

FILED

APR 30, 2001

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

SUPREME COURT OF WISCONSIN

In the Matter of the Amendment of
the Rules of Appellate
Procedure: Wis. Stat. §§
808.04(1); 808.07(6); 808.075(2)
and (8); 809.01(5); 809.10(1);
809.107(4), (5), (5m), (6) and
(6am); 809.11(4) to (8); 809.13;
809.14(1), (2) and (3); 809.15(2)
to (4m); 809.16; 809.17;
809.19(1), (3), (4), and (6) to
(11); 809.24; 809.25(1) and (3);
809.26; 809.30(2) to (4);
809.31(5); 809.32(1) to (4);
809.40(3); 809.41(1) to (4);
809.43(1) and (2); 809.50(1), (2)
and (3); 809.51(2); 809.60(1) and
(2); 809.62(3) and (4); 809.64;
809.70(2); 809.80(1); 809.81(2)
and (8); 809.82(2); 809.83(2)

ORDER
No. 00-02

The court held a public hearing on October 23, 2000, on the petition of the Judicial Council of Wisconsin seeking the amendment of the rules of appellate procedure set out in Wis. Stats. chs. 808 and 809. The court has considered the presentation made at that public hearing and the material filed in the matter.

IT IS ORDERED that, effective July 1, 2001, the rules of appellate procedure are amended as follows.

SECTION 1. 808.04 (1) of the statutes is amended to read:

808.04 (1) INITIATING AN APPEAL. An appeal to the court of appeals must be initiated within 45 days of entry of a final judgment or order appealed from if written notice of the entry of a final judgment or order is given within 21 days of the final judgment or order as provided in s. 806.06 (5), or within 90 days of entry if notice is not given, except as provided in this section or otherwise expressly provided by law. Time limits for seeking review of a nonfinal judgment or order are established in s. 809.50.

Judicial Council Note, 2001: The word "final" has been inserted before "judgment or order" in sub. (1). The amendment specifies that the 45- or 90-day time limit applies in appeals from final orders and the 10-day time limit in s. 809.50 applies to appeals from nonfinal orders.

SECTION 2. 808.07 (6) of the statutes is amended to read:

808.07 (6) SURETIES ON UNDERTAKINGS. A surety shall file with the undertaking an affidavit that the surety has a net worth in property within this state not exempt from execution which exceeds the amount of the undertaking, except as provided in s. 632.17 (2). The respondent may by motion object to the sufficiency of a surety within ~~10~~ 14 days after service of a copy of the undertaking.

Judicial Council Note, 2001: This is the first of fifteen statutes scattered throughout the rules in which a 10-day deadline is being changed to a 14-day deadline. Also 7-day deadlines are being changed to 11-day deadlines. Many of the current deadlines in ch. 809 are either 7 or 10 days and are affected by s. 801.15 (1) (b), which excludes "Saturdays, Sundays and holidays" from time periods "less than 11 days."

Additionally, many time periods in ch. 809 run from the service of a document, and under s. 801.15 (5) (a), when a document is served by mail, 3 days are added to the prescribed period. The interplay of s. 801.15 and ch. 809 causes many of the time periods in ch. 809 to be substantially longer than the number of days specified in the Rules. The varying time periods have made calculation of the court's deadlines difficult.

The proposed amendment of all of the 7-day or 10-day deadlines to 11 and 14 days, respectively, will remove the impact of s. 801.15 (1) (b) on the Rules of Appellate Procedure. However, there will be little adverse impact on the time actually given to parties. The proposed change will greatly facilitate the court's calculation of deadlines. If circumstances demand a different time period, the court may set an appropriate deadline under s. 809.82 (2) (a).

SECTION 3. 808.075 (2) of the statutes is amended to read:

808.075 (2) In a case appealed under s. 809.30, the circuit court retains the power to act on all issues until the notice of appeal has been filed with the clerk of the ~~trial~~ circuit court, except that the circuit court may not act upon any motion to extend a time limit that is specified in s. 809.30. Thereafter, the circuit court may act only as provided in subs. (1) and (4).

SECTION 4. 808.075 (8) of the statutes is created to read:

808.075 (8) If an appellate court remands the record to the circuit court for additional proceedings under sub. (5) or (6), the appellate court, in the pending appeal, may review the judgment or order that the circuit court enters following remand. If any party is aggrieved by the judgment or order of the circuit court, the party shall file in the appellate court a written statement of objections to the judgment or order within

14 days after the record is returned to the clerk of the appellate court. A party that files a statement of objections need not file an additional notice of appeal or cross-appeal.

