CHAPTER 809

RULES OF APPELLATE PROCEDURE

SUBCHAPTER I

DEFINITIONS

809.01 Rule (Definitions). In this chapter:

(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.

(5d) "Monospaced font" means a font in which each character uses an equal amount of horizontal space.

(5g) "Proportional font" means a font in which the horizontal space used by a character varies.

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

(8) "Serif font" means a font that has short ornaments or bars at the upper and lower ends of the main strokes of the characters.

(8m) "Sixty characters per full line" means the length of a nonindented line of 13 point proportional serif font characters determined by using a line composed of a repeating string of lowercase characters in alphabetical order.

(12) "Word" means a group consisting of one or more alphabetical characters with a space or punctuation mark preceding and succeeding the group.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); 1977 c. 449; Sup. Ct. Order No. 93−20, 179 W (2d) xxv.

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]

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, whether the appeal is in one of the types of cases specified in s. 752.31 (2), and

whether the appeal is one of those to be given preference in the circuit court or court of appeals pursuant to statute. 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. The person shall also send the court of appeals an original and one copy of a completed docketing statement on a form prescribed by the court of appeals. The statement shall accompany the court of appeals' copy of the notice of appeal. The person shall also send a copy of the completed docketing statement to opposing counsel. Docketing statements need not be filed in criminal cases or in cases in which a party appears pro se.

(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 this chapter.

(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 (1978); Sup. Ct. Order, 104 W (2d) xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order, 123 W (2d) xix (1985); Sup. Ct. Order, 131 W (2d) xv (1986); 1987 a. 403; Sup. Ct. Order, 161 W (2d) xiii (1991); Sup. Ct. Order No. 93−19, 179 W (2d) xxiii.

Cross−reference: Statutes requiring preference [under (1) (a)] include ss. 9.01 (9) (c), 9.10 (4) (c), 30.30 (3) (c), 62.50 (21), 66.014 (7) (b), 66.021 (10) (b), 66.05 (2) (b) and (3), 70.47 (13) and (16) (a), 70.85 (1), 78.72, 87.16, 103.59, 227.25 and 227.26.

See s. 767.15 (2) for appeals involving child support and maintenance.

Court of Appeals Note, 1986: Sub. (1) (a) is amended to require appellants to file a docketing statement in the court of appeals on a form prescribed by the court at the time the notice of appeal is filed in the trial court. The docketing statement will provide the court with information for its expedited appeals program pursuant to s. 809.17 and the rules and procedures set forth in Section VII, Expedited Appeals, of the Court of Appeals Internal Operating Procedures (amended March 1, 1986). Docketing statement forms are available in the offices of clerks of the circuit courts. [Re Order effective January 1, 1987]

Judicial Council Committee's Note, 1978: Sub. (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]

Judicial Council Committee's Note, 1981: To facilitate the efficient administration of appeals by the court of appeals, sub. (1) (a) is amended to require that the notice of appeal state whether the appeal is in one of the types of cases specified in s. 752.31 (2). [Re Order effective Jan. 1, 1982]

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).

Where appeal is pending, matters not directly concerned with appeal but related to case are still properly within trial court's jurisdiction. In Matter of Trust Estate of Schaefer, 91 W (2d) 360, 283 NW (2d) 410 (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 identified "what is appealed from". State v. Ascencio, 92 W (2d) 822, 285 NW (2d) 910 (Ct. App. 1979).

Respondent was allowed to challenge trial court order denying motion for summary judgment despite failure to file notice of cross−appeal. Auric v. Continental Cas. Co. 111 W (2d) 507, 331 NW (2d) 325 (1983).

Service of notice of appeal on opposing parties is not necessary to confer jurisdiction on court of appeals. Rhyner v. Sauk County, 118 W (2d) 324, 348 NW (2d) 588 (Ct. App. 1984).

See note to 808.03, citing In re Marriage of Hengel v. Hengel, 120 W (2d) 522, 355 NW (2d) 846 (Ct. App. 1984).

Failure to submit docketing fee within time specified for filing notice of appeal does not deprive court of jurisdiction; notice of appeal, not docketing fee, vests court with jurisdiction. Douglas v. Dewey, 147 W (2d) 328, 433 NW (2d) 243 (1989).

Federal prohibition against stacking cross−appeals is not applicable under (2) (b); time limits under (1) (b) are jurisdictional and may not be extended. Estate of Donnell v. Milwaukee, 160 W (2d) 529, 466 NW (2d) 670 (Ct. App. 1991).

A notice of appeal may not be filed by facsimile transmission. Only papers that do not require a filing fee may be filed by fax. Pratsch v. Pratsch, 201 W (2d) 491, 548 NW (2d) 852 (Ct. App. 1996).

Mechanics of making an appeal in the court of appeals. Felsenthal, WBB October 1981.

Appellate review: Choosing and shaping the proper standard. Leavell. WBB Apr. 1987.

Changing standards of review. Leavell. WBB May 1987.

809.105 Appeals in proceedings related to parental consent prior to performance of abortion.

(1) APPLICABILITY. This section applies to the appeal of an order under s. 48.375 (7) and supersedes all inconsistent provisions of this chapter.

(2) INITIATING AN APPEAL. Only a minor may initiate an appeal under this section. The minor shall initiate the appeal by filing, or by a member of the clergy filing on the minor's behalf, a notice of appeal with the clerk of the trial court in which the order appealed from was entered and shall specify in the notice of appeal the order appealed from. At the same time, the minor or member of the clergy 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

of appeals. The clerk of the trial court shall assist the minor or member of the clergy in sending a copy of the notice of appeal to the clerk of the court of appeals. The minor may use the name "Jane Doe" instead of her name on the notice of appeal and all other papers filed with the court of appeals.

(3) PERFECTING THE APPEAL. (a) *Fee.* No fee for filing an appeal in the court of appeals under this section may be required of a minor or of a member of the clergy who files an appeal under this section on behalf of the minor.

(b) *Forwarding to court of appeals.* The clerk of the trial court shall forward to the court of appeals within 3 calendar days after the filing of the notice of appeal a copy of the notice of appeal and a copy of the trial court case record maintained as provided in s. 59.40 (2) (b), using the name "Jane Doe" instead of the minor's name, and the record on appeal, assembled as provided in sub. (4).

(c) *Filing in court of appeals.* The clerk of the court of appeals shall file the appeal immediately upon receipt of the items specified in par. (b).

(d) *Statement on transcript.* A minor or member of the clergy may not be required to file a statement on transcript in an appeal under this section.

(4) RECORD ON APPEAL. The record in an appeal under this section consists of the following:

(a) The petition.

(b) Proof of service of the notice of hearing.

(c) The findings of fact, conclusions of law and final order of the trial court.

(d) Any other order made that is relevant to the appeal and the papers upon which that other order is based.

(e) Exhibits material to the appeal, whether or not received in evidence.

(f) Any other paper or exhibit filed in the trial court that the minor requests to have included in the record.

(g) The notice of appeal.

(h) A transcript of the reporter's notes.

(i) The certificate of the clerk.

(j) If the trial court appointed a guardian ad litem under s. 48.235 (1) (d), a letter written to the court of appeals by the guardian ad litem indicating his or her position on whether or not the minor is mature and well−informed enough to make the abortion decision on her own and whether or not the performance or inducement of an abortion is in the minor's best interests.

(5) TRANSCRIPT OF REPORTER'S NOTES. At the time that a minor or member of the clergy files a notice of appeal, the minor or member of the clergy shall make arrangements with the reporter for the preparation of a transcript of the reporter's notes of the proceedings under s. 48.375 (7). The reporter shall file the transcript with the trial court within 2 calendar days after the notice of appeal is filed. The county of the court that held the proceeding under s. 48.375 (7) shall pay the expense of transcript preparation under this subsection.

(6) VOLUNTARY DISMISSAL. A minor may dismiss an appeal under this section by filing a notice of dismissal in the court of appeals.

(7) BRIEFS. Briefs are not required to be filed in appeals under this section.

(8) ASSIGNMENT AND ADVANCEMENT OF CASES. The court of appeals shall take cases appealed under this section in an order that ensures that a judgment is made within 4 calendar days after the appeal has been filed in the court of appeals. The time limit under this subsection may be extended with the consent of the minor and her counsel, if any, or the member of the clergy who initiated the appeal under this section, if any.

(8m) ORAL ARGUMENT. If the court of appeals determines that a case appealed under this section is to be submitted with oral argument, the oral argument shall be held in chambers or, on motion of the minor through her counsel or through the member of the clergy who filed the appeal under this section, if any, or on the court of appeals' own motion, by telephone, unless the minor through her counsel or the member of the clergy demands that the oral argument be held in open court.

(9) COSTS. The court of appeals may not assess costs against a minor or member of the clergy in an appeal under this section.

