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CHAPTER 809

RULES OF APPELLATE PROCEDURE

SUBCHAPTER I

DEFINITIONS

809.01 Rule (Definitions). (1) "Appeal" means a review in an appellate court by appeal or writ of error authorized by law of a judgment or order of a circuit court.

(2) "Appellant" means a person who files a notice of appeal.

(3) "Co-appellant" means a person who files a notice of appeal in an action or proceeding in which a notice of appeal has previously been filed by another person and whose interests are not adverse to that person.

(4) "Court" means the court of appeals or, if the appeal or other proceeding is in the supreme court, the supreme court.

(5) "Cross-appellant" means a respondent who files a notice of cross-appeal.

(6) "Respondent" means a person adverse to the appellant or co-appellant.

History: Sup. Ct. Order, 83 W (2d) xiii; 1977 c. 449.

Judicial Council Committee's Note, 1978: The definitions reflect some of the changes incorporated into the rules. The term "appeal" applies both to an appeal authorized by statute and the writ of error guaranteed by Section 21 of Article I of the Constitution. The objective of these rules is to provide the same procedure for appeals and writs of error. Historically, the review authorized by a writ of error was limited to questions of law, while both the law and the facts could be reviewed on appeal. The Wisconsin Supreme Court does not distinguish between its power in appeals and in writs of error. Although under the former procedure appeals were normally used in civil cases and writs of error in criminal cases, the only differences between them were in nomenclature and method of initiating the review process. There is no reason to retain the formalistic differences between them.

The definitions of the parties to the appeal are intended to change the former statute, section 817.10, under which the party first appealing was the appellant, and all other parties were respondents. This often resulted in a party with interests identical to the appellant being labeled a respondent, while two parties opposed to each other were both labeled respondents. Under this section the party first appealing is the appellant, parties appealing from the same judgment or order not opposed to the appellant are co-appellants, and parties adverse to the appellant or co-appellant are respondents. The terms "plaintiff in error" and "defendant in error" previously used in connection with writs of error are no longer used. [Re Order effective July 1, 1978]

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SUBCHAPTER II

CIVIL APPEAL PROCEDURE IN COURT OF APPEALS

809.10 Rule (Initiating the appeal). (1) NOTICE OF APPEAL. (a) *Filing.* A person shall initiate an appeal by filing a notice of appeal with the clerk of the trial court in which the judgment or order appealed from was entered and shall specify in the notice of appeal the judgment or order appealed from. The person at the same time shall notify the court of appeals of the filing of the appeal by sending a copy of the notice of appeal to the clerk of the court.

(b) *Time for filing.* The notice of appeal must be filed within the time specified by law. The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal.

(2) MULTIPLE APPEALS. (a) *Joint and co-appeals.* If 2 or more persons are each entitled to appeal from the same judgment or order entered in the same action or proceeding in the trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may, after filing separate notices of appeal, proceed as a single appellant. If the persons do not file a joint appeal or elect to proceed as a single appellant, or if their interests are such as to make joinder impracticable, they shall proceed as appellant and co-appellant, with each co-appellant to have the same procedural rights and obligations as the appellant.

(b) *Cross-appeal.* A respondent who seeks a modification of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal within the period established by law for the filing of a notice of appeal, or 30 days after the filing of a notice of appeal, whichever is later. A cross-appellant has the same rights and obligations as an appellant under ch. 809.

(3) CONSOLIDATED APPEALS IN SEPARATE CASES. The court may consolidate separate appeals in separate actions or proceedings in the trial court upon its own motion, motion of a party, or stipulation of the parties.

(4) MATTERS REVIEWABLE. An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Subsection (1) (a) establishes the same procedure for initiating a review by the Court of Appeals whether it be the statutory appeal or constitutional writ of error. Both are begun by filing a notice of appeal in the trial court. The prior procedure under which a person could obtain a writ of error from the Supreme Court and then file it in the trial court at his leisure is eliminated. It is important to recognize that the right to seek review by writ of error as established by the Constitution is not abolished, but the procedure for seeking that review is made uniform with that for filing an appeal.

The second sentence of sub. (1) (b) is designed to change the law as declared in former s. 817.11 (4), and the decisions of the Supreme Court interpreting former s. 269.59 (1), under which the Supreme Court was vested with subject matter jurisdiction when an appealable order was entered. Under former s. 817.11 (4), the notice of appeal was necessary only to confer personal jurisdiction which could have been waived. The court often had to decide whether the respondent by some conduct, such as signing a stipulation or receiving a brief, had waived any objection to personal jurisdiction. The result was that a judgment of a trial court in Wisconsin was never completely final because even after the expiration of the time for an appeal a party could still appeal, and if the respondent failed to object or take some step that could be considered as participating in the appeal prior to objecting, the Supreme Court was able to review the judgment. This section conforms Wisconsin practice to that in the federal system and most other states.

Sub. (2) (a) provides that appellants whose interests are substantially identical may proceed jointly or separately. See Rule 3 (b), Federal Rules of Appellate Procedure (FRAP). If they do not wish to proceed jointly, or their interests are not the same, or if they are challenging from the same judgment or order, the subsequent appeal should be docketed with the first appeal, but the second person appealing has the same procedural rights, such as filing of briefs, as the first appellant. The respondent has separate briefing rights as to each appellant and co-appellant filing a separate brief. It is anticipated under this section that all appeals arising out of the same case filed within the same appeal period will be considered in a single appeal and not be treated as separate cases in the Court of Appeals.

Sub. (2) (b). The respondent who desires to challenge a judgment or order must file a notice of cross-appeal. Notices of review are abolished. Under former s. 817.12, it was very difficult to ascertain when a notice of review or cross-appeal was appropriate. Requiring a notice of cross-appeal in each instance eliminates this confusion. The respondent is given a minimum of 30 days after the filing of the notice of appeal to determine whether to file a cross-appeal. As was the case under former s. 817.12, a respondent loses the right to cross-appeal if the cross-appeal is not filed within the specified time.

Sub. (3). Appeals from judgments or orders in separate cases in the trial court are docketed as separate appeals in the Court of Appeals. If appropriate, these cases can be consolidated after docketing by order of the Court of Appeals. Rule 3 (b), FRAP.

Sub. (4). The provision of former s. 817.34 that an appeal from a final judgment brings before the court for review all of the prior orders entered in the case is continued. This does not apply, however, to any prior final order or judgment which could have been appealed as of right under s. 808.03 (1). Thus a judgment dismissing a codefendant from a case must be appealed immediately and cannot be reviewed when judgment is rendered on the plaintiff's claim against the other defendants. Nonfinal orders and judgments that are appealed and ruled upon by the Court of Appeals are, of course, not subject to further review upon appeal of the final judgment. This section is also limited to those orders made in favor of the named respondents to prevent the possibility of the court reviewing an order in favor of a person not a party to the appeal.

A change is made in prior law in that an interlocutory judgment, Rule 806.01 (2), which previously must have been appealed within the statutory period from the entry of the interlocutory judgment, Richter v. Standard Manufacturing Co., 224 Wis. 121, 271 N.W. 14 (1937), is now reviewable by the Court of Appeals upon an appeal of the final judgment. The objective is to have only one appeal in each case, absent unusual circumstances which would justify an appeal from a nonfinal order under s. 808.03 (2). [Re Order effective July 1, 1978]

Appeal from judgment "and all intermediate orders" brought before the court only prior nonappealable orders under (4). Northridge Bank v. Community Eye Care Center, 91 W. (2d) 298, 282 NW (2d) 632 (Ct. App. 1979).

Date of filing stamped on notice of appeal is not conclusive as to date of filing. Boston Old Colony Ins. v. Int'l. Rectifier Corp. 91 W. (2d) 813, 284 NW (2d) 93 (1979).

Court had jurisdiction to hear appeal from nonfinal order where judgment was entered later and notice of appeal sufficiently identitifed "what is appealed from". State v. Ascencio, 92 W. (2d) 822, 285 NW (2d) 910 (Ct. App. 1979).

