal and the executive budget has been introduced in the legislature and before the operational budgets are being prepared. Furthermore, the proposed executive budget for 2015-2017 adopts a new concept of block grants, with increased authority and responsibility placed in the director of state courts. The role of the finance committee should this new regimen be adopted by the legislature is beyond the scope of the rule.

¶32 I write separately because the rule as adopted can be substantially improved with regard to the role of the finance committee in the formation of the biennial budget. The role of the finance committee in reviewing almost 30 operational budgets is vague and indeterminate. The role of the finance committee after the court submits its biennial budget has never been discussed and is not stated in the rule. The relevance of the finance committee is uncertain should the concept of block grants be adopted.

¶33 Even the best drafted rule does not and cannot take into account unforeseen circumstances and problems that are sure to arise. Even the best drafted rule needs interpretation. In this rule-making process, the court knew about circumstances and

problems that are certain to arise, and, alas, made no attempt to address them.

¶34 For these reasons, I write separately.