(10) REMITTITUR. (a) A judgment by the court of appeals under this section is effective immediately, without transmittal to the trial court, as an order either granting or denying the petition. If the court of appeals reverses a trial court order denying a petition under s. 48.375 (7), the court of appeals shall immediately so notify the minor by personal service on her counsel or the member of the clergy who initiated the appeal under this section, if any, of a certified copy of the order of the court of appeals granting the minor's petition. If the court of appeals affirms the trial court order, it shall immediately so notify the minor by personal service on her counsel or the member of the clergy who initiated the appeal under this section, if any, of a copy of the order of the court of appeals denying the petition and shall also notify the minor by her counsel or the member of the clergy who initiated the appeal under this section on behalf of the minor, if any, that she may, under sub. (11), file a petition for review with the supreme court under s. 809.62. The court of appeals shall pay the expenses of service of notice under this subsection. The clerk of the court of appeals shall transmit to the trial court the judgment and opinion of the court of appeals and the record in the case filed under sub. (4), within 31 days after the date that the judgment and opinion of the court of appeals are filed. If a petition for review is filed under sub. (11), the transmittal shall be made within 31 days after the date that the supreme court rules on the petition for review.

(b) Counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall immediately, upon notification under par. (a) that the court of appeals has granted or denied the petition, notify the minor. If the court of appeals has granted the petition, counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall hand deliver a certified copy of the order of the court of appeals to the person who intends to perform or induce the abortion. If with reasonable diligence the person who intends to perform or induce the abortion cannot be located for delivery, then counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall leave a certified copy of the order with the person's agent at the person's principal place of business. If a clinic or medical facility is specified in the petition as the corporation, partnership or other unincorporated association that employs the person who intends to perform or induce the abortion, then counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall hand deliver a certified copy of the order to an agent of the corporation, partnership or other unincorporated association at its principal place of business. There may be no service by mail or publication. The person or agent who receives the certified copy of the order under this paragraph shall place the copy in the minor's medical record.

(11) PETITION FOR REVIEW IN SUPREME COURT. (a) Only a minor or the member of the clergy who initiated the appeal under this section, if any, may initiate a review of an appeal under this section. The petition for review of an appeal in the supreme court shall contain:

1. A statement of the issues presented for review and how the issues were decided by the trial court and court of appeals.

2. A brief statement explaining the reason for appeal to the supreme court.

3. The judgment and opinion of the court of appeals, and the findings of fact, conclusions of law and final order of the trial court that were furnished to the court of appeals. The court of appeals shall provide a copy of these papers to the minor, if any, the member of the clergy who initiated the appeal under this section, if any, her counsel or her guardian ad litem, if any, immediately upon request.

4. A copy of any other document submitted to the court of appeals under sub. (4).

(b) The supreme court shall decide whether or not to grant the petition for review and shall decide the issue on review within the time specified in par. (c).

(c) The supreme court shall, by court rule, provide for expedited appellate review of cases appealed under this subsection because time may be of the essence regarding the performance of the abortion.

(cm) If the supreme court determines that a case reviewed under this subsection is to be submitted with oral argument, the oral argument shall be held in chambers or, on motion of the minor through her counsel or through the member of the clergy who initiated the appeal under this section, if any, or on the supreme court's own motion, by telephone, unless the minor through her counsel or the member of the clergy demands that the oral argument be held in open court.

(d) A judgment or decision by the supreme court under this section is effective immediately, without transmittal to the trial court, as an order either granting or denying the petition. If the supreme court reverses a court of appeals order affirming a trial court order denying a petition under s. 48.375 (7), the supreme court shall immediately so notify the minor by personal service on her counsel, if any, or on the member of the clergy who initiated the appeal under this section, if any, of a certified copy of the order of the supreme court granting the minor's petition. If the supreme court affirms the order of the court of appeals, it shall immediately so notify the minor by her counsel or by the member of the clergy who initiated the appeal under this section, if any. The clerk of the supreme court shall transmit to the trial court the judgment, or decision, and opinion of the supreme court and the complete record in the case within 31 days after the date that the judgment, or decision, and opinion of the supreme court are filed. The supreme court shall pay the expense of service of notice under this subsection.

(e) Counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall immediately, upon notification under par. (d) that the supreme court has granted or denied the petition, notify the minor. If the supreme court has granted the petition, counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall hand deliver a certified copy of the order of the supreme court to the person who intends to perform or induce the abortion. If with reasonable diligence the person who intends to perform or induce the abortion cannot be located for delivery, then counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall leave a certified copy of the order with the person's agent at the person's principal place of business. If a clinic or medical facility is specified in the petition as the corporation, partnership or other unincorporated association that employs the person who intends to perform or induce the abortion, then counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall hand deliver a certified copy of the order to an agent of the corporation, partnership or other unincorporated association at its principal place of business. There may be no service by mail or publication. The person or agent who receives the certified copy of the order under this paragraph shall place the order in the minor's medical record.

(12) CONFIDENTIALITY AND ANONYMITY. All proceedings in the court of appeals and the supreme court that are brought under this section shall be conducted in a confidential manner, and the minor may use the name "Jane Doe" instead of her name on all papers filed with either court. The identity of the minor involved and all records and other papers pertaining to an appeal shall be kept confidential, except as provided in s. 48.375 (7) (e).

(13) CERTAIN PERSONS BARRED FROM PROCEEDINGS. No parent, or guardian or legal custodian, if one has been appointed, or foster parent or treatment foster parent, if the minor has been placed in a foster home or treatment foster home, and the minor's parent has signed a waiver granting the department of health and family services, a county department under s. 46.215, 46.22 or 46.23, the foster parent or the treatment foster parent the authority to consent to medical services or treatment on behalf of the minor, or adult family member, as defined in s. 48.375 (2) (b), of any minor who has initiated an appeal under this section may attend or intervene in any proceeding under this section.

History: 1991 a. 263, 315; 1993 a. 213, 446; 1995 a. 27 s. 9126 (19); 1995 a. 201, 224.

809.107 Appeals in proceedings related to termination of parental rights. (1) APPLICABILITY. This section applies to the appeal of an order or judgment under s. 48.43 and supersedes all inconsistent provisions of this chapter.

(2) INITIATING THE APPEAL. A person shall initiate an appeal under this section by filing, within the time specified in s. 808.04 (7m), a notice of intent to appeal with the clerk of the trial court in which the judgment or order appealed from was entered. Also within that time period, the person shall serve a copy of the notice on the person representing the interests of the public, opposing counsel, the guardian ad litem appointed under s. 48.235 (1) (c) for the child who is the subject of the proceeding, the child's parent and any guardian and any custodian appointed under s. 48.427 (3) or 48.428 (2). The notice shall include the following:

(a) The case name and court caption.

(b) An identification of the judgment or order from which the person filing the notice intends to appeal and the date on which it was granted or entered.

(c) The name and address of the person filing the notice of intent to appeal and the person's trial counsel.

(d) For a person other than the state, whether the trial counsel for the person filing the notice of intent to appeal was appointed by the state public defender and, if so, whether the person's financial circumstances have materially improved since the date on which the person's indigency was determined.

(e) For a person other than the state, whether the person filing the notice of intent to appeal will represent himself or herself or will be represented by retained counsel or requests the state public defender to appoint counsel for the appeal. If the person has retained counsel, the counsel's name and address shall be included.

(3) DUTIES OF CLERK OF TRIAL COURT. Within 5 days after a notice under sub. (2) is filed, the clerk shall:

(a) If the person filing the notice of intent to appeal under sub. (2) requests representation by the state public defender for purposes of the appeal, send to the state public defender's appellate intake office a copy of the notice, a copy of the judgment or order specified in the notice and a list of the court reporters for each proceeding in the action in which the judgment or order was entered.

(b) If the person filing the notice of intent to appeal does not request representation by the state public defender for purposes of the appeal, send or furnish to the person, if the person is appearing without counsel, or to the person's attorney, if one has been retained, a copy of the judgment or order specified in the notice and a list of the court reporters for each proceeding in the action in which the judgment or order was entered.

(4) TRANSCRIPT. A person filing a notice of intent to appeal under sub. (2) shall order a transcript of the reporter's notes within 15 days after filing the notice. The court reporter shall file the transcript with the trial court and serve a copy of the transcript on the person filing the notice of intent to appeal within 30 days after the ordering of the transcript.

(5) NOTICE OF APPEAL; TRANSMITTAL OF RECORD. Within 30 days after service of the transcript, the person filing a notice of intent to appeal under sub. (2) shall file a notice of appeal and docketing statement as provided in s. 809.10 (1) (a) and serve a copy of the notice on the persons required to be served under sub. (2). The clerk of the trial court shall transmit the record to the court

of appeals as soon as the record is prepared but in no event more than 15 days after the filing of the notice of appeal.

(6) SUBSEQUENT PROCEEDINGS IN COURT OF APPEALS; PETITION FOR REVIEW IN SUPREME COURT. Subsequent proceedings in the appeal are governed by the procedures for civil appeals and the procedures under subch. VI, except as follows:

(a) The appellant shall file a brief within 15 days after the filing of the record on appeal.