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809.11 Rule (Perfecting the appeal). (1) ITEMS TO BE FILED WITH NOTICE OF APPEAL. The appellant shall file with the notice of appeal the fee for docketing an appeal with the court of appeals.

(2) FORWARDING TO COURT OF APPEALS. The clerk of the trial court shall forward to the court of appeals within 3 days of the filing of the notice of appeal, a copy of the notice of appeal, the docketing fee, and a copy of the trial court record (docket entries) of the case in the trial court maintained pursuant to s. 59.39 (2) or (3).

(3) DOCKETING IN COURT OF APPEALS. The clerk of the court of appeals shall docket the appeal upon receipt of the items referred to in sub. (2).

(4) STATEMENT ON TRANSCRIPT. The appellant shall file with the clerk of the court of appeals within 10 days of the filing of the notice of appeal in the trial court, a statement that a transcript is not necessary for prosecution of the appeal or a statement by the court reporter that the transcript or designated portions thereof have been ordered, arrangements have been made for the payment by the appellant of the cost of the original transcript and all copies for other parties, the date on which the transcript was ordered and arrangements made for payment, and the date on which the transcript is due.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1978: This section requires the forwarding of the notice of appeal, filing fee and trial court docket entries immediately, the record to be forwarded when the transcript is completed. This will permit early notice to the court of the pendency of the appeal and will permit it to monitor the appeal during the period when the record and transcript are being prepared.

Another purpose of this section is to expedite the appellate process by requiring the appellant to order the transcript, if one is necessary, within 10 days of the filing of the notice of appeal. The filing of the statement of the reporter that the transcript has been ordered and arrangements made for payment for it will prevent any delay resulting from counsel not ordering the transcript immediately.

Docket entries are required by s. 59.39 (2) and (3). In order to comply with this section, the docket entries will have to be kept. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (4) is amended to clarify that the statement on transcript that is initiated by the appellant must include information that arrangements have been made for the preparation and payment of copies of the transcript for the other parties to the appeal. The language clarification rectifies a present ambiguity in chapter 809 in regard to who is responsible for initiating the arrangements for preparation and payment of copies of the transcript as compared with just the original. The appellant must make all arrangements for the original and copies of a transcript and is responsible for payment. Cost of the preparation of the transcript is included in allowable costs under 809.25. [Re Order effective Jan. 1, 1980]

809.12 Rule (Motion for relief pending appeal). A person seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court. A motion in the court must show why it was impractical to seek relief in the trial court or, if a motion had been filed in the trial court, the reasons given by the trial court for its action. A person aggrieved by an order of the trial court granting the relief requested may file a motion for relief from the order with the court. A judge of the court may issue an ex parte order granting temporary relief pending a ruling by the court on a motion filed pursuant to this rule. A motion filed in the court under this section must be filed in accordance with Rule 809.14.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Rule 809.12 details the procedure for seeking temporary relief pending appeal. It follows generally the prior unwritten procedure and Rule 8 (a), FRAP. [Re Order effective July 1, 1978]

809.13 Rule (Intervention). A person not a party to an appeal may file in the court a petition to intervene in the appeal. A party may file a response to the petition within seven (7) days after service of the petition. The court may grant the petition upon a showing that the petitioner's interest meets the requirements of Rule 803.09 (1) or (2).

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Former s. 817.12 (6) permitted the addition of parties but did not set the criteria for doing so. This void is filled by making the intervention rule in the Rules of Civil Procedure applicable to proceedings in the Court of Appeals. [Re Order effective July 1, 1978]

809.14 Rule (Motions). (1) A party seeking an order or other relief in a docketed case shall file a motion for the order or other relief. The motion must state the order or relief sought and the grounds on which the motion is based and may include a statement of the position of other parties as to the granting of the motion. A motion may be supported by a memorandum. Any other party may file a response to the motion within 7 days of service of the motion.

(2) A motion for a procedural order may be acted upon without a response to the motion. A party adversely affected by a procedural order entered without having had the opportunity to respond to the motion may move for reconsideration of the order within 7 days of service of the order.

(3) The filing of a motion seeking an order or other relief which may affect the disposition of an appeal or the content of the record or a brief automatically enlarges the time for performing an act required by these rules for a period coextensive with the time between the filing of the motion and its disposition.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1978: The motion procedure under former Rule 251.71 is continued except that the time for replying to a motion is reduced from 10 to 7 days. A response is not required before action can be taken on a procedural motion because these motions include matters previously handled by letter request or which usually do not adversely affect the opposing party. If an opposing party is

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adversely affected by a procedural order, he has the right to request the court to reconsider it. Procedural orders include the granting of requests for enlargement of time, to file an amicus brief, or to file a brief in excess of the maximum established by the rules. This section is based on Federal Rules of Appellate Procedure, Rule 27. Sub. (3) modifies the prior practice under which the filing of any motion stayed any due date until 20 days after the motion was decided. This could result in an unintentional shortening of the time in which a brief had to be filed. It could also result in an unnecessary delay if a ruling on the motion would not affect the outcome of the case, the issues to be presented to the court, or a brief or the record. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) is amended by deleting a provision that required only an original and one copy of a motion be filed with an appellate court. With the amendment, the number of copies of a motion to be filed is now governed by 809.81 on the form of papers to be filed with an appellate court, which requires in sub. (2) that 4 copies of a paper be filed with the Court of Appeals and 8 copies with the Supreme Court. [Re Order effective Jan. 1, 1979]

809.15 Rule (Record on appeal). (1) COMPOSITION OF RECORD. (a) The record on appeal consists of the following unless the parties stipulate to the contrary:

1. The paper by which the action or proceeding was commenced;

2. Proof of service of summons or other process;

3. Answer or other responsive pleading;

4. Instructions to the jury;

5. Verdict, or findings of the court, and order based thereon;

6. Opinion of the court;

7. Final judgment;

8. Order made after judgment relevant to the appeal and papers upon which the order is based;

9. Exhibits material to the appeal whether or not received in evidence;

10. Any other paper or exhibit filed in the court requested by a party to be included in the record;

11. Notice of appeal;

12. Bond or undertaking;

13. Transcript of reporter's notes;

14. Certificate of the clerk.

(b) The clerk of the trial court may request by letter permission of the court to substitute a photocopy for the actual paper or exhibit filed in the trial court.

(2) COMPILATION AND APPROVAL OF THE RECORD. The clerk of the trial court shall assemble the record in the order set forth in sub. (1) (a), identify by number or letter each paper, and prepare a list of the numbered or lettered papers. At least 10 days prior to the due date for filing the record in the court, the clerk shall notify in writing each party appearing in the trial court that the record has been assembled and is available for inspection. The clerk shall include with the notice the list of the papers constituting the record.

(3) DEFECTIVE RECORD. A party who believes the record, including the transcript of the reporter's notes, is defective or does not accurately reflect what occurred in the trial court may move the court in which the record is located to correct the record.

(4) TRANSMITTAL OF THE RECORD. The clerk of the trial court shall transmit the record to the court as soon as prepared, but in no event more than 90 days after the filing of the notice of appeal unless the court enlarges the time for the transmittal of the record or the preparation of the transcript of the reporter's notes. The clerk of the court shall notify the clerk of the trial court and all parties appearing in the trial court of the date the record was filed.

(5) AGREED STATEMENT IN LIEU OF RECORD. The parties may file in the court within the time prescribed by sub. (4) an agreed statement of the case in lieu of the record on appeal. The statement must:

(a) Show how the issues presented by the appeal arose and were decided by the trial court; and

(b) Recite sufficient facts proved or sought to be proved as are essential to a resolution of the issues presented.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Sub. (1) substantially embodies former s. 251.25. It also permits the filing of a photocopy instead of the original record but only with the approval of the Court of Appeals, changing to some extent prior Rules 251.25 (13) and 251.27. Under this section the parties can stipulate to exclude some items from the record, but this should be done before the clerk assembles the record.