Judicial Council Note, 2001: The second sentence in sub. (2) is a codification of *State v. Harris*, 149 Wis. 2d 943, 440 N.W.2d 364 (1989). Subsection (8) is intended to clarify procedure following a remand and to eliminate an additional notice of appeal or cross-appeal. The obligations of a person filing a statement of objections are the same as those of a cross-appellant.

SECTION 5. 809.01 (5) of the statutes is amended to read:

809.01 (5) "Cross-appellant" means a respondent who files a notice of cross-appeal or a respondent who files a statement of objections under s. 808.075 (8).

SECTION 6. 809.10 (1) of the statutes is repealed and recreated to read:

809.10 (1) NOTICE OF APPEAL. (a) *Filing.* A person shall initiate an appeal by filing a notice of appeal with the clerk of the circuit court in which the judgment or order appealed from was entered.

(b) *Content.* The notice of appeal shall include all of the following:

1. The case name and number.
2. An identification of the judgment or order from which the person filing the notice intends to appeal and the date on which it was entered.

3. A statement of whether the appeal arises in one of the types of cases specified in s. 752.31 (2).

4. A statement of whether the appeal is to be given preference in the circuit court or court of appeals pursuant to statute.

5. If the appeal is under s. 809.30 or 809.32, a statement of the date of service of the last transcript or copy of the circuit court case record if no postconviction motion is filed, the date of the order deciding postconviction motions, or the date of any other notice-of-appeal deadline that was established by the court of appeals.

6. If counsel is appointed under ch. 977, a copy of the order appointing counsel.

(c) *Copies of the notice.* At the same time that the person files the notice of appeal, the person shall send a copy of the notice of appeal to the clerk of the court of appeals.

(d) *Docketing statement.* The person shall 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 docketing statement shall accompany the court of appeals' copy of the notice of appeal. The person shall send a copy of the completed docketing statement to the other parties to the appeal. Docketing statements need not be filed in appeals brought under s. 809.105, 809.107, 809.32, or 974.06 (7), or in

cases in which a party represents himself or herself. Docketing statements need not be filed in appeals brought under s. 809.30 or 809.40 (1), except that a docketing statement shall be filed in cases arising under chs. 48, 51, 55, or 938.

(e) *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.

(f) *Error in content not jurisdictional defect.* An inconsequential error in the content of the notice of appeal is not a jurisdictional defect.

Judicial Committee Note, 2001: Former sub. (1) (a) has been repealed and recreated as subs. (1) (a) to (d). Subsection 1 (d) clarifies when a docketing statement must be filed. Former sub. (1) (b) has been repealed and recreated as sub. (1) (e). Subsection (1) (f) codifies existing law. See *Northridge Bank v. Community Eye Care Ctr.*, 94 Wis. 2d 201, 203, 287 N.W.2d 810, 811 (1980); *Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267, 269 n.2 (1992).

Please see s. 809.32 for special requirements for a Notice of Appeal in a No-Merit Report appeal.

SECTION 7. 809.107 (4) of the statutes is amended to read:

809.107 (4) TRANSCRIPT AND CIRCUIT COURT CASE RECORD. A person filing a notice of intent to appeal under sub. (2) shall ~~order~~ request a transcript of the reporter's notes and a copy of the circuit court case record within 15 days after filing the notice. The court reporter shall file the transcript with the

~~trial circuit~~ circuit 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 is requested. The clerk of circuit court shall serve a copy of the circuit court case record on the person filing the notice of intent to appeal within 30 days after the court record is requested.

SECTION 8. 809.107 (5) of the statutes is repealed and recreated to read:

809.107 (5) NOTICE OF APPEAL; TRANSMITTAL OF RECORD. (a) *Filing; copy.* 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 as provided in s. 809.10 (1) and serve a copy of the notice on the persons required to be served under sub. (2).

(b) *Transmittal of record.* The clerk of circuit 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.

(c) *Requesting transcripts.* The appellant shall request a copy of the transcript of the reporter's notes of the proceedings for each of the parties to the appeal and make arrangements to pay for the transcript and copies within 5 days after the filing of the notice of appeal.