(b) The respondent shall file a brief within 10 days after the service of the appellant's brief.

(c) The appellant shall file within 10 days after the service of the respondent's brief a reply brief or statement that a reply brief will not be filed.

(d) If the guardian ad litem appointed under s. 48.235 (1) (c) for the child who is the subject of the proceeding takes the position of the appellant, the guardian ad litem's brief shall be filed within 15 days after the filing of the record on appeal with the court of appeals. If the guardian ad litem takes the position of a respondent, the guardian ad litem's brief shall be filed within 10 days after service of the appellant's brief.

(e) Cases appealed under this section shall be given preference and shall be taken in an order that ensures that a decision is issued within 30 days after the filing of the appellant's reply brief or statement that a reply brief will not be filed.

(f) A petition for review of an appeal in the supreme court, if any, shall be filed within 30 days after the date of the decision of the court of appeals. The supreme court shall give preference to a petition for review of an appeal filed under this paragraph.

History: 1993 a. 395; 1995 a. 275.

NOTE: 1993 Wis. Act 395, which creates this section, contains extensive explanatory notes.

Time limits imposed by the legislature in sub. (6) did not constitute unconstitutional infringements on the judiciary, as they are subject to court modification. Time limits imposed by sub. (5) did not violate constitutional guarantees of due process or effective assistance of counsel. Interest of Christopher D. 191 W (2d) 681, 530 NW (2d) 34 (Ct. App. 1995).

The no merit appeal procedure under s. 809.32 and the authority to extend the time for filing a notice of appeal under s. 809.82 (2) do not apply to appeals regarding terminations of parental rights. Gloria A. v. State, 195 W (2d) 268, 536 NW (2d) 396 (Ct. App. 1995).

809.11 Rule (Items to be filed and forwarded). (1) FEE. The appellant shall pay the filing fee with the notice of appeal.

(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 filing fee, and a copy of the trial court record of the case maintained pursuant to s. 59.40 (2) (b) or (c).

NOTE: Sub. (2) is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93 (2) (c).

(3) FILING IN COURT OF APPEALS. The clerk of the court of appeals shall file 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. The appellant shall file a copy of the statement on transcript with the clerk of the trial court within 10 days of the filing of the notice of appeal.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); Sup. Ct. Order, 104 W (2d) xi (1981); Sup. Ct. Order, 146 W (2d) xiii (1988); 1995 a. 201, 224; s. 13.93 (2) (c).

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]

Judicial Council Committee's Note, 1981: Sub. (4) is amended to require that the appellant file a copy of the statement on transcript with the clerk of the trial court within 10 days of the filing of the notice of appeal. This filing will notify the trial court clerk as to whether a transcript is necessary for prosecution of the appeal and, if so, the date on which the transcript is due. [Re Order effective Jan. 1, 1982]

See note to 809.10, citing Douglas v. Dewey, 147 W (2d) 328, 433 NW (2d) 243 (1989).

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 s. 809.14.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); 1981 c. 390 s. 252.

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 s. 803.09 (1) or (2).

History: Sup. Ct. Order, 83 W (2d) xiii (1978); 1981 c. 390 s. 252.

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]

A party who could have, but failed to, file a timely notice of appeal may not participate in the appeal as an intervenor or by filing a nonparty brief. Weina v. Atlantic Mut. Ins. Co. 177 W (2d) 341, 501 NW (2d) 465 (Ct. App. 1993).

809.14 Rule (Motions). (1) A party seeking an order or other relief in a 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.

(4) Subsection (3) does not apply in an appeal under s. 809.105.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 92 W (2d) xiii; 1991 a. 263; 1995 a. 224.

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 adversely affected by a procedural order, he has the right to request the court to recon-

sider 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]

Motion to dismiss appeal under (3) does not extend time for filing cross−appeal. Marriage of Rossmiller v. Rossmiller, 151 W (2d) 386, 444 NW (2d) 445 (Ct. App. 1989).

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. Motions under this subsection may be heard under s. 807.13.

(4) TRANSMITTAL OF THE RECORD. The clerk of the trial court shall transmit the record to the court within 20 days from the date of the filing of the transcript or from the date of the filing of a statement that no transcript is necessary for prosecution of the appeal, 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; Sup. Ct. Order, 104 W (2d) xi; Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 403.

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]

Judicial Council Committee's Note, 1981: Sub. (4) is amended to provide for an expedited transmittal of the record for appeals in which a transcript is not necessary for prosecution of the appeal or a transcript is filed in less than the maximum time period permitted by ch. 809. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 1988: Sub. (3) is amended to allow motions to correct the record to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Appellant's failure to file motion under (3) did not constitute waiver of right to challenge adequacy of transcript. State v. Perry, 136 W (2d) 92, 401 NW (2d) 748 (1987).

It is the appellant's responsibility to assure the record is complete; where the record is incomplete, it is assumed the missing material supports the trial court ruling. Fiumefreddo v. McLean, 174 W (2d) 10, 496 NW (2d) 226 (Ct. App. 1993).

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 of the other party's designation the statement required by s. 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) Subsection (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 (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); 1981 c. 390 s. 252.

Cross−reference: See s. 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]

Procedure established for use when court reporter's notes are lost while post−trial proceedings are pending. State v. DeLeon, 127 W (2d) 74, 377 NW (2d) 635 (Ct. App. 1985).

809.17 Rule (Expedited appeals program and pre−submission conference). (1) In order to minimize appellate delay and reduce its backlog, the court of appeals may develop an expedited appeals program. The program may involve mandatory completion of docketing statements by appellant's counsel and participation in presubmission conferences at the direction of the court, but participation in the court's accelerated briefing and decision process is voluntary. The rules and procedures governing the program shall be set forth in the court of appeals' internal operating procedures.

(2) The court of appeals may require all attorneys of record in any appeal to participate in a presubmission conference, either by telephone or in person, with an officer of the court. An attorney of record with no direct briefing interest in the appeal may waive his or her participation in the conference by written notice to the court.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 131 W (2d) xvi (1986).

Court of Appeals Note, 1986: Section (Rule) 809.17 is repealed and recreated to give the court of appeals authority to administer its expedited appeals program pursuant to Section VII, Expedited Appeals, of the Court of Appeals Internal Operating Procedures (amended 1986). The rule replaces a similar delegation of authority to the chief judge of the court of appeals by order of the supreme court dated December 19, 1983. [Re Order effective January 1, 1987]

Although a formal order was subsequently signed, the trial court's letter to the parties informing them that a motion for reconsideration was denied was a denial "on the record" under sub. (3) and the time for filing an appeal commenced on the date of the letter. Orth v. Ameritrade, Inc. 187 W (2d) 162, 522 NW (2d) 30 (Ct. App. 1994).

809.18 Rule (Voluntary dismissal). An appellant may dismiss a filed appeal by filing a notice of dismissal in the court or, if the appeal is not yet filed, 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 (1978); 1995 a. 224.

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]

This section does not command the dismissal of a petition for a supervisory writ upon the filing of a notice of voluntary dismissal. A petition for a supervisory writ is not an "appeal". Interest of Peter B. 184 W (2d) 57, 616 NW (2d) 746 (Ct. App. 1994).

The court of appeals must dismiss an appeal when an appellant files a notice of voluntary dismissal before the court issues its decision on the appeal. State v. Lee, 197 W (2d) 960, 542 NW (2d) 143 (1996).

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 and SCR 80.02.

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

(g) Reference to an individual by first name and last initial rather than by his or her full name when the record is required by law to be confidential.

(2) APPENDIX. The appellant's brief shall include a short appendix providing relevant trial court record entries, the findings or opinion of the trial court and limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

(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 or her 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, except that a respondent−cross−appellant shall, within 30 days after service of the appellant−cross−respondent's brief, file a combined respondent−cross−appellant's brief that does not exceed the separate page limitations for each portion of the brief. The appellant−cross−respondent shall, within 30 days after service of the respondent−cross−appellant's brief, file a combined reply−cross−respondent's brief that does not exceed the separate page limitations for each portion of the brief.

(7) NONPARTY BRIEFS. (a) A person not a party may by motion request permission to file a brief. The motion shall identify the interest of the person and state why a brief filed by that person is desirable.

(b) If the brief will support or oppose a petition under s. 809.62 or 809.70, the brief shall accompany the motion and shall be filed within the time permitted for the opposing party to file a response to the petition.

(c) Except as provided in par. (b), the motion shall be filed not later than 10 days after the respondent's brief is filed and the brief shall be filed within the time specified by the court.

(8) NUMBER, FORM AND LENGTH OF BRIEFS AND APPENDICES. (a) *Number.* 1. Except as provided in s. 809.43, a person who files a brief or appendix in the supreme court shall file 15 copies with the court, or such other number as the court directs, and serve 3 copies on each party.

2. Except as provided in subd. 3. and s. 809.43, a person who files a brief or appendix in a court of appeals shall file 10 copies with the court, or such other number as the court directs, and serve 3 copies on each party.