Sub. (2). The responsibility for having the record assembled and transmitted to the Court of Appeals is transferred from the appellant to the clerk of the trial court. It is not necessary to have the attorneys present at the pagination of the record. The federal procedure set forth in Rule 11 (b), FRAP, under which the clerk assembles the record and then notifies the parties so that they can inspect the record prior to it being sent to the Court of Appeals is adopted. Also adopted is the federal procedure of the clerk preparing a list of all the papers in the record. The former system of numbering each page in the record consecutively is abandoned for the simpler practice of assigning a letter or number to each document and using its internal page reference. Thus, the reference to the third page of the first document would be A-3 and to the fifth page of the second document B-5.

Sub. (3). This provision replaces former Rule 251.30 and s. 817.117.

Subs. (4) and (5). The provisions of former Rules 251.29 and 251.28 are included in these subsections. [Re Order effective July 1, 1978]

809.16 Rule (Transcript of reporter's notes). (1) Within 10 days of the filing of the notice of appeal, the appellant shall make arrangements with the reporter for the preparation of a transcript of the reporter's notes of the proceedings and service of copies and file in the court a designation of the portions of the reporter's notes that have been ordered. Any other party may file within 10 days of service of the appellant's notice, a designation of additional portions to be included in the transcript. The appellant shall file within 10 days of the service

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of the other party's designation the statement required by Rule 809.11 (4) covering the other party's designations. If the appellant fails or refuses to order the designated portions, the other party may order the portions or file a motion with the trial court for an order requiring the appellant to do so.

(2) Sub. (1) applies to a cross-appeal.

(3) The reporter shall serve copies of the transcript on the parties to the appeal, file the transcript with the trial court and notify the clerk of the court within 60 days of the date the transcript was ordered and arrangements made for payment.

(4) A reporter may obtain an extension for filing the transcript only by motion showing good cause filed in the court and served on all parties to the appeal.

(5) If a reporter fails to file timely a transcript, the court may declare a reporter ineligible to act as an official court reporter in any court proceeding and prohibit the reporter from performing any private reporting work until the overdue transcript is filed.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Cross Reference: See 809.80 concerning serving copies of papers required to be filed in the appellate or trial courts.

Judicial Council Committee's Note, 1978: Subs. (1) and (2). The procedure in Rule 10 (b), FRAP, for the ordering of the transcript is combined with former s. 817.118. A time limit is placed on ordering the transcript to prevent the failure to do so from being a cause of delay in the appellate process.

Subs. (3), (4) and (5). The reporter is given 60 days from the date the transcript is ordered in which to complete the transcript, a reduction of up to 30 days from the total time allowed in former s. 817.115. The obligation is placed on the reporter rather than the appellant to obtain an extension for filing the transcript because this is a matter not in the control of the appellant. The application for an extension is filed in the Court of Appeals rather than the trial court because of the primary concern of the Court of Appeals with cases pending before it and because of the natural reluctance of the trial judge to deny a request made by his own appointee.

The power of the Court of Appeals to impose sanctions upon a court reporter for failing to file a transcript on time is expressly recognized. These sanctions were among those recommended in 1971 by a special committee appointed by the Supreme Court to study the problem of delayed transcripts.

The provisions of former s. 817.117, detailing the procedure for approval of the transcript, are eliminated in favor of the federal procedure which treats the correction of the transcript the same as correction of any other part of the record. Thus, correction of any alleged error in the transcript will be made under Rule 809.15 (3). [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Subs. (1) and (3) are amended to clarify that the court reporter is responsible for serving copies of the transcript on the parties. The appellant is responsible for initiating the arrangements for preparation and payment of the original and copies of the transcript. Rule 809.16 does not prohibit any party from waiving the service of copies of the transcript. [Re Order effective Jan. 1, 1980]

809.17 Rule (Presubmission conference). The supreme court may establish a procedure for an officer of the court of appeals to meet with the parties for the purpose of discussing an agreed disposition of the case, simplification of issues, content of the record, or such other matters as may aid in the disposition of the appeal. The court may enter an order incorporating the agreement of the parties.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: The Supreme Court adopted procedures for presubmission conferences in September 1976, 73 Wis. 2d xvii, 246 N.W. 2d LXXX. These procedures can be used under this section. [Re Order effective July 1, 1978]

809.18 Rule (Voluntary dismissal). An appellant may dismiss an appeal by filing a notice of dismissal. The notice must be filed in the court or, if not yet docketed in the court, in the trial court. The dismissal of an appeal does not affect the status of a cross-appeal or the right of a respondent to file a cross-appeal.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: An appeal may be dismissed by the appellant at any time prior to a court decision on the appeal without approval of the court or the respondent. This changes the former procedure and modifies Rule 42, FRAP. The Rule specifically protects a respondent who has or intends to file a cross-appeal, and for this reason the appellant is authorized to dismiss the appeal at will. The filing of a notice of dismissal does not affect the liability of the appellant for costs or fees, or the power of the court to impose penalties under Rule 809.83 (1). [Re Order effective July 1, 1978]

809.19 Rule (Briefs and appendix). (1) BRIEF OF APPELLANT. The appellant shall file a brief within 40 days of the filing in the court of the record on appeal. The brief must contain:

(a) A table of contents with page references of the various portions of the brief, including headings of each section of the argument, and a table of cases arranged alphabetically, statutes and other authorities cited with reference to the pages of the brief on which they are cited.

(b) A statement of the issues presented for review and how the trial court decided them.

(c) A statement with reasons as to whether oral argument is necessary and a statement as to whether the opinion should be published and, if so, the reasons therefor.

(d) A statement of the case, which must include: a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record.

(e) An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation.

(f) A short conclusion stating the precise relief sought.

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(2) APPENDIX. The appellant shall include in his brief a short appendix to include relevant docket entries in the trial court, the findings or opinion of the trial court and limited portions of the record essential to an understanding of the issues raised.

(3) RESPONDENT'S BRIEF. (a) The respondent shall file a brief within 30 days of the service of the appellant's brief. The brief must conform with sub. (1), except that the statement of issues and the statement of the case may be excluded.

(b) The respondent may file with his brief a supplemental appendix in conformity with sub. (2).

(4) REPLY BRIEF. The appellant shall file within 15 days of the service of the respondent's brief a reply brief or statement that a reply brief will not be filed.

(5) CONSOLIDATED AND JOINT APPEALS. Each appellant in consolidated appeals or a joint appeal and each co-appellant may file a separate brief or a joint brief with another appellant or co-appellant. A joint brief must not exceed the page allowance for a single appellant.

(6) CROSS-APPEAL. The parties in a cross-appeal have the same briefing rights as the parties in an appeal. A party in a cross-appeal may include the brief on the cross-appeal with the brief on the original appeal but shall not exceed the separate page limitations for each portion of the brief.

(7) REQUEST TO FILE A BRIEF. A person not a party may by motion request permission to file a brief. The motion must identify the interest of the person and state why a brief filed by that person is desirable. The brief must be filed not later than 10 days prior to the date of oral argument or, if submitted on briefs, filed the first day of the week in which the case is assigned for submission.

(8) NUMBER, FORM AND LENGTH OF BRIEFS AND APPENDICES. (a) *Number.* A person filing a brief or appendix shall file 20 copies with the court unless Rule 809.43 applies, or such other number as the court may direct, and serve 3 copies on each party.

(b) *Form.* A brief and appendix must conform to the following specifications:

1. Produced by standard typographic printing or by a duplicating or copying process of a typewritten original that produces a clear, black image on white paper. Carbon copies must not be filed.

2. Produced on 8-1/2 by 11 inch paper.

3. Typeset: 12 point type with 2 point lead, printed portion 7 by 4-1/4 inches centered in the page. Typewritten: pica, 10 spaces per inch, type; double-spaced; 1-1/2 inch margins on left side and 1 inch margin on other three sides.

4. Bound on the left side only with staple or tape, with pagination at the center of the bottom margin.

(c) *Length.* 1. Appellant's or respondent's brief: maximum of 40 pages if typeset, 50 pages if typewritten.

