SUPREME COURT OF WISCONSIN

No. 17-04

In re Petition to Repeal and Replace SCR 10.03(5)(b) with SCR 10.03(5)(b)-(e) and to Amend SCR 10.03(6)

FILED

APR 12, 2018

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On April 25, 2017, Attorney Steven Levine filed a rule petition asking the court to repeal and replace Supreme Court Rule (SCR) 10.03(5)(b) with a newly created SCR 10.03(5)(b)-(e) and to amend SCR 10.03(6). The proposed changes would require the State Bar of Wisconsin to establish a bifurcated annual budget. Under Attorney Steven Levine's proposal, "mandatory" dues could be used only for: (a) preparing for and participating in rulemaking proceedings before the Supreme Court; (b) administering the Fund for Client Protection, SCR Ch. 12; (c) administering a program to aid lawyers with addictions or other personal problems which may affect their practices and clients (i.e. WisLAP); (d) offering legal advice to Wisconsin lawyers concerning the requirements of SCR Ch. 20 and other ethical questions; and (e) other regulatory programs which may be specifically approved by the Supreme Court after hearing. All other State Bar activities would be "funded entirely by voluntary dues, user fees or other revenue sources." The proposal would maintain the existing arbitration provision available to members who challenge the

use of mandatory dues. The petition would also amend SCR 10.03(6) to permit license suspension only for non-payment of mandatory dues. As the petition explains, this proposal is modeled on similar change the Nebraska Supreme Court made to the Nebraska State Bar Association in 2013. See In Re Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. 1018, 841 N.W.2d 167 (Neb. 2013).

At an open administrative rules conference on June 21, 2017, the court voted to solicit public comment and schedule a public hearing. A letter to interested persons was sent on August 21, 2017.

The State Bar of Wisconsin ("State Bar"), by its counsel, Attorney Roberta F. Howell, filed a written response dated September 15, 2017, opposing the petition. The Honorable Gary E. Sherman and Attorney Dean R. Dietrich each submitted a letter opposing the petition. The court received three written comments in support of the petition from Attorney John B. Edmondson; the Wisconsin Institute for Law & Liberty, by Attorney Richard M. Esenberg; and Attorney Theodore D. Kafkas.

In its response, the State Bar identified a long list of services that it currently provides to citizens, bar members, and the court that could be adversely affected by this petition. The State Bar states:

> If insufficient voluntary dues are paid to fund the numerous activities and services that the Bar currently provides to the Court, the profession and, most importantly, to the public, the Court will have to provide them with its existing staff and/or seek additional funding from the state legislature to add staff necessary to replace the services currently provided by the State Bar; otherwise, these activities and services will cease to exist.

Attorney Steven Levine filed a reply to the State Bar's response.

The court conducted a public hearing on October 30, 2017. Attorney Steven Levine presented the petition to the court. A number of individuals spoke including: Attorney Dean R. Dietrich (opposed), Attorney Douglas W. Kammer (supported), Attorney Richard M. Esenberg (supported), Attorney Paul G. Swanson (opposed), Attorney Roberta Howell (opposed), Attorney Michelle Behnke (opposed), Attorney George Burnett (opposed), Attorney Steven Sorenson (opposed), and Attorney Christopher Rogers (opposed). After the public hearing, the State Bar filed a brief document addressing certain questions raised during the hearing.

The court discussed the petition in closed conference on October 30, 2017 and voted to hold the matter pending receipt of additional information.

On December 8, 2017, a meeting was convened to discuss certain issues the court deemed relevant to the petition.[1]

The participants discussed the so-called Keller review process in considerable detail.[2] They discussed how improved access to

[1] The meeting was chaired by Justice Michael J. Gableman and attended by Justice Shirley S. Abrahamson; Justice Ann Walsh Bradley; Hon. Randy R. Koschnick, Director of State Courts; Hon. James A. Morrison, Circuit Court Judge for Marinette County, Chief Judge for District 8; Mr. Dean Stensberg, Deputy Director of State Courts; Attorney Paul G. Swanson, State Bar President; Attorney Chris Earl Rogers, State Bar President-elect; Attorney Larry Martin, State Bar Executive Director; Attorney Lisa M. Roys, State Bar Public Affairs Director; Attorney Roberta F. Howell, State Bar Counsel; Attorney Steven Levine, Petitioner and Past-State Bar President; Attorney Douglas Kammer, Past-State Bar President; and Attorney James Boll, Past-State Bar President. Julie Anne Rich, Supreme Court Commissioner, served as recorder.

information, particularly regarding staff salaries and bar expenditures, could ameliorate some negative perceptions of the State Bar. Throughout, Attorney Levine emphasized his perception that lawyers in Wisconsin want a voluntary bar.