3. Except as provided in s. 809.43, a person who is found indigent under s. 814.29 and files a brief or appendix in the court of appeals shall file the original and 4 copies with the court and serve one copy on each party.

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

1. Produced by a duplicating or copying process that produces a clear, black image of the original on white paper. Briefs shall be produced by using either a monospaced font or a proportional serif font. Carbon copies may not be filed.

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

3. b. If a monospaced font is used: 10 characters per inch; double−spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides.

c. If a proportional font is used: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. Italics may not be used for normal body text but may be used for citations, headings, emphasis and foreign words.

4. Securely bound only on the left side with heavy strength staples or by means of the "perfect" ("hot glue") binding method, with pagination at the center of the bottom margin. A brief may be bound by other methods authorized in writing by the clerk of the court.

(c) *Length.* 1. Those portions of a party's or a guardian ad litem's brief referred to in sub. (1) (d), (e) and (f) shall not exceed 50 pages if a monospaced font is used or 11,000 words if a proportional serif font is used.

2. Appellant's reply brief or a brief filed under sub. (7) shall not exceed 13 pages if a monospaced font is used or 3,000 words if a proportional serif font is used.

(d) *Form and length certification.* Counsel shall append to the brief and appendix a signed certification that the brief and appendix meet the form and length requirements of pars. (b) and (c) in the following form:

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a [monospaced] [proportional serif] font. The length of this brief is ....[pages] [words].

Signed:....

Signature

For purposes of the certification and length requirements of this subsection, counsel may use the word count produced by a commercial word processor available to the general public.

(8m) GUARDIAN AD LITEM BRIEF. If the guardian ad litem chooses to participate in an appeal and takes the position of an appellant, the guardian ad litem's brief shall be filed within 40 days after the filing in the court of the record on appeal. If the guardian ad litem chooses to participate in an appeal and takes the position of a respondent, the guardian ad litem's brief shall be filed within 30 days after service of the appellant's brief. If the guardian ad litem chooses not to participate in an appeal of an action or proceeding, the guardian ad litem shall file with the court a statement of reasons for not participating within 20 days after the filing of the appellant's brief.

(9) BRIEF COVERS. Each brief or appendix shall have a front and back cover. The front cover shall 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 covers of the appellant's brief shall be blue; the respondent's, red; a combined respondent−cross−appellant's, red with a blue divider page; a combined reply−cross−respondent's, gray with a red divider page; a guardian ad litem's, yellow; a person other than a party, green; the reply brief, gray; and the appendix, if separately printed, white. In the event the supreme court grants a petition for review of a decision of the court of appeals, the covers of the briefs of each party shall be the same color as the cover of that party's briefs filed in the court of appeals.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); 1979 c. 110; Sup. Ct. Order, 104 W (2d) xi (1980); 1981 c. 390 s. 252; Sup. Ct. Order, 111 W (2d) xiii (1983); Sup. Ct. Order, 112 W (2d) xv (1983); Sup. Ct. Order, 115 W (2d) xv (1983); Sup. Ct. Order, 123 W (2d) xx (1985); Sup. Ct. Order, 146 W (2d) xxxiii (1988); Sup. Ct. Order, 151 W (2d) xvii (1989); Sup. Ct. Order, 161 W (2d) xiii (1981); Sup. Ct. Order, 164 W (2d) xxix (1991); Sup. Ct. Order, 167 W (2d) xiii (1992); Sup. Ct. Order, 171 W (2d) xiii, xvii, xxxvii (1992); Sup. Ct. Order No. 93−20, 179 W (2d) xxv; 1993 a. 486; 1995 a. 224.

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.

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]

Judicial Council Committee's Note, 1981: Sub. (1) (e) is amended to incorporate SCR 80.02, governing citation of a published court of appeals or supreme court opinion in a brief, memorandum or other document filed with the court of appeals or supreme court.

Sub. (8) (b) 4 previously required that a brief and appendix be bound only on the left side with staple or tape. A sufficient number of heavy strength staples are to be used to assure that the briefs and appendix remain securely bound when used by the court of appeals and supreme court. The prior alternative method of binding the brief and appendix solely with tape is repealed.

Sub. (9) is amended to clarify that both a front and back cover of a brief and appendix are required. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 1988: Sub. (7) (b) permits nonparties to request permission to file a brief supporting or opposing a petition for the Supreme Court to review a decision of the Court of Appeals or to take original jurisdiction. In these cases, the motion and the brief shall be filed together, within the time permitted for response by the opposing party.

Revised sub. (8) (c) clarifies that the page limit does not include the table of contents, table of cases and other authorities, statement of issues, statement on oral argument and publication, appendix or supplemental appendix. [Re Order effective Jan. 1, 1989]

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 (1978).

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. Section 809.14 governs the procedure on the motion.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); 1981 c. 390 s. 252.

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.

(4) On motion of any party or its own motion, the court may order that oral argument be heard by telephone.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 141 W (2d) xiii (1987).

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]

Judicial Council Note, 1988: Sub. (4) [created] authorizes oral arguments to be heard by telephone conference on motion of any party or the court of appeals. [Re Order effective Jan. 1, 1988]

809.23 Rule (Publication of opinions). (1) CRITERIA FOR PUBLICATION. (a) While neither controlling nor fully measuring the court's discretion, 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 modifies, clarifies or criticizes an existing rule;

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

3. Resolves or identifies a conflict between prior decisions;

4. Contributes to the legal literature by collecting case law or reciting legislative history; or

5. Decides a case of substantial and continuing 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;

3. The issues are decided on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent;

4. The decision is by one court of appeals judge under s. 752.31 (2) and (3);

5. It is a per curiam opinion on issues other than appellate jurisdiction or procedure;

6. It has no significant value as precedent.

(2) DECISION ON PUBLICATION. The 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 or a judge of the court of appeals designated by 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) UNPUBLISHED OPINIONS NOT CITED. 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) REQUEST FOR PUBLICATION. 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 s. 809.80 on the parties to the appeal or other proceeding in which the opinion was filed.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 92 W (2d) xiii; 1981 c. 390 s. 252; Sup. Ct. Order, 109 W (2d) xiii (1982); Sup. Ct. Order, 118 W (2d) xiii (1984); 1991 a. 189.

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]

Attorney fined $50 for citing unpublished opinion of court of appeals. Tamminen v. Aetna Casualty & Surety Co. 109 W (2d) 536, 327 NW (2d) 55 (1982).

Sub. (3) does not ban citation to circuit court opinions. Brandt v. LIRC, 160 W (2d) 353, 466 NW (2d) 673 (Ct. App. 1991).

Citation to unpublished court of appeals decision to show conflict between districts for purposes of 809.62 (1) (d) is appropriate. State v. Higginbotham, 162 W (2d) 978, 471 NW (2d) 24 (1991).

A party's invitation to the court of appeals to consider an unpublished opinion, or even a naked citation to it, violates the letter and spirit of sub. (3). Kuhn v. Allstate Co. 181 W (2d) 453, 510 NW (2d) 826 (Ct. App. 1993).

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

Publication of court of appeals' opinions. Scott. WBB July 1988.

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

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 104 W (2d) xi (1981); 1981 c. 390 s. 252.

Judicial Council Committee's Note, 1981: Rule 809.24 is amended to refer properly to the petition for supreme court review of decisions of the court of appeals. The rule has been redrafted stylistically. No substantive change is intended. [Re Order effective Jan. 1, 1982]

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 of 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 of the supreme court as set forth in pars. (a) and (b). The clerk of the supreme court shall include in the remittitur the costs allowed in the court. The clerk of circuit court shall enter the judgment for costs in accordance with s. 806.16.

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

1. For filing an appeal, cross−appeal, petition for review, petition to bypass, or other proceeding, $150.

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, 25 cents for each page.

4. For a certificate and seal, $1, except for an attorney's certificate of good standing, $3.

(b) The state is exempt from payment of the fees set forth in par. (a) 1. to 4., except that the clerk is not obligated to supply the state with free copies of opinions.

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

(3) FRIVOLOUS APPEALS. (a) If an appeal or cross−appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section. A motion for costs, fees and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross−appeal is filed, the cross−respondent's brief.

(b) The costs, fees and attorney fees awarded under par. (a) may be assessed fully against the appellant or cross−appellant or the attorney representing the appellant or cross−appellant or may be assessed so that the appellant or cross−appellant and the attorney each pay a portion of the costs, fees and attorney fees.

(c) In order to find an appeal or cross−appeal to be frivolous under par. (a), the court must find one or more of the following:

1. The appeal or cross−appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The party or the party's attorney knew, or should have known, that the appeal or cross−appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); Sup. Ct. Order, 104 W (2d) xi (1981); 1981 c. 316, 317; 1981 c. 390 ss. 220, 252; 1985 a. 29; Sup. Ct. Order, 151 W (2d) xvii (1989); 1995 a. 224.