2. Appellant's reply or brief filed under sub. (7): maximum of 10 pages if typeset, 13 pages if typewritten.

(9) BRIEF COVER. Each brief or appendix must have a cover to contain the name of the court, the caption and number of the case, the court and judge appealed from, the title of the document and the name and address of counsel filing the document. The cover of the appellant's brief must be blue; the respondent's, red; a person other than a party, green; the reply brief, gray; and the appendix, if separately printed, white.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup Ct Order, 92 W (2d) xiii; 1979 c 110.

Judicial Council Committee's Note, 1978: Sub. (1). The format for briefs established in former Rule 251.34 is generally followed except that the requirement of a synopsis of the argument in the table of contents is eliminated. Former Rule 251.34 (1) required the synopsis and gave 200 Wis. 530 as an illustration. The synopsis was no longer included in most briefs and if it was, often was very lengthy and served no real purpose. It is replaced in the table of contents by a shorter, one sentence summary of each section of the argument portion of the brief. New statements pertaining to the need for oral argument and whether the opinion in the case will set precedent and thus should be published are added. The purpose of the latter is to assist the court in screening cases for oral argument or submission on briefs.

Sub. (2). The lengthy appendix with the narrative of testimony required by former Rule 251.34 (5) is replaced with the system used in the United States Court of Appeals for the Seventh Circuit. Under this system the original record serves as the primary evidence of what occurred in the trial court. The appendix becomes a very abbreviated document with only those items absolutely essential to an understanding of the case. It is designed to be nothing more than a useful tool to the members of the court. The failure to include some item in the appendix has no effect on the ability or willingness of the court to consider any matter in the record. This change, combined with the elimination of the requirement of printed briefs, should reduce the cost of an appeal.

Sub. (5). Each appellant in a case has the right to file a separate brief and need not share a brief with co-appellants.

Sub. (6). The parties to a cross-appeal can file the same briefs as the parties to the main appeal. Thus the cross-appellant can file a 40 page brief as cross-appellant in addition to his 40 page brief as respondent. The cross-appellant can also combine both briefs in a single brief but is limited to the page limits on each section of brief. A cross-appellant filing a 30 page brief as respondent is still limited to a 40 page brief as cross-appellant.

Sub. (7). The practice under former Rule 251.40 is modified to require the request to file an amicus curiae brief be made by motion rather than by letter. Rule 29, FRAP. The motion should indicate the interest of the amicus and why a brief by the amicus is desirable.

Subs. (8) and (9). In addition to briefs produced by the standard typographical process, briefs produced by a mimeograph or photocopy process from typewritten copy may also be filed. The principal objective is to reduce the cost of an appeal to the Court of Appeals. The specifications for the printed and typewritten pages are designed to result in briefs of approximately an equal number of words no matter which process is used. The paper size of 8-1/2 x 11 is specified for the sake of uniformity and ease of handling.

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Colors for covers are specified to permit easy identification of the briefs. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (8) (a) previously required that 30 copies of a brief or appendix be filed in either the Court of Appeals or Supreme Court. The number of copies to be filed in the Court of Appeals or Supreme Court has been reduced to 20 copies to reflect the smaller number of judges deciding an appeal before the Court of Appeals and the difficulty the Supreme Court is facing in having enough storage space to retain the 30 copies of a brief previously required. The provision in Rule 809.43 requiring the filing of 10 copies of a brief and appendix in an appeal heard by one judge remains unchanged. [Re Order effective Jan. 1, 1980]

809.20 Rule (Assignment and advancement of cases). The court may take cases under submission in such order and upon such notice as it determines. A party may file a motion to advance the submission of a case either before or after the briefs have been filed. The motion should recite the nature of the public or private interest involved, the issues in the case and how delay in submission will be prejudicial to the accomplishment of justice.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: This rule incorporates the present unwritten procedure for having the submission of a case advanced. It also specifies the factors that may affect the advancement of a case. [Re Order effective July 1, 1978]

809.21 Rule (Summary disposition). (1) The court upon its own motion or upon the motion of a party may dispose of an appeal summarily.

(2) A party may file at any time a motion for summary disposition of an appeal. Rule 809.14 governs the procedure on the motion.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: The basic concept in former Rule 251.54 of allowing the Supreme Court to dispose of appeals summarily is continued, but Rule 809.21 specifically authorizes a motion for this purpose. Such a motion was often used under prior procedure, but the rules did not expressly authorize it. [Re Order effective July 1, 1978]

See note to 802.08, citing Am. Orthodontics Corp. v. G. & H. Ins. 77 W (2d) 337, 253 NW (2d) 82.

809.22 Rule (Oral argument). (1) The court shall determine whether a case is to be submitted with oral argument or on briefs only.

(2) The court may direct that an appeal be submitted on briefs only if:

(a) The arguments of the appellant:

1. Are plainly contrary to relevant legal authority that appear to be sound and are not significantly challenged;

2. Are on their face without merit and for which no supporting authority is cited or discovered; or

3. Involve solely questions of fact and the fact findings are clearly supported by sufficient evidence; or

(b) The briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant.

(3) The court shall determine the amount of time for oral argument allowed to each party in a case either by general or special order.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: The Supreme Court has for a number of years scheduled some cases for submission on briefs only without oral argument in an effort to accommodate its burgeoning caseload. The criteria by which the court decides whether a case is to have oral argument have never been formally adopted. This rule is a statement of those criteria. Counsel should address these criteria in their briefs in discussing the question of the need for oral argument. See Rule 809.19 (1) (c). Flexibility is provided by sub. (3) as to the length of oral argument in order to meet the needs of an individual case. It may be appropriate, for example, to have an oral argument for the sole purpose of allowing the court to ask questions of counsel. [Re Order effective July 1, 1978]

809.23 Rule (Publication of opinions). (1) CRITERIA FOR PUBLICATION. (a) Criteria for publication in the official reports of an opinion of the court include whether the opinion:

1. Enunciates a new rule of law or a modification of an old rule;

2. Applies an established rule of law to a factual situation significantly different from that in published opinions;

3. Resolves a conflict between prior decisions of the court; or

4. Decides a case of substantial public interest.

(b) An opinion should not be published when:

1. The issues involve no more than the application of well-settled rules of law to a recurring fact situation;

2. The issue asserted is whether the evidence is sufficient to support the judgment and the briefs show the evidence is sufficient; or

3. The disposition of the appeal is clearly controlled by a prior holding of the court or a higher court and no reason appears for questioning or qualifying the holding.

(2) DECISION ON PUBLICATION. The judge or judges of the court of appeals who join in an opinion in an appeal or other proceeding shall make a recommendation on whether the opinion should be published. A committee composed of the chief judge and one judge from each district of the court of appeals selected by the court of appeals judges of each district shall determine whether an opinion is to be published.

(3) An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

(4) A person may at any time request the court to have an unreported opinion published in the official reports. A copy of the request shall be served pursuant to Rule 809.80 on the parties

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to the appeal or other proceeding in which the opinion was filed.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1978: As with Rule 809.22 on oral argument, a former practice of the Supreme Court is written into this Rule and formal criteria established for it. The trend toward nonpublication of opinions is nationwide and results from the explosion of appellate court opinions being written and published. Many studies of the problem have concluded that unless the number of opinions published each year is reduced legal research will become inordinately time-consuming and expensive. Some argue that even accepting the premise that a court may properly decide not to publish an opinion this should not prevent that opinion from being cited as precedent since in common law practice any decision of a court is by its nature precedent. Others argue that a court may try to hide what it is doing in a particular case by preventing the publication of the opinion in the case.

There are several reasons why an unpublished opinion should not be cited: (1) The type of opinion written for the benefit of the parties is different from an opinion written for publication and often should not be published without substantial revision; (2) If unpublished opinions could be cited, services that publish only unpublished opinions would soon develop forcing the treatment of unpublished opinions in the same manner as published opinions thereby defeating the purpose of nonpublication; (3) Permitting the citation of unpublished opinions gives an advantage to a person who knows about the case over one who does not; (4) An unpublished opinion is not new authority but only a repeated application of a settled rule of law for which there is ample published authority.