The State Bar was receptive to a number of the concerns articulated during this proceeding. On February 9, 2018, the State Bar's Board of Governors ("Board") unanimously adopted a new policy regarding the Keller dues rebate, the pro rata amount members can withhold from annual dues. The pro rata portion that members may withhold from annual dues will now reflect all expenditures for direct State Bar lobbying activity, "regardless of whether they would otherwise qualify as chargeable under a Wisconsin Keller dues analysis."[3] In short, the State Bar will no longer use mandatory dues to fund direct lobbying activity. The Board also adopted amendments to its "access to records" policy, to provide its members with greater transparency. These amendments will allow members to receive information regarding the State Bar employee salary bands, as well as job titles within those bands.

On February 12, 2018, Attorney Steve Levine submitted a letter requesting leave to respond to an expected filing from the State Bar.

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[2] Under Keller v. State Bar of California, 496 U.S. 1 (1990), and subsequent rulings, mandatory bar associations can use compulsory dues to fund activities "necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services." Keller is codified in Wisconsin SCR 10.03(5)(b)1.

[3] See https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?Volume=10&Issue=3&ArticleID=26170.

On February 16, 2018, the State Bar responded, stating it did not intend to file anything further in this matter.

The court discussed the matter in closed conference on February 22, 2018. As the foregoing summary reflects, the petition generated serious discussion on a myriad of topics. Many of the comments received perceived this petition as a challenge to the existence of a mandatory bar. However, the petition before the court would not eliminate the mandatory nature of the bar. Rather, it would restructure the State Bar's budget to limit and designate how mandatory bar dues could be used. The narrow question before the court was whether to adopt the amendments to SCR 10.03, as proposed by the petitioner.

On balance, the court was not persuaded that granting this rule petition would serve the best interests of Wisconsin's citizens, the lawyers of this state, or the court. Therefore,

IT IS ORDERED that the petition is denied.

Dated at Madison, Wisconsin, this 12th day of April, 2018.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. *(dissenting).* Once again, I express my disagreement with the court's discussing and denying a rule petition behind closed doors and failing to reveal the views and votes of the individual justices.

¶2 For over 20 years, rule petitions and administrative matters were discussed and decided in public, and the views and votes of individual justices were public. As part of its continuing recent practice of closing its proceedings to the public, the court voted on June 21, 2017, to close court discussion of rule petitions. Justice Ann Walsh Bradley and I dissented. See In the matter of Revisions to Internal Operating Procedures Section III.A. and Section IV.B. (June 30, 2017) (closing court deliberations of rule petitions) (attached hereto and on file with Clerk of Supreme Court).

¶3 Today's order states that the "petition generated serious discussion [by the justices] on a myriad of topics." Unfortunately neither the "serious discussion" nor the "myriad of topics" are described in the order. The petitioners, the State Bar of Wisconsin, and the public should hear the "serious discussion" on the "myriad of topics" so that they can judge for themselves whether the court properly decided that granting this rule petition would not serve "the best interests of Wisconsin's citizens, the lawyers of this state, or the court" and whether revision of the petition is warranted.

¶4 For these reasons, I dissent.

ATTACHMENT

¶1 On June 21, 2017, in open conference, five justices approved revisions to the Supreme Court's Internal Operating Procedures overthrowing a 22-year-old court practice.

¶2 For 22 years the court has deliberated rule petitions in public. As a result of this revision, hereafter court deliberations on rule petitions will be closed to the public.

¶3 The revised sections of the Internal Operating Procedures are Section III.A. and Section IV.B. The revisions are set forth in Attachment 1.

¶4 Significant changes in Internal Operating Procedures are usually accomplished by court order.[1] Although significant and important for the public, this change in the Internal Operating Procedures will not be done by a public order. The revision will be clandestinely sent to the publishers, with as little public notification as the court can muster.

[1] For example, see the Order described in note 11 of this dissent revising the Internal Operating Procedures.

¶5 The court's action is not in keeping with the principles of transparency and open government that have been hallmarks of the State of Wisconsin.

¶6 The court has in the past kept with the tradition of open government. Thus, this court's conferences on Rules Petitions have been open since 1995 for all to see and hear the justices' deliberations. More recently, court deliberations have been televised and archived on Wisconsin Eye Public Affairs Network.

¶7 Twenty-two years later, as of June 21, 2017, the courtroom is going dark. The public will be shut out of court deliberations on rule petitions as well as administrative matters.[2]

¶8 Should the people care? Yes, is my answer. Rule petitions are a critical part of this court's business. Some are significant and others less so. They can have a profound effect on the people of this state and their court system. The people should be able to see how and why the court is making weighty (and sometimes not so weighty) decisions.