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]

Judicial Council Committee's Note, 1981: Sub. (2) (a) 1. is amended to correct the reference from a petition to appeal to a petition for review. The supreme court reviews the decisions of the court of appeals. [Re Order effective Jan. 1, 1982]

Appeal was frivolous because assertion of trial court error was without any reasonable basis in law or equity and there was no argument that existing law should have been extended, modified or reversed. In Matter of Estate of Koenigsmark, 119 W (2d) 394, 351 NW (2d) 169 (Ct. App. 1984).

Tax protesters appealing without counsel were properly assessed costs under (3) (c) 2. Tracy v. Department of Revenue, 133 W (2d) 151, 394 NW (2d) 756 (Ct. App. 1986).

Restricting access to courts as sanction for frivolous action upheld where order was narrowly tailored to balance interests of public access to courts, res judicata and public's right not to have frivolous litigation be drain on public resources. Minniecheske v. Griesbach, 161 W (2d) 743, 468 NW (2d) 760 (Ct. App. 1991).

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 s. 809.15 31 days after the filing of the decision of the court. If a petition for review is filed pursuant to s. 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 (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); 1981 c. 390 s. 252.

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) DEFINITIONS. In this section:

(a) "Postconviction relief" means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under s. 973.19 or 974.06. In a ch. 48, 51, 55 or 938 case, other than a termination of parental rights case under s. 48.43, it means an appeal or a motion for reconsideration by the trial court of its final judgment or order; in such cases a notice of intent to pursue such relief or a motion for such relief need not be styled as seeking "postconviction" relief.

(b) "Sentencing" means, in a felony or misdemeanor case, the imposition of a sentence, fine or probation. In a ch. 48, 51, 55 or 938 case, other than a termination of parental rights case under s. 48.43, it means the entry of the trial court's final judgment or order.

(2) APPEAL OR POSTCONVICTION MOTION BY DEFENDANT. (a) A defendant seeking postconviction relief in a felony case shall comply with this section. Counsel representing the defendant at sentencing shall continue representation by filing a notice under par. (b) if the defendant desires to pursue postconviction relief unless sooner discharged by the defendant or by the trial court.

(b) Within 20 days of the date of sentencing, the defendant shall file in the trial court and serve on the district attorney a notice of intent to pursue postconviction relief. The notice shall include the following:

1. The case name and court caption.

2. An identification of the judgment or order from which the defendant intends to seek postconviction relief and the date it was granted or entered.

3. The name and address of the defendant and the defendant's trial counsel.

4. Whether defendant's trial counsel was appointed by the state public defender and if so, whether the defendant's financial circumstances have materially improved since the date the defendant's indigency was determined.

5. Whether the defendant requests the state public defender to appoint counsel for purposes of postconviction relief.

6. Whether a defendant who does not request the state public defender to appoint counsel will represent himself or herself or will be represented by retained counsel. If the defendant has retained counsel, counsel's name and address shall be included.

(c) Within 5 days after a notice under par. (b) is filed, the clerk shall:

1. If the defendant requests representation by the state public defender for purposes of postconviction relief, send to the state public defender's appellate intake office a copy of the notice, a copy of the judgment or order specified in the notice, a list of the court reporters for each proceeding in the action in which the judgment or order was entered and a list of those proceedings in which a transcript has been filed in the court record at the request of trial counsel.

2. If the defendant does not request representation by the state public defender, send or furnish to the defendant, if the defendant is appearing without counsel, or to the defendant's attorney if one has been retained, a copy of the judgment or order specified in the notice, a list of the court reporters for each proceeding in the action in which the judgment or order was entered and a list of those proceedings in which a transcript has been filed in the court record at the request of trial counsel.

(d) Except as provided in this paragraph, whenever a defendant whose trial counsel is appointed by the state public defender files a notice under par. (b) requesting public defender representation for purposes of postconviction relief, the district attorney may, within 5 days after the notice is served and filed, file in the trial court and serve upon the state public defender a request that the defendant's indigency be redetermined before counsel is appointed or transcripts are ordered. This paragraph does not apply to a child who is entitled to be represented by counsel under s. 48.23 or 938.23.

(e) Within 30 days after the filing of a notice under par. (b) requesting representation by the state public defender for purposes of postconviction relief, the state public defender shall appoint counsel for the defendant and order a transcript of the reporter's notes, except that if the defendant's indigency must first be determined or redetermined, the state public defender shall do so, appoint counsel and order transcripts within 50 days after the notice under par. (b) is filed.

(f) A defendant who does not request representation by the state public defender for purposes of postconviction relief shall order a transcript of the reporter's notes within 30 days after filing a notice under par. (b).

(fm) A child who has filed a notice of intent to pursue relief from a judgment or order entered in a ch. 48 or 938 proceeding shall be furnished at no cost a transcript of the proceedings or as much of it as is requested. To obtain the transcript at no cost, an affidavit must be filed stating that the person who is legally responsible for the child's care and support is financially unable or unwilling to purchase the transcript.

(g) The court reporter shall file the transcript with the trial court and serve a copy of the transcript on the defendant within 60 days of the ordering of the transcript. Within 20 days of the ordering of a transcript of postconviction proceedings brought under sub. (2) (h), the court reporter shall file the original with the trial court and serve a copy of that transcript on the defendant. The reporter may seek an extension under s. 809.16 (4) for filing and serving the transcript.

(h) The defendant shall file a notice of appeal or motion seeking postconviction relief within 60 days of the service of the transcript.

(i) 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.

(j) 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.

(k) The clerk of the trial court shall transmit the record to the court as soon as prepared but in no event more than 40 days after the filing of the notice of appeal by the defendant. Subsequent proceedings in the appeal are governed by the procedures for civil appeals.

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

(3) 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 is a child or 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 (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); Sup. Ct. Order, 104 W (2d) xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order, 112 W (2d) xvii (1985); Sup. Ct. Order, 123 W (2d) xi (1985); 1985 a. 332; Sup Ct. Order, 136 W (2d) xxv (1987); Sup. Ct. Order, 161 W (2d) xiii (1991); Sup. Ct. Order No. 93−19, 179 W (2d) xxiii (1994); 1993 a. 16, 395, 451; 1995 a. 77.

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 prepa-

ration, 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]

Judicial Council Committee's Note, 1981: Sub. (1) (e) is amended to increase from 40 to 60 days the period for the court reporter to complete and serve a copy of the transcript on the defendant and sub. (1) (f) is amended to increase from 30 to 60 days the period for the defendant to either file a notice of appeal or motion seeking postconviction relief. The previous time periods were often insufficient for preparation of the transcript and for review of the transcript and record by the defendant determining which, if any, postconviction proceedings to commence.

Sub. (1) (e) is clarified to establish that the original of the transcript is filed with the trial court by the court reporter whereas a copy is served by the court reporter on the defendant. Also, the transcript of postconviction proceedings must be filed and served by the court reporter within 20 days of ordering by the defendant.

Sub. (1) (i) is amended to provide that the clerk of the trial court shall transmit the record to the court of appeals no later than 40 days after the filing of the notice of appeal. Presently transmittal of the record is governed by Rule 809.15 (4) which allows up to 90 days from the filing of the notice of appeal.

The total time period from ordering the transcript to transmittal of the record to the court of appeals has not been altered by these amendments.

Judicial Council Committee's Note, 1978, explained that extensions of time for taking various steps under Rule 809.30 can be granted by the court of appeals under Rule 809.82. In State v. Rembert, 99 Wis. 2d 401, 299 N.W. 2d 292 (Ct. App. 1980), the court of appeals stated that its authority to extend the time periods of Rule 809.30 is to the exclusion of the trial court. The court of appeals, not the trial court, is responsible for monitoring, enforcing or extending the time periods of Rule 809.30. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 1984: Requiring that the appellate process be initiated by filing a notice in the trial court within 20 days after sentencing is intended to:

Expedite the process; the information needed for a decision regarding postconviction relief is available to the defendant at sentencing and the decision can usually be made shortly thereafter.

Emphasize trial counsel's duties to counsel the defendant about the decision to seek postconviction relief and to continue representation until appellate counsel is retained or appointed. SCR 20.34 (2) (d); Whitmore v. State, 56 Wis. 2d 706, 203 N.W. 2d 56 (1973).

Create a record in the trial court showing whether the postconviction process has been timely invoked.

Notify the judge, clerk, court reporter and district attorney that postconviction relief is contemplated and allow the district attorney to request a redetermination of indigency in public defender cases.

Give the public defender the information needed to appoint counsel and order transcripts promptly, and to decide whether the defendant's indigency must first be determined or redetermined. [Re order effective July 1, 1985]

Judicial Council Note, 1986: Sub. (1) is amended to clarify the application of the statute when the appeal is taken from the final judgment or order in a non−criminal case.

Sub. (2) (fm) is prior s. 48.47 (2), renumbered for more logical placement in the statutes. [Re Order eff. 7−1−87]

Appellate court did not abuse its discretion in refusing to allow convicted accused to pursue late appeal. State v. Argiz, 101 W (2d) 546, 305 NW (2d) 124 (1981).