If it is desirable to reduce the number of published opinions, the only alternative to having some opinions unpublished is to decide cases without written opinions. This would be far worse because it would compound the problems of nonpublication and at the same time take away from the parties the benefit of a written opinion.

Section 752.41 (3) authorizes the Supreme Court to establish by rule the procedure under which the Court of Appeals decides which of its opinions are to be published. Sub. (1) provides for a committee of judges of the Court of Appeals to make this decision.

As a safeguard against any mistakes as to nonpublication, sub. (4) adopts the procedure of the United States Court of Appeals for the Seventh Circuit in permitting a person to request that an unpublished opinion be published. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (4) is amended to delete the prior requirement that a motion had to be filed in order to ask the Court of Appeals to have one of its unreported opinions published in the official reports of the Court of Appeals. Requiring a motion to be filed led to confusion in some instances because the person requesting the opinion to be published may not be a party to the appeal decided by the opinion and uncertainty can occur as to who should be served with a copy of the motion and given an opportunity to respond. The requirement to file a motion has been replaced by the need to simply make a request to the Court of Appeals for publication of an unreported opinion. [Re Order effective Jan. 1, 1980]

The noncitation rule and the concept of stare decisis. Walther. 61 MLR 581 (1978).

809.24 Rule (Reconsideration). The court of appeals may on its own motion reconsider a decision or opinion: (1) at any time prior to remittitur if no petition to appeal under Rule 809.62 is filed; or (2) within 30 days of the filing of a petition to appeal. A motion for reconsideration is not permitted.

History: Sup. Ct. Order, 83 W (2d) xiii.

809.25 Rule (Costs and fees). (1) COSTS. (a) Costs in a civil appeal are allowed as follows unless otherwise ordered by the court:

1. Against the appellant before the court of appeals when the appeal is dismissed or the judgment or order affirmed;

2. Against the respondent before the court of appeals when the judgment or order is reversed;

3. Against the petitioner before the supreme court when the judgment of the court of appeals is affirmed by the supreme court;

4. Against the respondent before the supreme court when the judgment of the court of appeals is reversed by the supreme court and the costs in the court of appeals are canceled and may be taxed by the supreme court as costs against another party.

5. In all other cases as allowed by the court.

(b) Allowable costs include:

1. Cost of printing and assembling the number of copies and briefs and appendices required by the rules, not to exceed the rates generally charged in Dane County, Wisconsin, for offset printing of camera-ready copy and assembling;

2. Fees charged by the clerk of the court;

3. Cost of the preparation of the transcript of testimony or for appeal bonds;

4. Fees of the clerk of the trial court for preparation of the record on appeal;

5. Other costs as directed by the court.

(c) A party seeking to recover costs in the court shall file a statement of the costs within 14 days of the filing of the decision of the court. An opposing party may file within seven days of the service of the statement a motion objecting to the statement of costs.

(d) Costs allowed by the court are taxed by the clerk in the court of appeals irrespective of the filing by a party of a petition for review in the supreme court. In the event of review by the supreme court, costs are taxed by the clerk in the supreme court as set forth in subs. (a) and (b). The clerk shall include in the remittitur the costs allowed in the court. The clerk of the trial court shall docket the judgment for costs in accordance with Rule 806.16.

(2) FEES. (a) The clerk of the court shall charge the following fees:

1. For filing an appeal, cross-appeal, petition to appeal, petition to bypass, or other proceeding, $25.

2. For making a copy of a record, paper, or opinion of the court and comparing it to the original, 40 cents for each page.

3. For comparing for certification of a copy of a record, entry or paper, when the copy is furnished by the person requesting its certification, 10 cents for each page.

4. For comparing a photographic reproduction of an original record, entry or paper, when furnished by the person requesting its certification, 5 cents for each page.

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5. For a certificate and seal, $1.

(b) The state is exempt from payment of the fees set forth in sub. (a) 1 to 5, except that the clerk is not obligated to supply the state with free copies of opinions.

(c) The clerk may refuse to file, docket, record, certify, or render any other service without prepayment of the fees established by this section.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1978: Most of the provisions of former ss. 251.23 and 251.90 are retained. The major change is to provide that execution for costs in the Court of Appeals is to be had in the trial court in accordance with Rule 806.16 rather than in the Court of Appeals. The Judicial Council did not review the adequacy of the fees and thus made no recommendations on them. It is suggested, however, that many of the fees appear to be out of date and should be revised. This should be done in connection with a general review of fees in all courts. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) (a) and (d), which governs costs that are allowed in an appeal to the Court of Appeals or a review by the Supreme Court, have been amended for purposes of clarification.

A provision has been added to clarify that costs are taxed by the clerk in the Court of Appeals irrespective of the filing of a petition for review in the Supreme Court. In the event of review by the Supreme Court, a provision has been added specifically stating that costs are allowed against a petitioner in a case before the Supreme Court when the decision of that court affirms a judgment of the Court of Appeals.

An additional clarifying provision has been added allowing costs against a respondent in a case before the Supreme Court when the petitioner before the Supreme Court has achieved reversal of a judgment of the Court of Appeals. The provision further states that the costs that were allowed when the case was originally decided by the Court of Appeals are canceled. [Re Order effective Jan. 1, 1980]

809.26 Rule (Remittitur). (1) The clerk of the court shall transmit to the trial court the judgment and opinion of the court and the record in the case filed pursuant to Rule 809.15 31 days after the filing of the decision of the court. If a petition for review is filed pursuant to Rule 809.62, the transmittal is stayed until the supreme court rules on the petition.

(2) If the supreme court grants a petition for review of a decision of the court of appeals, the supreme court upon filing its decision shall transmit to the trial court the judgment and opinion of the supreme court and the complete record in the case unless the case is remanded to the court of appeals with specific instructions.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1978: Former s. 817.35 is embodied in this section except that the time for issuance of the remittitur is reduced from 60 to 31 days. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: This section is amended by creating a sub. (2) that specifically authorizes the Supreme Court after filing its decision in the review of a decision from the Court of Appeals to remit directly to the trial court the complete record of the case without the necessity of returning the case to the Court of Appeals for remittitur to the trial court. The only exception to this new procedure will occur when the Supreme Court remands a case to the Court of Appeals with some specific instructions that the Court of Appeals is required to follow. [Re Order effective Jan. 1, 1980]

SUBCHAPTER III

FELONY APPEAL PROCEDURE IN COURT OF APPEALS

809.30 Rule (Appeals in felony cases). (1) APPEAL OR POSTCONVICTION MOTION BY DEFENDANT. (a) An appeal or motion for postconviction relief by a defendant in a felony case must be taken in accordance with this subsection.

(b) The trial judge shall inform the defendant at the time of sentencing or imposition of a fine or probation of the right to appeal or seek other postconviction relief, the time limits on seeking the relief and, if indigent, the right to publicly compensated counsel in those proceedings.

(c) If the defendant claims or appears to be indigent and wishes to have publicly compensated counsel to represent the defendant in seeking postconviction relief, the defendant shall notify the state public defender within 45 days of the date of sentencing or imposition of fine or probation. The state public defender shall determine the defendant's indigency and appoint counsel as provided in ch. 977, and at the same time shall request the court reporter to prepare the transcript of notes of the proceedings in the case.

(d) A defendant who desires to appeal or seek other postconviction relief without counsel or with retained counsel shall order a transcript of the reporter's notes within 45 days of sentencing or imposition of a fine or probation.

(e) The court reporter shall serve the transcript on the defendant within 40 days of the ordering of the transcript. The reporter may seek an extension under Rule 809.16 (4) for serving the transcript.

(f) The defendant shall file a notice of appeal or motion seeking postconviction relief within 30 days of the service of the transcript.

(g) The trial court shall determine by an order the defendant's motion for postconviction relief within 60 days of its filing or the motion is considered to be denied and the clerk of the trial court shall immediately enter an order denying the motion.

(h) The defendant shall file an appeal from the judgment of conviction and sentence and, if necessary, from the order of the trial court on the motion for postconviction relief within 20 days of the entry of the order on the postconviction motion.