(d) *Statement on transcript.* The appellant shall file a statement on transcript with the clerk of the court of appeals, shall file a copy of the statement on transcript with the clerk of circuit court, and shall serve a copy of the statement on transcript on the other parties to the appeal within 5 days after the filing of the notice of appeal in the circuit court. The statement on transcript shall either designate the portions of the transcript that have been requested by the appellant or contain a statement by the appellant that a transcript is not necessary for prosecution of the appeal. If a transcript is necessary for prosecution of the appeal, the statement on transcript shall also contain a statement by the court reporter that the appellant has requested copies of the transcript or designated portions thereof for each of the other parties; that the appellant has made arrangements to pay for the original transcript and for all copies for other parties; the date on which the appellant requested the transcript and made arrangements to pay for it; and the date on which the transcript must be served on the parties.

(e) *Service of transcript.* The court reporter shall serve copies of the transcript on the parties indicated in the statement on transcript within 5 days after the date the appellant requested copies of the transcript under par. (c).

SECTION 9. 809.107 (5m) of the statutes is created to read:

809.107 (5m) No-MERIT REPORTS. A s. 809.32 no-merit report, response, and supplemental no-merit report may be filed in an appeal from an order or judgment terminating parental rights. The appointed attorney shall file in the court of appeals and serve on the client-parent the no-merit report and certification within 15 days after the filing of the record on appeal. The appointed attorney shall serve on the client-parent a copy of the transcript and the record on appeal at the same time that the no-merit report is served on the client-parent. The client-parent may file in the court of appeals a response to the no-merit report within 10 days after service of the no-merit report. Within 5 days after the response to the no-merit report has been filed in the clerk's office, the clerk shall send a copy of the response to the appointed attorney. The attorney may file a supplemental no-merit report and affidavit within 10 days after receiving the response to the no-merit report.

SECTION 10. 809.107 (6) (a) (title), (b) (title), (c) (title), (d) (title), (e) (title), and (f) (title) of the statutes are created to read:

809.107 (6) (titles).

(a) (title) *Appellant's brief-in-chief.*

(b) (title) *Respondent's brief.*

(c) (title) *Appellant's reply brief.*

(d) (title) *Guardian ad litem's brief.*

(e) (title) *Decision*.

(f) (title) *Petition for review*.

SECTION 11. 809.107(6)(am) of the statutes is created to read:

809.107 (6) (am) *Motion for remand*. If the appellant intends to appeal on any ground that may require postjudgment fact-finding, the appellant shall file a motion in the court of appeals, within 15 days after the filing of the record on appeal, raising the issue and requesting that the court of appeals retain jurisdiction over the appeal and remand to the circuit court to hear and decide the issue. If the court of appeals grants the motion for remand, it shall set time limits for the circuit court to hear and decide the issue, for the appellant to request transcripts of the hearing, and for the court reporter to file and serve the transcript of the hearing. The court of appeals shall extend the time limit under par. (a) for the appellant to file a brief presenting all grounds for relief in the pending appeal.

Judicial Council Note, 2001: Titles and subtitles were added. Subsection (4) is amended to require that the person who files a notice of intent to appeal must request a copy of the circuit court case record within 15 days after filing the notice of intent to appeal. Subsection (4) also requires the clerk of the circuit court to serve a copy of the circuit court case record upon the person requesting it within 30 days after the date of the request.

Former sub. (5) is recreated as subs. (5) (a) and (b).

Subsection (5) (c) requires the appellant to request a copy of the transcript for the other parties to the appeal, and to make arrangements to pay for those copies, within 5 days after filing the notice of appeal.

Subsection (5) (d) requires the appellant to file a statement on transcript within 5 days after filing the notice of appeal.

Subsection (5) (e) requires the court reporter to serve copies of the transcript on the other parties to the appeal within 5 days after the appellant requests the copies.

Subsection (5m) codifies *Brown County v. Edward C.T.*, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998), which extends the no-merit procedure to TPR cases.

Subsection (6) (am) provides a procedure for ineffective assistance of counsel claims and other claims that require fact-finding after the final judgment or order has been entered.

SECTION 12. 809.11 (4) of the statutes is repealed and recreated to read:

809.11 (4) REQUESTING TRANSCRIPTS AND FILING STATEMENT ON TRANSCRIPT.

(a) The appellant shall request a copy of the transcript of the reporter's notes of the proceedings for each of the parties to the appeal and make arrangements to pay for the transcript and copies within 14 days after the filing of the notice of appeal.