Limitation period under sub. (1) (f), 1983 stats. [now sub. (2) (h)] cannot begin to run until entry of appealable order. In Interest of M. T. 108 W (2d) 410, 321 NW (2d) 289 (1982).

For issues on appeal to be considered as matter of right, postconviction motions must be made except in challenges to sufficiency of evidence under 974.02 (2). State v. Monje, 109 W (2d) 138, 325 NW (2d) 695 (1982).

Because double jeopardy precludes retrial if appellate court finds conviction is not supported by sufficient evidence, court must decide claim of insufficiency even if there are other grounds for reversal that would not preclude retrial. State v. Ivy, 119 W (2d) 591, 350 NW (2d) 622 (1984).

Court may grant extensions under this section for good cause. State v. Harris, 149 W (2d) 943, 440 NW (2d) 364 (1989).

A defendant is incompetent to pursue postconviction relief when he or she is unable to assist counsel or make decisions committed by law to the defendant with a degree of rational reasoning. Process to be followed when competency issue arises discussed. State v. Debra A. E. 188 W (2d) 111, 523 NW (2d) 727 (Ct. App. 1994).

The decision to appeal. Kempinen, WBB August, 1985.

Sentence modification by Wisconsin trial courts. Kassel. 1985 WLR 195.

The decision to appeal a criminal conviction: Bridging the gap between the obligations of trial and appellate counsel. 1986 WLR 399.

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 or to the intensive sanctions program 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 s. 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 (1978); 1981 c. 390 s. 252; 1991 a. 39.

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).

See note to 974.06, citing State v. Shumate, 107 W (2d) 460, 319 NW (2d) 834 (1982).

Merits of underlying appeal may be considered by trial court in considering release pending appeal and by appellate court in determining whether immediate review of order denying release pending appeal is necessary. State v. Salmon, 163 W (2d) 369, 471 NW (2d) 286 (Ct. App. 1991).

See note to 969.09, citing Dreske v. Wis. Department of Health and Social Services, 483 F Supp. 783 (1980).

809.32 Rule (No merit reports). (1) If an attorney appointed under s. 809.30 or ch. 977 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 and shall file a statement in the court of appeals that service has been made upon the defendant. The defendant 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 s. 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 s. 809.30 (2) (g).

(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 the right to file a petition for review to the supreme court under s. 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 for review in the supreme court under s. 809.62 would be frivolous and without any arguable merit, the attorney shall advise the defendant of the reasons for this opinion and that the defendant has the right to file a petition for review. If requested by the defendant, the attorney shall file a petition satisfying the requirements of s. 809.62 (2) (d) and (f) and the defendant shall file a supplemental petition satisfying the requirements of s. 809.62 (2) (a), (b), (c) and (e). The petition and supplemental petition shall both be filed within 30 days of the date of the decision of the court of appeals. An opposing party may file a response to the petition and supplemental petition within 10 days of the service of the supplemental petition.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 104 W (2d) xi (1981); 1981 c. 390 s. 252; 1983 a. 192; Sup. Ct. Order, 123 W (2d) xix (1985); 1987 a. 403 s. 256.

Judicial Council Committee's Note, 1981: Subs. (3) and (4) are amended to refer properly to the petition for supreme court review of decisions of the court of appeals.

Sub. (4) is amended to reflect the amendments to Rule 809.62 regulating the form, contents and length of a petition for review. If requested by the defendant, the attorney shall file with the supreme court a petition for review containing the statement of the case and the appendix required by Rule 809.62 (2) (d) and (f), as the attorney is in the best position to formulate the statement of the case and to provide the documents required for the appendix. The defendant shall file a supplement containing the statement of the issues presented for review, the table of contents, the statement of the criteria relied upon for a review and the argument amplifying the reasons relied on to support the petition as required by Rule 809.62 (2) (a), (b), (c) and (e). The rule does not prohibit the defendant from including a supplement to the statement of the case provided by the attorney.

The rule requires that both the petition and supplemental petition be filed within 30 days of the date of the decision of the court of appeals. As with all petitions for review, the opposing party may file a response to the petition and supplemental petition within 10 days. The amendment provides that the 10 days begins to run from the service of the supplemental petition. [Re Order effective Jan. 1, 1982]

This rule is constitutional although it does not secure indigent convict the right to counsel in preparing petition for review. State v. Mosley, 102 W (2d) 636, 307 NW (2d) 200 (1981).

"No−merit brief" requirement under (1) does not deny right to counsel. State ex rel. McCoy v. Appeals Ct., 137 W (2d) 90, 403 NW (2d) 449 (1987).

Appellate counsel's closing of a file because of no merit without the defendant knowing of the right to disagree and compel a no merit report is ineffective assistance of counsel. A defendant must be informed of the right to appeal and to a no merit report, but need not be informed orally. State ex rel. Flores v. State, 183 W (2d) 587, 516 NW (2d) 362 (1994).

The no merit appeal procedure does not apply to appeals regarding terminations of parental rights under s. 809.107. Gloria A. v. State, 195 W (2d) 268, 536 NW (2d) 396 (Ct. App. 1995).

Read together, s. 809.32 (4) and 977.05 (4) (j) create a statutory, but not constitutional, right to counsel in petitions for review, provided counsel does not determine the appeal to be without merit. Where counsel fails to timely file a petition for review, the defendant may petition for a writ of habeas corpus and the supreme court has the power to allow late filing. Schmelzer v. Murphy, 201 W (2d) 246, 548 NW (2d) 45 (1996).

This section comports with constitutional requirements. McCoy v. Court of Appeals, 486 US 429 (1988).

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, 55 or 938 case, or a motion for postconviction relief in a misdemeanor case must be initiated within the time periods specified in s. 808.04 and is governed by the procedures specified in ss. 809.30 to 809.32.

(1m) Subsection (1) does not apply to an appeal from an order denying a petition under s. 48.375 (7), which is governed by the procedures specified in s. 809.105, or to an appeal from an order or judgment under s. 48.43, which is governed by the procedures specified in s. 809.107.

(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 ss. 809.01 to 809.26 and 809.50 to 809.85, unless a different procedure is expressly provided in ss. 809.41 to 809.43.

(3) Any civil appeal to the court of appeals under sub. (1) or (2) is subject to the docketing statement requirement of s. 809.10 (1) (a) and may be eligible for the expedited appeals program in the discretion of the court.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); 1979 c. 32 s. 92 (16); Sup. Ct. Order, 92 W (2d) xiii (1979); 1979 c. 175 s. 53; 1979 c. 355; 1981 c. 390 s. 252; Sup. Ct. Order, 130 W (2d) xi xix ((1986); Sup. Ct. Order, 131 W (2d) xv (1986); Sup. Ct. Order, 136 W (2d) v, xxv ((1987); 1991 a. 263; 1993 a. 395; 1995 a. 77.

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 or a petitioner requesting the court to exercise its supervisory jurisdiction or its original jurisdiction to issue prerogative writs or its appellate jurisdiction to grant petitions for leave to appeal desires the matter to be decided by a 3−judge panel, the appellant or petitioner shall file with the copy of the notice of appeal required by s. 809.10 (1) (a) or with the petition requesting the court to exercise its supervisory, original or appellate jurisdiction a motion for a 3−judge panel. Any other party must file a motion under this rule for a 3−judge panel within 10 days of service of the notice of appeal or with the response to the petition. The failure to file a motion under this rule waives the right to request the matter to be decided by a 3−judge panel. A motion for a 3−judge panel in a case in which the state is a party shall also be served upon the attorney general. The attorney general may file a response to the motion within 7 days of service.

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

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

(4) If an appellant desires 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 copy of the notice of appeal required by s. 809.10 (1) (a) a motion requesting a hearing in the county of origin. Any other party must file a motion requesting a hearing in the county of origin 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 be heard in the county where the case or action originated.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); Sup. Ct. Order, 104 W (2d) xi (1981); Sup. Ct. Order 151 W (2d) xvii (1989); 1993 a. 486.

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]

Judicial Council Committee's Note, 1981: Rule 809.41 is amended to harmonize with ch. 192, Laws of 1979.

Sub. (1) is amended to apply the procedure for requesting a 3−judge panel for appeals to other proceedings in the types of case specified in s. 752.31 (2). The rule is also amended to require that if the motion for 3−judge panel is in a case in which the state is a party the motion must be served upon the attorney general as well as all persons of record. If the district attorney files the motion for 3−judge panel, the district attorney must serve the motion on the attorney general. The attorney general is given 7 days to respond to the motion.

The rule is further amended to require that the motion for 3−judge panel be filed with the copy of the notice of appeal required to be sent to the clerk of the court of appeals under Rule 809.10 (1) (a) and not with the original notice of appeal filed with the clerk of the circuit court.

Subs. (2) and (3) are amended to clarify that their provisions may apply to both an appeal and a petition requesting the exercise of supervisory jurisdiction or original jurisdiction to issue a prerogative writ.