(i) Subsequent proceedings in the appeal are governed by the procedures for civil appeals.

(j) An appeal under s. 974.06 is governed by the procedures for civil appeals.

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(2) APPEALS BY STATE OR OTHER PARTY. In a felony case in which the state of Wisconsin, the representative of the public or any other party appeals and the defendant or subject individual claims or appears to be indigent, the court shall refer the person to the state public defender for the determination of indigency and the appointment of legal counsel under ch. 977.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1978: Many changes are made in prior practice in criminal cases and in protective placement, juvenile and mental commitment cases. Under the former procedure counsel, usually the State Public Defender appointed by the Supreme Court, was required to order a transcript, wait for its preparation, review it, present to the trial court by a post-trial motion any issues which the defendant desired to raise on appeal even if the issue had been presented to and decided by the court during the trial, [see State v. Charette, 51 Wis. 2d 531, 187 N.W. 2d 203 (1971) and State v. Wuensch, 69 Wis. 2d 467, 230 N.W. 2d 665 (1975)], and after the court ruled on the motion, appeal both the original conviction and the denial of the post-trial motion to the Supreme Court. Often a year or more elapsed between the sentencing of the defendant and the docketing of his appeal in the Supreme Court. This delay, combined with the delay in the Supreme Court caused by its backlog, often resulted in an appeal not being decided by the Supreme Court until two or three years after conviction.

The procedures in this section are designed to expedite the entire process by putting time limits on each step and by eliminating the necessity of each issue being presented twice to the trial court.

The term "postconviction relief", as used in this Rule, includes new trial, reduction of sentence and any other type of relief which the trial court is authorized to give, other than under s. 974.06.

Extensions of time for taking various steps under this section can be granted by the court of appeals under Rule 809.82. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) (h) is amended to increase from 10 to 20 days the period for a defendant to file a notice of appeal after entry of a trial court's order denying postconviction relief. It is sometimes difficult to meet the present 10-day requirement for filing an appeal under this subsection due to the delays that may occur in the prompt delivery by mail of the order of the trial court on a motion for postconviction relief. Increasing the time period by 10 days does not unduly lengthen the appellate process for determination of an appeal on its merits. [Re Order effective Jan. 1, 1980]

809.31 Rule (Release on bond pending seeking postconviction relief). (1) A defendant convicted of a felony who is seeking relief from a conviction and sentence of imprisonment and who seeks release on bond pending a determination of a motion or appeal shall file in the trial court a motion seeking release.

(2) The trial court shall promptly hold a hearing on the motion of the defendant, determine the motion by order and state the grounds for the order.

(3) Release may be granted if the court finds that:

(a) There is no substantial risk the appellant will not appear to answer the judgment following the conclusion of postconviction proceedings;

(b) The defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice;

(c) The defendant will promptly prosecute postconviction proceedings; and

(d) The postconviction proceedings are not taken for purposes of delay.

(4) In making the determination on the motion, the court shall take into consideration the nature of the crime, the length of sentence and other factors relevant to pretrial release.

(5) The defendant or the state may seek review of the order of the trial court by filing a petition in the court. The procedures in Rule 809.50 govern the petition.

(6) The court ordering release shall require the defendant to post a bond in accordance with s. 969.09 and may impose other terms and conditions. The defendant shall file the bond in the trial court.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Section 969.09 provides for release on bond pending appeal and the conditions of the bond. Section 969.01 (2) provides for bond in felony cases after conviction in the discretion of the trial court or by the Supreme Court or a justice thereof or the Court of Appeals or a judge thereof. Neither the statutes nor case law, however, establishes the standards for release or indicates whether the Supreme Court or Court of Appeals is reviewing the action of the trial court or acting de novo. This Rule is intended to meet these deficiencies. The standards for release are those included in the American Bar Association Criminal Justice Standards, Criminal Appeals, s. 2.5. [Re Order effective July 1, 1978]

Petition for bail pending appeal discussed. State v. Whitty, 86 W (2d) 380, 272 NW (2d) 842 (1978).

809.32 Rule (No merit reports). (1) If an attorney appointed under s. 967.06 (3) or Rule 809.30 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

(2) The attorney also shall file in the trial court a notice of appeal of the judgment of conviction and of any order denying a postconviction motion. The clerk of the trial court shall transmit the record in the case to the court pursuant to Rule 809.15. The no merit brief and notice of appeal must be filed within 180 days of the service upon the defendant of the transcript under Rule 809.30 (1) (e).

(3) In the event the court of appeals finds that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction and the denial of any postconviction motion and relieve the attorney of further responsibility in the case. The attorney shall advise the defendant of his right to file a petition

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for appeal to the supreme court under Rule 809.62.

(4) If a fully briefed appeal is taken to the court of appeals and the attorney is of the opinion that a petition to appeal in the supreme court under Rule 809.62 would be frivolous and without any arguable merit, the attorney shall advise the defendant of the reasons for his opinion and that the defendant has the right to file a petition to appeal. If requested by the defendant, the attorney shall file the petition to appeal and the defendant shall file a statement of reasons in support of the petition.

History: Sup. Ct. Order, 83 W (2d) xiii.

SUBCHAPTER IV

CHAPTERS 48, 51, 55 AND 799, TRAFFIC REGULATION, MUNICIPAL ORDINANCE VIOLATION, AND MISDEMEANOR CASES APPEAL PROCEDURE IN COURT OF APPEALS

809.40 Rule (Applicability). (1) An appeal to the court of appeals from a judgment or order in a misdemeanor case or a ch. 48, 51 or 55 case, or a motion for postconviction relief in a misdemeanor case must be initiated within the time periods specified in Rule 809.30 and are governed by the procedures specified in Rules 809.30 to 809.32.

(2) An appeal to the court of appeals from a judgment or order in a ch. 799, traffic regulation or municipal ordinance violation case must be initiated within the time period specified in s. 808.04, and is governed by the procedures specified in Rules 809.01 to 809.26 and 809.50 to 809.85, unless a different procedure is expressly provided in Rules 809.41 to 809.43.

History: Sup. Ct. Order, 83 W (2d) xiii; 1979 c. 32 s. 92 (16); Sup. Ct. Order, 92 W (2d) xiii; 1979 c. 175 s. 53; 1979 c. 355.

Judicial Council Committee's Note, 1978: Rule 809.40 establishes the time periods for appealing in a misdemeanor case or Chapter 48, 51 or 55 case or seeking postconviction relief in a misdemeanor case pursuant to s. 974.02 (1). It also makes the procedures set forth in Rules 809.30 to 809.32 apply to these types of cases.

Rules 809.41 to 809.43 establish special procedures for appeals that may be heard by one appellate judge. The appeal time periods in Chapter 299, traffic regulation and municipal ordinance violation cases, are found in s. 808.04. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (2) is repealed and recreated to place into it for purposes of clarity the appropriate reference in Chapter 808 containing the appeal time periods for Chapter 799, traffic regulations, and municipal ordinance violations cases. No substantive change is intended. [Re Order effective Jan. 1, 1980]

809.41 Rule (Motion for 3-judge panel or hearing in county of origin). (1) If an appellant desires the appeal to be heard by a 3-judge panel or that the appeal be heard in the county where the case or action originated under s. 752.31 (3), the appellant shall file with the notice of appeal a motion for a 3-judge panel or hearing in the county of origin. Any other party must file a motion under this rule within 10 days of service of the notice of appeal. The failure to file a motion under this rule waives the right to request the appeal to be heard by a 3-judge panel or in the county where the case or action originated.

(2) The chief judge may change or modify his decision on a motion that the appeal be heard by a 3-judge panel at any time prior to a decision on the merits of the appeal.

