

# **COURT GOVERNANCE: JUDICIAL RULEMAKING**

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### **ABSTRACT**

With heightened scrutiny of court systems, increased challenges to judicial independence, and waning public confidence, it is imperative that state courts are proactive in analyzing the judicial rulemaking function and take steps to strengthen governance structures, define and document procedures, and improve accountability and awareness of judicial rulemaking. The Conference of Chief Justices and Conference of State Court Administrators have adopted resolutions supporting the principles of judicial governance and administration. The members of the conferences urge courts leaders to critique their court systems using the principles and take steps to operate court systems in accordance with the principles. A review can assist courts to keep pace with and stay informed on issues, technology, and best practices, and withstand legal challenges.

Judicial rulemaking is critical to the operation of court systems. Judicial rulemaking involves a significant level of authority and range of uses. It is a tool through which a court enacts procedures that have the effect of law, addresses its resolution of disputes, administers justice, and guides procedural and administrative reform efforts. However, "[r]ule making is not for the short winded, impatient or faint hearted."<sup>1</sup> A court's rulemaking function is neither high profile nor does it bring recognition similar to that of the court's adjudicatory function but can be equally challenging.

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<sup>1</sup> Schofield, L.G. (2010, Spring). Greater Efficiency in Civil Procedure. *Litigation* 36(3), 1. The author attributes this quote to Judge Lee Rosenthal, United States District Court for the Southern District of Texas, who served as chair of the Judicial Conference Committee on Rules of Practice and Procedure from 2007 to 2010.

The purpose of this study is to examine the judicial rulemaking structure in Wisconsin. The project reviews the status of recent and ongoing debates about the rulemaking process in this court system. The supreme court has concerns about its rulemaking structure and process including roles of authority and decision-making, procedural efficiency, accessibility, time commitment, the quality of proposed rule amendments, and the degree of meaningful input in petitions.

Selected principles of court governance served as the lens through which the effectiveness and efficiency of the court's rulemaking process were examined to identify practices and procedures in need of reform as well as areas of strength. The study compiled information about different governance structures and procedures for purposes of comparison, to inform discussions, and to provide options for restructuring and improving the court's rulemaking process. The framework of the principles focused the court's review and facilitated discussion of the court's rulemaking role, governance structure, and the current procedures.

The study reviews literature on court governance and elements of judicial rulemaking, compares rulemaking structures and procedures of six state courts, and cites recent challenges to judicial rulemaking authority. Research includes reviews of literature from Roscoe Pound to Harvard University's Kennedy School of Government Executive Session papers issued in 2012; reviews of statutes and court rules; and oral interviews with the justices of the Wisconsin Supreme Court.

The project analyzed whether the court's governance structure was well-defined including whether the court's decision-making authority for rulemaking was explicit; what role, if any, committees play in the rulemaking process; how clear and understood were the roles and

responsibilities of the justices, court staff, petitioners, and interested persons; whether notices of pending matters, hearings, conferences, and decisions were sufficient; whether input was meaningful; and whether court actions supported transparency, accessibility, and accountability.

Overall, the justices were moderately satisfied to somewhat satisfied with the current rulemaking process.<sup>2</sup> The justices clarified their authority role by unanimously agreeing the court would remain the decision maker for rules matters. The research revealed mixed perceptions about the importance of standing committees, the effectiveness of various procedures, and the degree of involvement and engagement of the court, petitioners, attorneys, and the public in the rulemaking process. Some of the changes can be addressed by rule amendments but not all issues can be solved by rule amendments.

The court is considering rules governing the rulemaking process that incorporate principles of court governance and objectives of rulemaking including notice, opportunity to be heard, public process, transparency, and reasoned decisions. The court is also studying a rules calendar and researching outreach efforts in order to improve input, heighten awareness, and increase engagement related to rulemaking.

The findings of this study are specific to judicial rulemaking in Wisconsin but the study demonstrates that the court governance principles provide a framework for other state courts to analyze rulemaking, review and compare processes, discuss potential changes, and decide and implement improvements to their governance structures and rulemaking procedures.

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<sup>2</sup> In question 10 of the judicial interview questionnaire the justices selected from one through four on a scale that provided (1) completely satisfied, (2) moderately satisfied, (3) somewhat satisfied, (4) completely unsatisfied.