Section 752.31, as amended by ch. 192, Laws of 1979, provides for a hearing in the county of origin for appeals but not for other proceedings such as a petition for supervisory writ or original jurisdiction prerogative writ. Sub. (4) is created to set out in a separate subsection of Rule 809.41 the procedure to request that an appeal be heard in the county where a case or action originated as authorized under sub. 752.31 (3). The creation of this separate subsection makes no substantive change in the prior procedure that was contained in Rule 809.41 (1). The rule requires that the motion for hearing in county of origin be filed with the copy of the notice of appeal required to be sent to the clerk of the court of appeals under Rule 809.10 (1) (a).

Rule 809.41 is also amended to clarify that the appeal or petition is decided rather than heard, as oral argument may not occur in all matters filed in the court of appeals. [Re Order effective Jan. 1, 1982]

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 (1978); Sup. Ct. Order, 92 W (2d) xiii (1979).

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). (1) A person who files a brief or appendix shall file 8 copies with the court, or such other number as the court directs, and serve 3 copies on each party.

(2) A person who is found indigent under s. 814.29 and files a brief or appendix shall file the original and 2 copies with the court and serve one copy on each party.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 164 W (2d) xxix (1991).

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 and memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. The petition shall 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) 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; and

(d) A copy of the judgment or order sought to be reviewed.

(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. The response and memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. Costs and fees may be awarded against any party in a petition for leave to appeal proceeding.

(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.

(4) A person filing a petition under this section shall append to the petition a statement identifying whether the petition is produced with a monospaced font or with a proportional serif font. If produced with a proportional serif font, the person shall set forth the word count of the petition.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); Sup. Ct. Order, 151 W (2d) xvii (1989); Sup. Ct. Order, 164 W (2d) xxix (1991); Sup. Ct. Order, 171 W (2d) xxxv (1992); Sup. Ct. Order No. 93−20, 179 W (2d) xxv.

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).

Interlocutory Appeals in Wisconsin. Towers, Arnold, Tess−Mattner & Levenson. Wis. Law. July 1993.

809.51 Rule (Supervisory writ and original jurisdiction to issue prerogative writ). (1) A person may request the court to exercise its supervisory jurisdiction or its original jurisdiction to issue a prerogative writ over a court and the presiding judge, or other person or body, by filing a petition and supporting memorandum. The petition and memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. 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 shall 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 response and memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. The respondents shall respond with supporting memorandum 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. Costs and fees may be awarded against any party in a writ proceeding.

(4) A person filing a petition under this section shall append to the petition a statement identifying whether the petition is produced with a monospaced font or with a proportional serif font. If produced with a proportional serif font, the person shall set forth the word count of the petition.

History: Sup. Ct. Order, 83 W (2d) xiii; Sup. Ct. Order, 104 W (2d) xi (1978); Sup. Ct. Order, 151 W (2d) xix (1981); Sup. Ct. Order, 164 W (2d) xxix (1991); Sup. Ct. Order, 171 W (2d) xxxv (1992); Sup. Ct. Order No. 93−20, 179 W (2d) xxv.

Judicial Council Committee's Note, 1981: Sub. (1) is amended to reflect the procedure for issuance of a prerogative writ currently followed by the court of appeals and to alert attorneys to the correct procedure to be followed. Rule 809.51 governs the procedures for seeking a petition for supervisory writ or original jurisdiction prerogative writ in the court of appeals. [Re Order effective Jan. 1, 1982]

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).

See note to Art. VII, s. 5, citing State ex rel. Swan v. Elections Bd., 133 W (2d) 87, 394 NW (2d) 732 (1986).

809.52 Rule (Temporary relief). A petitioner may request in a petition filed under s. 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 (1978); 1981 c. 390 s. 252.

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 no later than 10 days following the filing of the respondent's brief under s. 809.19 or response. The petition must include a statement of reasons for bypassing the court of appeals.

(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 (1978); Sup. Ct. Order, 104 W (2d) xi (1981).

Judicial Council Committee's Note, 1981: The amendment to sub. (1) establishes time periods for filing a bypass petition to discourage use of the petition for dilatory purposes. [Re Order effective Jan. 1, 1982]

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 (1978).

Supreme court's denial of certification has no precedential value on merits of case. State v. Shillcutt, 119 W (2d) 788, 350 NW (2d) 686 (1984).

Discretionary review by the Wisconsin supreme court. Pokrass, WBB March, 1985.

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. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

(a) A real and significant question of federal or state constitutional law is presented.

(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well−settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

(2) Except as provided in s. 809.32 (4), the petition must contain:

(a) A statement of the issues presented for review, the method or manner of raising the issues in the court of appeals and how the court of appeals decided the issues.

(b) A table of contents.

(c) A concise statement of the criteria of sub. (1) relied upon to support the petition, or in the absence of any of the criteria, a concise statement of other substantial and compelling reasons for review.

(d) A statement of the case containing a description of the nature of the case; the procedural status of the case leading up to the review; the dispositions in the trial court and court of appeals; and a statement of those facts not included in the opinion of the court of appeals relevant to the issues presented for review, with appropriate references to the record.

(e) An argument amplifying the reasons relied on to support the petition, arranged in the order of the statement of issues presented. All contentions in support of the petition must be set forth in the petition. A memorandum in support of the petition is not permitted.

(f) An appendix containing, in the following order:

1. The decision and opinion of the court of appeals.

2. Judgment, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition.

3. Any other portions of the record necessary for an understanding of the petition.

(2m) Subsection (2) does not apply to a petition for review of an appeal that is governed by s. 809.105. A petition governed by that section shall comply with s. 809.105 (11).

(2r) This section applies to petitions for review of an appeal under s. 809.107, except as provided in s. 809.107 (6) (f).

(3) Except as provided in s. 809.32 (4), an opposing party may file a response to the petition within 10 days of the service of the petition.

(4) The petition and response, if any, shall conform to s. 809.19 (8) (b) and (d) as to form and certification and shall be as short as possible but not exceed 35 pages in length if a monospaced font is used or 8,000 words if a proportional serif font is used, exclusive of appendix.

(5) Except as provided in s. 809.24, the filing of the petition stays further proceedings in the court of appeals.

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

briefs. If the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court. The supreme court may limit the issues to be considered on review.

(7) 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 (1978); Sup. Ct. Order, 92 W (2d) xiii (1979); Sup. Ct. Order, 104 W (2d) xi (1981); 1991 a. 263; Sup. Ct. Order No. 93−20, 179 W (2d) xxv; 1993 a. 395.

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) [7] 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]

Judicial Council Committee's Note, 1981: Rule 809.62 is amended to regulate the form, contents and length of petitions for review. The amendments are intended to focus the petition for review on the criteria promulgated by the supreme court for granting a petition for review, to facilitate the efficient and effective consideration of the petition by the supreme court, and to develop a petition that may be used by the supreme court for consideration of the merits after review is granted.

Sub. (1) incorporates criteria promulgated by the supreme court for granting a petition for review. In re Standards to Review Petitions to Appeal, 85 Wis. 2d xiii, 268 N.W. 2d xxviii (1978).

Sub. (2) regulates the contents of the petition. Sub. (2) (a) requires that the petition contain a statement of the issues presented for review, the method or manner of raising the issues in the court of appeals, and how the court of appeals decided the issues. Correspondingly, sub. (6), formerly sub. (4), is amended to provide that if the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court. The supreme court may limit the issues to be considered on review. These amendments establish that the parties are limited to the issues raised in the petition, but the supreme court may order the parties to argue issues not raised. Likewise, the supreme court may limit the issues to be reviewed. The petition informs the supreme court as to whether an issue had been raised in the court of appeals. If an issue was not raised in the court of appeals, then it is left to the judicial discretion of the supreme court as to whether it will grant the petition so as to allow the issue to be raised in the supreme court.

Sub. (2) (c) requires that the petition contain a concise statement of the criteria of sub. (1) relied upon to support the petition, or in the absence of any of the criteria, a concise statement of other substantial and compelling reasons for review. Supreme court review is a matter of discretion. The supreme court has promulgated the criteria as guidelines for the exercise of its discretion. In the absence of one of the criteria, the supreme court may grant a petition for review if the petitioner establishes other substantial and compelling reasons for review. The amendment requires that the petitioner either state criteria relied upon or in the absence of any of the criteria, state other substantial and compelling reasons for review. The burden is on the petitioner to explicitly define the other substantial and compelling reasons for review.

Sub. (2) (d) requires that the petition contain a statement of the case containing a description of the nature of the case, the procedural status of the case leading up to the review, the dispositions in the trial court and court of appeals, and a statement of those facts not included in the opinion of the court of appeals relevant to the issues presented for review, with appropriate references to the record. The opinion of the court of appeals must be included in an appendix to the petition. Consequently, if the opinion of the court of appeals sets forth a complete statement of the facts relevant to the issues presented for review, the petition for review need not restate those facts. The petition need only state those facts not included in the opinion of the court of appeals relevant to the issues presented for review. The statement of facts must include appropriate references to the record.