(3) Whether or not a motion for a 3-judge panel has been filed, the chief judge may order that an appeal be decided by a 3-judge panel at any time prior to a decision on the merits of the appeal.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1979: Sub. (3) is created to clarify that the chief judge of the Court of Appeals has the authority to order that an appeal be decided by a 3-judge panel after it has initially been assigned to a single Court of Appeals judge. This authority of the chief judge may be exercised at any time prior to a decision on the merits of the appeal by the single Court of Appeals judge to whom the appeal was originally assigned. [Re Order effective Jan. 1, 1980]

809.42 Rule (Waiver of oral argument). The appellant and respondent in an appeal under s. 752.31 (2) may waive oral argument, subject to approval of the court.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1979: This rule is amended to delete language authorizing an appellant and respondent to waive the filing of briefs in an appeal to the Court of Appeals. The Court of Appeals as a consistent policy does not allow the waiving of filing of briefs. The rule is brought into conformity with that policy. [Re Order effective Jan. 1, 1980]

809.43 Rule (Number of briefs). A person filing a brief or appendix shall file 10 copies or such other number as the court may direct and serve three copies on each party.

History: Sup. Ct. Order, 83 W (2d) xiii.

SUBCHAPTER V

DISCRETIONARY JURISDICTION PROCEDURE IN COURT OF APPEALS

809.50 Rule (Appeal from judgment or order not appealable as of right). (1) A person shall seek leave of the court to appeal a judgment or order not appealable as of right under s. 808.03 (1), by filing within 10 days of the entry of the judgment or order a petition and supporting memorandum, if any. The petition must contain:

(a) A statement of the issues presented by the controversy;

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(b) A statement of the facts necessary to an understanding of the issues; and

(c) A statement showing that review of the judgment or order immediately rather than on an appeal from the final judgment in the case or proceeding will materially advance the termination of the litigation or clarify further proceedings therein, protect a party from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice.

(2) An opposing party in the trial court shall file a response with supporting memorandum, if any, within 10 days of the service of the petition.

(3) If the court grants leave to appeal, the procedures for appeals from final judgments are applicable to further proceedings in the appeal, except that the entry of the order granting leave to appeal has the effect of the filing of the notice of appeal.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1978: Section 808.03 (1) makes only final judgments and final orders appealable as of right. All other judgments and orders are appealable only in the discretion of the court. This section provides the procedure for asking the court to permit the appeal of a nonfinal order. The issue of whether the court should hear the appeal is presented to the court by petition with both parties given the opportunity of submitting memoranda on the question. The standards on which nonfinal judgments or orders should be reviewed immediately are set forth in s. 808.03 (2) and are taken from the American Bar Association's Standards of Judicial Administration, Standards Relating to Appellate Courts, s. 3.12 (b). [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) (c) is amended to conform with 808.03 (2) (b), which sets out the standards created by the Wisconsin Legislature for appeals to the Court of Appeals by permission. A drafting error in the original preparation of chapter 809 replaced the word "or" found in 808.03 (2) (b) with the word "and", which results in a party having to show in a petition to the Court of Appeals for the court to assume discretionary jurisdiction that granting such a petition will protect a party from both substantial "and" irreparable injury rather than meeting just one of the 2 criteria, as was the intention of the Wisconsin Legislature. [Re Order effective Jan. 1, 1980]

See note to 808.03, citing State v. Jenich, 94 W (2d) 74, 288 NW (2d) 114 (1980).

809.51 Rule (Supervisory writ). (1) A person may request the court to exercise its supervisory jurisdiction over a court and the judge presiding therein or other person or body by filing a petition and supporting memorandum. The petitioner shall name as respondents the court and judge or other person or body and all other parties in the action or proceeding. The petition must contain:

(a) A statement of the issues presented by the controversy;

(b) A statement of the facts necessary to an understanding of the issues;

(c) The relief sought; and

(d) The reasons why the court should take jurisdiction.

(2) The court may deny the petition ex parte or may order the respondents to file a response with a supporting memorandum, if any, and may order oral argument on the merits of the petition. The respondents shall respond with supporting memoranda within 10 days of service of the order. A respondent may file a letter stating that he or she does not intend to file a response, but the petition is not thereby admitted.

(3) The court, upon a consideration of the petition, responses, supporting memoranda and argument, may grant or deny the petition or order such additional proceedings as it considers appropriate.

History: Sup. Ct. Order, 83 W (2d) xiii.

Court abused discretion by ordering oral argument one day after petition for writ was filed and served. State ex rel. Breier v. Milwaukee County Cir. Ct. 91 W (2d) 833, 284 NW (2d) 102 (1979).

809.52 Rule (Temporary relief). A petitioner may request in a petition filed under Rule 809.50 or 809.51 that the court grant temporary relief pending disposition of the petition. The court or a judge of the court may grant temporary relief upon the terms and conditions it considers appropriate.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Rules 809.51 to 809.52 incorporate into the rules for the first time the procedures to be followed when the court is asked to exercise its supervisory jurisdiction. For an excellent discussion of original and supervisory jurisdiction of the Supreme Court and the distinction between them see the opinion by Justice Wickhem in Petition of Heil, 230 Wis. 428, 284 N.W. 42 (1939). To a large degree the procedures specified in 201 Wis. 123, 229 N.W. 643 (1930) are followed, but some of the features of Rule 21, FRAP, are included.

There are a number of changes, however, from prior procedures. The parties in the action or proceeding in the trial court must be made respondents in the Court of Appeals because they in most cases are the real parties in interest. Usually the judge whose order is being challenged has no direct interest in the outcome and should not be forced to appear but may, of course, do so. The Attorney General must also be served in certain cases such as declaratory judgments involving the constitutionality of a statute or arising under Chapter 227, the administrative procedure act.

The petition must be filed with the clerk rather than being submitted ex parte to a judge of the court. By virtue of the requirement that the petition be filed, it must previously have been served on opposing parties as required by s. 809.80. The initial action of the court will be to direct the respondents to answer the petition rather than to issue an order to show cause why the relief requested should not be granted. [Re Order effective July 1, 1978]

SUBCHAPTER VI

APPELLATE PROCEDURE IN SUPREME COURT

809.60 Rule (Petition to bypass). (1) A party may file with the supreme court a petition to bypass the court of appeals pursuant to s. 808.05 any time prior to the court of appeals placing an appeal or other proceeding on an assignment of cases for consideration by the court. The petition must include a statement of reasons for bypassing the court of appeals.

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(2) An opposing party may file a response to the petition within 10 days of the service of the petition.

(3) The filing of the petition stays the court of appeals from taking under submission the appeal or other proceeding.

(4) The supreme court may grant the petition upon such conditions as it considers appropriate.

(5) Upon the denial of the petition by the supreme court the appeal or other proceeding in the court of appeals continues as though the petition had never been filed.

History: Sup. Ct. Order, 83 W (2d) xiii.

809.61 Rule (Bypass by certification of court of appeals or upon motion of supreme court). The supreme court may take jurisdiction of an appeal or other proceeding in the court of appeals upon certification by the court of appeals or upon the supreme court's own motion. The supreme court may refuse to take jurisdiction of an appeal or other proceeding certified to it by the court of appeals.

History: Sup. Ct. Order, 83 W (2d) xiii.

809.62 Rule (Petition for review). (1) A party may file with the supreme court a petition for review of an adverse decision of the court of appeals pursuant to s. 808.10 within 30 days of the date of the decision of the court of appeals. The petition must include a statement of reasons for review of the decision.

(2) An opposing party may file a response to the petition within 10 days of the service of the petition.

(3) The filing of the petition stays further proceedings in the court of appeals.

(4) The supreme court may grant the petition upon such conditions as it considers appropriate, including the filing of additional briefs.

(5) A party who seeks a modification of an adverse decision of the court of appeals may file a petition for cross-review within the period for filing a petition for review with the supreme court, or 30 days after the filing of a petition for review by another party, whichever is later. A party seeking cross-review has the same rights and obligations as a party seeking review under ch. 809.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 92 W (2d) xiii.

Judicial Council Committee's Note, 1979: The caption of Rule 809.62 is amended to more properly describe the function of the Supreme Court in reviewing decisions of the Court of Appeals.