¶9 What are rule petitions, anyway? Rule petitions are analogous to legislative bills, but they are addressed to the supreme

[2] For media coverage of the June 21, 2017, open conference on this motion, see Patrick Marley, Wisconsin Supreme Court Votes To Keep More Meetings Behind Closed Doors, Milwaukee J. Sentinel, June 22, 2017; Associated Press, State Supreme Court Votes To Have Closed Deliberations, Wis. State J., June 23, 2017, at A4; Ruth Conniff, Democracy Dies in Darkness, Wisconsin Edition, Isthmus, June 27, 2017; Erika Strebel, Justices Close Doors on Rules Deliberations with Some Disorder in the Court, Wis. L. J., June 27, 2017; Neil Heinen, Opinion: State Supreme Court Hides Dysfunctionality Behind Closed Doors, www.channel3000.com/meet-the-team/neil-heinen/136592725.

court, not the state legislature.[3] The Wisconsin Constitution requires that the Wisconsin Supreme Court do more than decide cases. This court has the constitutional responsibility and authority to administer the entire judicial system of the state.[4] Rule petitions are one means by which the court fulfills its constitutional obligation to administer Wisconsin's judicial system.

¶10 Rule petitions relate to diverse subjects: access to justice in civil proceedings by persons not able to pay legal fees; pleading, practice, procedure, and evidence in court proceedings; regulation of ethical behavior of lawyers and judges; regulation of the State Bar of Wisconsin, to which all lawyers practicing must belong; payment to attorneys appointed by a court; and many others.

¶11 On Wednesday June 21, 2017, to the surprise of Justice Ann Walsh Bradley and me (but not to five justices who obviously secretly planned and caucused on this matter), five justices voted to move the court's deliberations on rule petitions from the open Supreme Court Hearing Room to the closed Supreme Court Conference Room. The five justices are Chief Justice Patience D. Roggensack and Justices Annette K. Ziegler, Michael J. Gableman, Rebecca G. Bradley, and Daniel Kelly.

¶12 The reason given by Justice Gableman for his motion to close deliberations to the public: It is time for us to return to

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[3] The rule-making conferences are often characterized as legislative or quasi-legislative proceedings.

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

how a court actually operates. It is time to get in line with the 49 states that do not deliberate on rule matters in public.

¶13 To preserve institutional memory, I briefly recount the history of the open court movement in Wisconsin and write to object to the new movement—closing the public's business to the public.

¶14 In 1989, in various writings I began asking that the court's deliberations on rules petitions be open to the public. In October 1990, the Director of State Courts, at the direction of the court, surveyed the other 49 states asking whether the highest court in each held public conferences; 41 states responded, and all but one stated that conferences are not held in public.[5]

¶15 On December 10, 1991, Attorney Steve Levine filed a petition asking that the court's decision-making conference on a particular rule petition be held in public. The Court denied Attorney Levine's petition, with Chief Justice Nathan S. Heffernan and Justices Shirley S. Abrahamson and William A. Bablitch dissenting.[6]

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[5] For this history, see S. Ct. Order In the Matter of the Amendment of the State Bar of Wisconsin; Membership—SCR 10.01(1) and (4); Membership Dues and Dues Reduction—SCR 10.03(5); Assembly of Members—SCR 10.07(2); Referendum Procedure—SCR 10.08; Amendment of Rules—SCR 10.13(1) (issued Feb. 26, 1992) (Heffernan, C.J., Abrahamson, J., and Bablitch, J., dissenting).

Rule Petitions and orders on rule petitions are available on the court's website at https://www.wicourts.gov/scrules/supreme.htm.

[6] For this history, see Order referenced in note 4, supra.

¶16 On June 1, 1995, the court on its own motion opened its deliberative conferences on rule matters on a trial basis, commencing September 1995.[7]

¶17 One year later, in September 1996, the court (again on its own motion) determined that the open court deliberative conferences on rule matters should continue to be open.[8]

¶18 On April 14, 1999, Justices N. Patrick Crooks and William A. Bablitch announced that they would move to open all administrative conferences to the public. Their proposal would open to the public the administrative conferences as well as the rule petition conferences.[9] These justices reasoned that important matters were discussed in the administrative conferences, and they should be open to the public:

> Rule conferences are just the tip of the iceberg. We do far more in our administrative capacity than debate supreme court rules, [including] . . . new programs being instituted in the court system . . . budgetary concerns . . . [and the] lawyer disciplinary system . . . .