Sub. (2) (e) provides that the petition must contain an argument amplifying the reasons relied on to support the petition, arranged in the order of the statement of issues presented. All contentions must be contained within the petition. There is no memorandum in support of the petition.

The appendix required by sub. (2) (f) will assure that all relevant supporting documents necessary for an understanding of the petition for review be before the supreme court for consideration. This will facilitate not only the review of the petition for review but will enhance the petition as an aid to the court in any subsequent review on the merits.

Sub. (4) is created to regulate the form and length of the petition for review and response. The form of the petition and response is based on Rule 809.19 for briefs as to printing requirements, page size and binding. The petition and response shall be as short as possible but shall not exceed 35 pages in length, exclusive of appendix.

Prior sub. (3) is renumbered sub. (5) and amended to allow the court of appeals to reconsider on its own motion a decision or opinion within 30 days of a filing of a petition for review.

The amendments to the rule refer to Rule 809.32 (4) which governs the filing of a petition for review in a criminal case where there has been a fully briefed appeal to the court of appeals and appointed counsel is of the opinion that a petition for review in the supreme court under Rule 809.62 would be frivolous and without any arguable merit.

Prior subs. (2) and (5), relating to the time for filing the response to the petition for review and the provisions for cross−review have been renumbered subs. (3) and (7), respectively, but have not been substantively altered. [Re Order effective Jan. 1, 1982]

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).

Supreme court will not order new trial when majority concludes there is prejudicial error but there is no majority with respect to a particular error. "Minority vote pooling" is rejected. State v. Gustafson, 121 W (2d) 459, 359 NW (2d) 920 (1985).

Petitions for review must be filed by 5:00 p.m. on the 30th day following filing of court of appeals decision. St. John's Home v. Continental Cas. Co., 150 W (2d) 37, 441 NW (2d) 219 (1989), per curiam.

Discretionary review by the Wisconsin supreme court. Wilson and Pokrass. WBB Feb. 1983.

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

See note to 809.23 citing State v. Higginbotham, 162 W (2d) 978, 471 NW (2d) 24 (1991).

Issues before the court are issues presented in petition for review and not the discrete arguments that may be made pro or con in the disposition of the issue. State v. Weber, 164 W (2d) 788, 476 NW (2d) 867 (1991).

Read together, s. 809.32 (4) and 977.05 (4) (j) create a statutory, but not constitutional, right to counsel in petitions for review, provided counsel does not determine the appeal to be without merit. Where counsel fails to timely file a petition for review, the defendant may petition for a writ of habeas corpus and the supreme court has the power to allow late filing. Schmelzer v. Murphy, 201 W (2d) 246, 548 NW (2d) 45 (1996).

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 (1978).

809.64 Rule (Reconsideration). A party may seek reconsideration of the judgment or opinion of the supreme court by filing a motion under s. 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 (1978); 1981 c. 390 s. 252.

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).

Motion mailed within 20−day period but received after period expired was not timely and did not merit exemption from time requirement. Lobermeier v. General Tel. Co. of Wisconsin, 120 W (2d) 419, 355 NW (2d) 531 (1984).

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 all of the following:

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

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

(c) A statement of the relief sought.

(d) A statement of 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 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 (1978); 1995 a. 225.

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 s. 809.51. A person seeking a supervisory writ from the supreme court shall first file a petition for a supervisory writ in the court of appeals under s. 809.51 unless it is impractical to seek the writ in the court of appeals. A petition in the supreme court shall show why it was impractical to seek the writ in the court of appeals or, if a petition had been filed in the court of appeals, the disposition made and reasons given by the court of appeals.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 104 W (2d) xi (1981); 1981 c. 390 s. 252.

Judicial Council Committee's Note, 1981: The supreme court will not exercise its supervisory jurisdiction where there is an adequate alternative remedy. Unless the court of appeals is itself the object of the supervisory writ, usually there is an adequate alternative remedy of applying to the court of appeals under Rule 809.51 for the supervisory writ. The amendment to Rule 809.71 establishes that before a person may request the supreme court to exercise its supervisory jurisdiction, the person must first seek the supervisory writ in the court of appeals, unless to do so is impractical. Following the decision of the court of appeals, the amendment does not preclude the supreme court from considering a petition for review under Rule 809.62 or a petition for supervisory writ under Rule 809.71, depending upon the circumstances and the petitioner's ability to establish the respective governing criteria. [Re Order effective Jan. 1, 1982]

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) 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 s. 801.14 (1), (2) and (4).

(b) Any paper required or authorized to be served on the state in appeals and other proceedings in felony cases in the court of appeals or supreme court shall be served on the attorney general unless the district attorney has been authorized under s. 978.05 (5) to represent the state. Any paper required or authorized to be served on the state in appeals and other proceedings in misdemeanor cases decided by a single court of appeals judge under s. 752.31 (2) and (3) shall be served on the district attorney. Every petition for review by the supreme court of a decision of the court of appeals in a misdemeanor case shall be served on the attorney general.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); 1981 c. 390 s. 252; Sup. Ct. Order, 130 W (2d) xi (1986); 1989 a. 31.

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]

Judicial Council Note, 1986: Sub. (2) (b) does not change the existing service rules; it is intended to consolidate and clarify the procedure specified by ss. 59.47 (7), 165.25 (1) and 752.31 (2) and (3). [Re Order eff. 7−1−86]

To avoid potential delay, address all types of mail to: Clerk of the Court, Supreme Court of Wisconsin, P. O. Box 1688, Madison, WI 53701. Gunderson v. State, 106 W (2d) 611, 318 NW (2d) 779 (1982).

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. An original and 4 copies in the court of appeals, an original and 8 copies in the supreme court. A party shall file an original and 2 copies of a motion filed under s. 809.14 in the court of appeals when the appeal or other proceeding is one of the types of cases specified in s. 752.31 (2).

(3) STYLE. Produced using either a monospaced or a proportional serif font.

(4) SPACING AND MARGINS. Double−spaced with a minimum of a 1.5 inch margin on each of the 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 (1978); Sup. Ct. Order, 104 W (2d) xi (1981); Sup. Ct. Order No. 93−18, 179 W (2d) xxi; Sup. Ct. Order No. 93−20, 179 W (2d) xxv.

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]

Judicial Council Committee's Note, 1981: Sub. (2) is amended to clarify that an original must be filed with the 4 copies in the court of appeals or with the 8 copies in the supreme court. [Re Order effective Jan. 1, 1982]

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

(2) ENLARGEMENT OR REDUCTION OF TIME. (a) Except as provided in this subsection, 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.

(b) Notwithstanding the provisions of par. (a), the time for filing a notice of appeal or cross−appeal of a final judgment or order other than in an appeal under s. 809.30 or 809.40 (1) may not be enlarged.

(c) The court may not enlarge the time prescribed for an appeal under s. 809.105 without the consent of the minor and her counsel.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 104 W (2d) xi (1981); 1981 c. 390 s. 252; 1991 a. 263.

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]

Judicial Council Committee's Note, 1981: Sub. (2) is amended to permit the court of appeals to extend the time for filing a notice of appeal or cross−appeal in appeals under Rules 809.30 and 809.40 (1), which cover criminal appeals and post-conviction motions and appeals in ch. 48, 51 and 55 cases. When read with Rules 809.30 and 809.40 (1), the rule was previously ambiguous regarding extensions of time to file a notice of appeal or cross−appeal in ch. 48, 51 and 55 cases. The amendment clarifies the rules. Other than appeals under Rules 809.30 and 809.40 (1), the time for filing a notice of appeal or cross−appeal may not be extended. [Re Order effective Jan. 1, 1982]

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

The authority to extend the time for filing a notice of appeal under sub. (2) does not apply to appeals regarding terminations of parental rights under s. 809.107. Gloria A. v. State, 195 W (2d) 268, 536 NW (2d) 396 (Ct. App. 1995).

809.83 Rule (Penalties for delay or noncompliance with rules). (1) DELAY; EXTRA COSTS AND DAMAGES. (a) If the court finds that an appeal was taken for the purpose of delay, it may award any of the following:

1. Double costs.

2. A penalty in addition to interest not exceeding 10% on the amount of the judgment affirmed.

3. Damages occasioned by the delay.

4. Reasonable attorney fees.

(b) A motion for costs, penalties, damages and fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross−appeal is filed, the cross−respondent's brief.

(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 (1978); Sup. Ct. Order, 151 W (2d) xvii (1989); 1995 a. 225.

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).

Summary reversal of court's dismissal order as sanction under sub. (2) entitled the plaintiffs to a trial without consideration of the issue which resulted in the dismissal. State ex rel. Blackdeer v. Town of Levis, 176 W (2d) 252, NW (2d) (Ct. App. 1993).

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 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 (1978).

809.85 Rule (Counsel to continue). An attorney 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.

History: Sup. Ct. Order, 83 W (2d) xiii (1978); Sup. Ct. Order, 151 W (2d) xxv (1989).

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

Judicial Council Note, 1990: See ss. 48.235 (7), 767.045 (5) and 880.331 (7).