Rule 809.62 (5) is created to protect the review rights of all parties to a review in the Supreme Court by creating a cross-review provision for a decision being reviewed by the Supreme Court similar to the cross-appeal provision for a judgment or order being appealed to the Court of Appeals from a trial court found in Rule 809.10 (2) (b). New sub. 809.62 (5) gives a party the ability to file for cross-review with the Supreme Court up to an additional 30 days from the filing of a petition for review by another party to the decision rendered by the Court of Appeals. [Re Order effective Jan. 1, 1980]

Supreme court has power to entertain petitions filed by state in criminal cases. State v. Barrett, 89 W (2d) 367, 280 NW (2d) 114 (1979).

"Decision" under (1) means result, disposition, or mandate reached by court, not opinion. Neely v. State, 89 W (2d) 755, 279 NW (2d) 255 (1979).

See note to art. I, sec. 8, citing State v. Bowden, 93 W (2d) 574, 288 NW (2d) 139 (1980).

Petitions for review by the Wisconsin supreme court. 1979 WLR 1176.

809.63 Rule (Procedure in supreme court). When the supreme court takes jurisdiction of an appeal or other proceeding, the rules governing procedures in the court of appeals are applicable to proceedings in the supreme court unless otherwise ordered by the supreme court in a particular case.

History: Sup. Ct. Order, 83 W (2d) xiii.

809.64 Rule (Reconsideration). A party may seek reconsideration of the judgment or opinion of the supreme court by filing a motion under Rule 809.14 for reconsideration within 20 days of the filing of the decision of the supreme court.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Rule 809.64 replaces former Rules 251.65, 251.67 to 251.69, which provided for motions for rehearing. The necessity for the filing of briefs on a motion for reconsideration as required by former Rule 251.67 is eliminated. The matter will be considered on the motion and supporting and opposing memoranda as with any other motion. The term "reconsideration" is used rather than rehearing because in a case decided without oral argument there has been no initial hearing. [Re Order effective July 1, 1978]

Supreme court order denying petition to review court of appeals decision was neither judgment nor opinion. Archdiocese of Milwaukee v. Milwaukee, 91 W (2d) 625, 284 NW (2d) 29 (1979).

SUBCHAPTER VII

ORIGINAL JURISDICTION PROCEDURE IN SUPREME COURT

809.70 Rule (Original action). (1) A person may request the supreme court to take jurisdiction of an original action by filing a petition which may be supported by a memorandum. The petition must contain statements of: (a) the issues presented by the controversy; (b) the facts necessary to an understanding of the issues; (c) the relief sought; and (d) the reasons why the court should take jurisdiction.

(2) The court may deny the petition or may order the respondent to respond and may order oral argument on the question of taking original jurisdiction. The respondent shall file a response, which may be supported by a memorandum, within 10 days of the service of the order.

(3) The court, upon a consideration of the petition, response, supporting memoranda and

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argument, may grant or deny the petition. The court, if it grants the petition, may establish a schedule for pleading, briefing and submission with or without oral argument.

History: Sup. Ct. Order, 83 W (2d) xiii

809.71 Rule (Supervisory writ). A person may request the supreme court to exercise its supervisory jurisdiction over a court and the judge presiding therein or other person or body by filing a petition in accordance with Rule 809.51.

History: Sup. Ct. Order, 83 W (2d) xiii.

SUBCHAPTER VIII

MISCELLANEOUS PROCEDURES IN COURT OF APPEALS AND SUPREME COURT

809.80 Rule (Filing and service of papers). (1) A person shall file any paper required to be filed by these rules with the clerk of the court, State Capitol, Madison, Wisconsin 53702, unless a different place of filing is expressly required or permitted by statute or rule.

(2) A person shall serve and file a copy of any paper required or authorized under these rules to be filed in a trial or appellate court as provided in Rules 801.14 (1), (2) and (4).

History: Sup. Ct. Order, 83 W (2d) xiii

Judicial Council Committee's Note, 1978: The prior requirement of an affidavit of service is eliminated. The provision of the Rules of Civil Procedure that the filing of a paper is a certification that the paper has been served is adopted. [Re Order effective July 1, 1978]

809.81 Rule (Form of papers). A paper filed in the court must conform to the following requirements unless expressly provided otherwise in these rules:

(1) SIZE. 8-1/2 x 11 inches.

(2) NUMBER OF COPIES. Four copies in the court of appeals, 8 copies in the supreme court.

(3) STYLE. Typewritten.

(4) SPACING AND MARGINS. Double-spaced with 1-1/2 inch margin on all 4 sides.

(5) PAGINATION. Paginated at the center of the bottom margin.

(6) COPYING PROCESS. Any duplicating or copying process that produces a clear, black image on white paper. Carbon copies may not be filed.

(7) BINDING. Bound or stapled at the top margin.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: The 8-1/2 x 11 letter size paper is adopted as the standard size for all papers to be filed in the Court of Appeals in place of using both 8-1/2 x 14 and 8-1/2 by 11. A standard size paper simplifies records management. There is a national trend away from legal size paper. [Re Order effective July 1, 1978]

809.82 Rule (Computation and enlargement of time). (1) COMPUTATION. In computing any period of time prescribed by these rules, the provisions of Rule 801.15 (1) and (5) apply.

(2) ENLARGEMENT OR REDUCTION OF TIME. The court upon its own motion or upon good cause shown by motion, may enlarge or reduce the time prescribed by these rules or court order for doing any act, or waive or permit an act to be done after the expiration of the prescribed time, except the filing of a notice of appeal or cross-appeal of a final judgment or order in a civil appeal.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Sub. (1). The provisions of the Rules of Civil Procedure as to computation of time are adopted for appeals to avoid any problems resulting from a lack of uniformity.

Sub. (2) continues the first sentence of former Rule 251.45. It eliminates the second sentence of that Rule permitting the attorneys by stipulation to extend the time for filing briefs if the extension does not interfere with the assignment of the case because this procedure interferes with the ability of the court to monitor cases pending before it and because it is not always certain when a case will be on an assignment. The Supreme Court considers that deadlines as to briefs and other actions in the court should have priority over all matters except previously scheduled trials in circuit and county courts and deadlines set by a federal court. Requests for extensions are not, consequently, looked upon with favor by the court. [Re Order effective July 1, 1978]

See note to 809.51, citing State ex rel. Breier v. Milwaukee County Cir. Ct. 91 W (2d) 833, 284 NW (2d) 102 (1979).

809.83 Rule (Penalties for delay or noncompliance with rules). (1) DELAY; EXTRA COSTS AND DAMAGES. If the court finds that an appeal was taken for the purpose of delay, it may award: (a) double costs; (b) a penalty in addition to interest not exceeding 10% on the amount of the judgment affirmed; (c) damages occasioned by the delay; and (d) reasonable attorneys fees.

(2) NONCOMPLIANCE WITH RULES. Failure of a person to comply with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

History: Sup. Ct. Order, 83 W (2d) xiii.

Judicial Council Committee's Note, 1978: Former ss. 251.22, 251.23, 251.51, 251.56, 251.57, 251.73, 251.75, 251.77, 251.81, 251.82, 251.85 and 251.89, providing for specific penalties for delay and for certain rule violations, are replaced. In the event of a rule violation, the court is authorized to take such action as it considers appropriate. If the court finds an appeal was taken for purposes of delay, it can impose one or more of the four types of penalties specified in sub. (1). [Re Order effective July 1, 1978]

See note to 808.10, citing State v. Rhone, 94 W (2d) 682, 288 NW (2d) 862 (1980).

809.84 Rule (Applicability of rules of civil procedure). An appeal to the court is governed by the rules of civil procedure as to all matters

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not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result.

History: Sup. Ct. Order, 83 W (2d) xiii

809.85 Rule (Counsel or guardian appointed in trial court). An attorney or guardian ad litem appointed by a lower court in a case or proceeding appealed to the court shall continue to act in the same capacity in the court until the court relieves the attorney or guardian.

History: Sup. Ct. Order, 83 W (2d) xiii

Judicial Council Committee's Note, 1978: Rule 809.85 continues former Rule 251.88. [Re Order effective July 1, 1978]