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[7] See S. Ct. Order 95-06 (issued June 1, 1995, eff. June 1, 1995).

[8] See S. Ct. Order 96-11 (issued Sept. 16, 1996, eff. Sept. 16, 1996). In December 1998, Attorney Steve Levine advocated that the court open its decision making conference on petitions for review. Steve Levine, Open Up the Wisconsin Supreme Court—Just a Little Bit More, Wis. Lawyer, Dec. 1998, at 6. No petition was brought to the court.

[9] I wrote in December 1990 In the Matter of the Petition of the Ad Hoc Committee on the Administrative Committee of the Courts that the court "should discuss and decide rule making and administrative matters in open, public session." (Emphasis added.)

> We did it all behind closed doors. In retrospect, that was a mistake. It is time to change that.[10]

¶19 At least four Justices favored the motion to hold open administrative conferences: Justices William Bablitch, Ann Walsh Bradley, N. Patrick Crooks, and I. The first open administrative conference was held on April 20, 1999. The court proudly proclaimed that it was the first state in the nation to hold open administrative conferences.

¶20 Seventeen years later began the movement to close court deliberations to the public. In February 2012 at an open administrative conference, on motion of Justice Patience Roggensack, four justices (Justices Prosser, Roggensack, Ziegler, and Gableman) voted to close deliberations on administrative matters other than rule petitions. Three justices voted against the motion: Justices Ann Walsh Bradley, N. Patrick Crooks, and I.[11]

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[10] The two justices issued a press release announcing their intention to move in closed conference to open court deliberations on all administrative matters. A copy of this press release is an attachment to S. Ct. Order 12-04, 2012 WI 47 (filed May 4, 2012, eff. May 4, 2012) (Abrahamson, C.J., dissenting).

In 2006, Wisconsin State Bar President Steve Levine advocated opening administrative conferences (and decision making in cases) to the public. President's Message: Open Up the Supreme Court, Wis. Lawyer, Dec. 2006.

[11] See S. Ct. Order 12-04, 2012 WI 47 (filed May 4, 2012, eff. May 4, 2012) (In the Matter of Amendments to Wisconsin Supreme Court Internal Operating Procedures II.A. and III.B.).

For articles discussing the 2012 closing of deliberations on administrative matters to the public view, see, e.g.,:

¶21 Each of the four justices voting for the closure motion, except Justice Prosser, expressed a reason for his or her vote for closure. Justice Prosser declared that it would be better if he did not speak.[12]

¶22 Justice Roggensack claimed that closed administrative conferences will help the court release opinions more promptly.[13] Justice Gableman claimed we should follow the practice of the other states that do not have open administrative conferences.[14] Justice Ziegler asserted that the court's image is tarnished when the public can witness the court's discussions.[15]

- Steven Elbow, Crime and Courts: Roggensack Moves To Close High Court conferences, Capital Times (Feb. 21, 2012), http://host.madison.com/ct/news/local/crime_and_courts/blog/crime-and-courts-roggensack-moves-to-close-high-court-conferences/article_183e6cfe-5c04-11e1-b161-0019bb2963f4.html.

- Melanie G. Ramey, High Court Conferences Should Remain Public, Capital Times (Feb. 22, 2012), http://host.madison.com/ct/news/opinion/column/melanie-g-ramey-high-court-conferences-should-remain-public/article_992f4c8c-0a99-5a0f-9f32-1bdf17cd9695.html.

- Opinion, Other View: Justices Wrong To Close Court Meetings, Wausau Daily Herald (Mar. 5, 2012).

- Editorial, Justices Wrong To Close Court Meetings, Appleton Post Crescent (Mar. 5, 2012).

[12] See S. Ct. Order 12-04, 2012 WI 47, ¶5 (filed May 4, 2012, eff. May 4, 2012) (Abrahamson, C.J., dissenting).

[13] See id.

[14] See id.

[15] See id.

¶23 My responses to each justice are in my dissent to the order. I repeat my response to Justice Ziegler's reason to close the conference here: If the court's discussions in open conference show us in a poor light, we should change the tenor of our discussions, not close the conferences. I wrote in May 2012 as follows:

> 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.
>
> 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 opportunity to demonstrate its ability to perform its work properly.
>
> 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.[16]

¶24 The close-the-court-conferences movement culminated on June 21, 2017, when five justices voted to amend the Internal Operating Procedures to close court conferences to the public when the court is deliberating on rules petitions: Chief Justice Patience D. Roggensack and Justices Annette K. Ziegler, Michael J. Gableman,

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[16] See id., ¶25-27.