(b) The appellant shall file a statement on transcript with the clerk of the court of appeals, shall file a copy of the statement on transcript with the clerk of circuit court, and shall serve a copy of the statement on transcript on the other parties to the appeal within 14 days after the filing of the notice of appeal in the circuit court. The statement on

transcript shall either designate the portions of the transcript that have been ordered by the appellant or contain a statement by the appellant that a transcript is not necessary for prosecution of the appeal. If a transcript is necessary for prosecution of the appeal, the statement on transcript shall also contain a statement by the court reporter that the appellant has requested copies of the transcript or designated portions thereof for each of the other parties; that the appellant has made arrangements to pay for the original transcript and for all copies for other parties; the date on which the appellant requested the transcript and made arrangements to pay for it; and the date on which the transcript must be served on the parties.

SECTION 13. 809.11 (5) to (7) of the statutes are created to read:

809.11 (5) ADDITIONAL PORTIONS OF TRANSCRIPT. Within 14 days after filing of a statement on transcript as required under sub. (4), any other party may file a designation of additional portions to be included in the transcript and serve a copy of the designation on the appellant. Within 14 days after the filing of such a designation, the appellant shall file the statement required by sub. (4) (b) covering the other party's designation. If the appellant fails or refuses to request the designated portions, the other party may request the portions or

move the circuit court for an order requiring the appellant to request the designated portions.

(6) CROSS-APPEALS. Subsections (4) and (5) apply to cross-appellants.

(7) REPORTER'S OBLIGATIONS. (a) *Service of transcript copies.* The reporter shall serve copies of the transcript on the parties to the appeal, file the transcript with the circuit court, and notify the clerk of the court of appeals within 60 days after the date on which the transcript was requested and arrangements were made for payment. If supplementation or correction of the record is ordered, the reporter shall serve copies of the supplemental or corrected transcript on the parties to the appeal, file the supplemental or corrected transcript with the circuit court, and notify the clerk of the court within 20 days after the order for supplementation or correction or within the time limit set by order of the court.

(b) *Return of statement regarding transcript arrangements.* The reporter shall sign and send to the appellant, within 5 days after receipt, the statement regarding transcript arrangements and filing required under sub. (4) (a).

(c) *Extensions.* A reporter may obtain an extension for filing the transcript only by motion, showing good cause, that is filed in the court of appeals and served on all parties to the appeal.

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

Judicial Council Note, 2001: The revision places all of the rules concerning transcript preparation and service in one statute, and eliminates the need for former s. 809.16. Subsection (4) combines and recreates former s. 809.11 (4) and the first sentence of former s. 809.16 (1). Subsection (5) recreates the remaining portions of former s. 809.16 (1). The time limits in subs. (4) and (5) are changed from 10 to 14 days. See the comment to s. 808.07 (6) concerning time limits. No other substantive changes in subs. (4) and (5) were intended. Subsection (6) recreates former s. 809.16 (2). Subsection (7) (a) recreates former s. 809.16 (3). Subsection (7) (b) is created to specify a time within which the court reporter must furnish a statement regarding transcript arrangements to the appellant or cross-appellant. Subsection (7) (c) recreates former s. 809.16 (4). Subsection (7) (d) recreates former s. 809.16 (5).

SECTION 14. 809.13 of the statutes is amended to read:

809.13 Rule (Intervention). A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal. A party may file a response to the petition within ~~seven (7)~~ 11 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).

Judicial Council Note, 2001: The 7-day time limit has been changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits.

SECTION 15. 809.14 (1) and (2) of the statutes are amended to read:

809.14 (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~~ 11 days ~~of~~ after 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~~ 11 days ~~of~~ after service of the order.

SECTION 16. 809.14 (3) of the statutes is repealed and recreated to read:

809.14 (3) (a) The filing of a motion seeking an order or other relief which may affect the disposition of an appeal or the content of a brief, or a motion seeking consolidation of appeals, automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order.

(b) The filing of a motion to supplement or correct the record automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order. If a motion to correct or supplement the record is granted, time limits for performing an act required by these rules shall be tolled from the date on which the motion was filed until the date on which the supplemental or corrected record return is filed, except that the time for preparation of supplemental or corrected transcripts is governed by s. 809.11 (7) (a).

(c) The moving party shall serve the clerk of circuit court with any motion filed in the court of appeals under this subsection.