Chris Rickert, in State High Court Rules No to Sunshine, Wis. State J., June 27, 2017, at A2, expressed this sentiment as follows:

> I don't know whether closing rules meeting is a good idea for state high courts in general. Wisconsin's high court in particular, though, strikes me as a public institution more in need than most of the kind of antiseptic sunshine provides.

Rebecca G. Bradley, and Daniel Kelly.[17] The only reason expressed in favor of the motion was by Justice Gableman saying that this court should join the other 49 states and act like a court by holding deliberations in secret.[18]

¶25 These are the same five justices who voted on April 20, 2017, to dismiss Rule Petition 17-01, a proposal to require recusal of judges and justices on the basis of campaign contributions.[19]

¶26 Some may wonder whether the numerous editorials and op-ed pieces criticizing both the dismissal of Rule Petition 17-01 and the justices' reasons for the dismissal have stimulated the closure of future court deliberations on rule petitions.[20] Is closing court

[17] Justice Ann Walsh Bradley and I (apparently the only justices who did not have advance notice of Justice Gableman's motion) asked that the motion be held in order to advise new justices of the history of open proceedings. It was not. I tried to move that J. Gableman's motion be put on for a public hearing. I could not get recognized to put my motion to a vote.

Justice Rebecca G. Bradley was not present for the conference and did not voice in any way her position on other matters raised that day. She did voice her vote on the motion to close deliberations on rule petitions by texting a message to Justice Gableman stating that she voted in favor of Justice Gableman's motion. Justice Gableman read the text to the court.

[18] Columnist Chris Rickert wrote: "There wasn't much talk . . . about the benefits of closing rules meetings . . . ." Chris Rickert, State High Court Rules No on Sunshine, Wisconsin State Journal, June 27, 2017, at A2.

[19] Justice Ann Walsh Bradley and I voted against the dismissal of Rule Petition 17-01.

[20] See, e.g., Matt Rothschild, Wisconsin Supreme Court Shuts Public Out, Capital Times, June 25, 2017, http://host.madison.com/ct/opinion/column/matt-rothschild-wisconsin-supreme-court-shuts-public-out/article_9100bfae-c1ef-5d2d-8fe2-a9de9fa34f43.html.

deliberations on rules petitions an attempt to stop unfavorable comments about the court?

¶27 I have written previously, and I write once again in opposition to shutting out the public from court deliberations on rule petitions and administrative matters:

> [The justices favoring closed administrative conferences] 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 [a majority of the] 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.
>
> 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.[21]

¶28 For the same reasons that I wrote in opposition to closing administrative conferences, I now oppose closing rule conferences. I therefore write in dissent.

¶29 I am authorized to state that Justice Ann Walsh Bradley joins this dissent.

[21] See 2012 WI 47, ¶29 (filed May 4, 2012, eff. May 4, 2012) (Abrahamson, C.J., dissenting).

ATTACHMENT 1

[Section III. A. and Section IV. B. of the Supreme Court's Internal Operating Procedures are revised to read as follows with deletions and additions shown. The Supreme Court's Internal Operating Procedures are printed in volume 6 of the Wisconsin Statutes.]

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III. DECISIONAL PROCESS - APPELLATE AND ORIGINAL JURISDICTION

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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.

~~Filed rules petitions are discussed at open conference as they 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.~~

IV. RULE-MAKING PROCESS

. . .

B. ~~Open~~ Closed Conference

After a public hearing is held the court meets in ~~open~~ closed 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:~~

~~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.~~

~~2. *Procedure.* Members of the court convene at the attorneys table in the Supreme Court Hearing Room and the chief justice presides. Microphones are provided for sound amplification and to provide a recording of the conference.~~

~~3. *Public Attendance.* The public is invited to observe the conference from the area designated for public seating but may not participate in it.~~

~~4. *Media Coverage.* The rules governing electronic media and still photography coverage of judicial proceedings, SCR chapter 61, apply to open conferences.~~

~~5. *Staff.*~~ All matters within the court's rule-making jurisdiction are assigned to a court commissioner for analysis and reporting to the court. See IOP. III. B. 5. The commissioner prepares and circulates material to the court for its assistance at the conference, participates in the conference at the court's discretion, and drafts rules and prepares orders at the court's direction.

~~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.~~

~~7. *Exceptions.*~~

~~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.~~

Amended July 1, 1991; February 18, 1992; June 24, 1992; June 1, 1995; September 16, 1996; June 22, 1998; March 16, 2000; April 2006; May 4, 2012; April 16, 2015; November 2015; February 13, 2017~~.~~; June 21, 2017.