Judicial Council Note, 2001: The 7-day time limits in subs. (1) and (2) have been changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits. Subsection (3) (a) was revised to include consolidation motions within the tolling provision. Subsection (3) (b) creates a tolling provision when a motion to supplement or correct the record is filed. Subsection (3) (c) creates a service requirement for motions affecting the time limits for transmittal of the record.

SECTION 17. 809.15 (2) and (3) of the statutes are amended to read:

809.15 (2) COMPILATION AND APPROVAL OF THE RECORD. The clerk of ~~the trial~~ circuit 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~~ before the due date for filing the record in the court, the clerk shall notify in writing each party appearing in the ~~trial~~ circuit 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 that the record, including the transcript of the reporter's notes, is defective or that the record does not accurately reflect what occurred in the ~~trial~~ circuit court may move the court in which the record is located to supplement or correct the record. Motions under this subsection may be heard under s. 807.13.

SECTION 18. 809.15 (4) of the statutes is repealed and recreated to read:

809.15 (4) PROCESSING THE RECORD. (a) *Transmittal of the record.* The clerk of circuit court shall transmit the record to the court of appeals within 20 days after the date of the filing of the transcript designated in the statement on transcript or within 20 days after the date of the filing of a statement on transcript indicating that no transcript is necessary for prosecution of the appeal, unless the court extends the time for transmittal of the record or unless the tolling provisions of s. 809.14(3) extend the time for transmittal of the record.

(b) *Late transcript.* If the reporter fails to file the transcript within the time limit specified in the statement on transcript, the clerk of circuit court shall transmit the record not more than 90 days after the filing of the notice of appeal, unless the court of appeals extends the time for filing the transcript of the reporter's notes. If the court extends the time for filing the transcript of the reporter's notes, the clerk of circuit court shall transmit the record within 20 days after the date that the transcript is filed.

(c) *Supplementation or correction of record.* Notwithstanding pars. (a) and (b), if a motion to supplement or correct the record is filed in circuit court, the clerk of circuit court may not transmit the record until the motion is determined. A copy of any motion to supplement or correct the record that is filed in circuit court shall be sent to the clerk of the court of appeals. The circuit court shall determine, by order, the motion to supplement or correct the record within 14 days after the filing or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion and shall transmit the record to the court of appeals within 20 days after entry of the order. If the circuit court grants the motion, the clerk of circuit court shall transmit the supplemented or corrected record to the court of appeals within 20 days after entry of the

order or filing of the supplemental or corrected record in the circuit court, whichever is later.

SECTION 19. 809.15 (4m) of the statutes is created to read:

809.15 (4m) NOTICE OF FILING OF RECORD. The clerk of the court of appeals shall notify the clerk of circuit court and all parties appearing in the circuit court of the date on which the record was filed.

Judicial Council Note, 2001: Subsection (2) requires that numbers be used to identify the contents of the record. Subsection (4) (a) recreates the general rule for record transmittal from former sub. (4). Exceptions to the general rule are set forth in subs. (4) (b) and (c). Subsection (4m) recreates the last sentence of former sub. (4).

SECTION 20. 809.16 of the statutes is repealed.

809.16 of the statutes is repealed.

Judicial Council Note, 2001: This entire section has been eliminated and consolidated into the revision to s. 809.11.

SECTION 21. 809.17 (title) of the statutes is amended to read:

809.17 (title) (Expedited appeals program, voluntary alternative dispute resolution and ~~pre-submission~~ presubmission conference).

SECTION 22. 809.17 (2m) of the statutes is created to read:

809.17 (2m) The court of appeals may establish an appellate mediation program and make and enforce all rules necessary for the prompt and orderly dispatch of the business of the program. Participation in the appellate mediation program

is voluntary, but the program may involve mandatory participation in the presubmission conferences at the direction of the court. Only those cases in which a docketing statement is required to be filed under s. 809.10 (1) (a) are eligible for participation in the appellate mediation program. The parties to the appeal shall pay the fees of a mediator providing services under the program, unless those fees are waived or deferred by the court. The rules and procedures governing the program shall be set forth in the court of appeals' internal operating procedures.

SECTION 23. 809.19 (1) (h) and (i) of the statutes are created to read:

809.19 (1) (h) The signature of the attorney who files the brief; or, if the party who files the brief is not represented by an attorney, the signature of that party.

(i) Reference to the parties by name, rather than by party designation, throughout the argument section.

SECTION 24. 809.19 (3) (a) of the statutes is renumbered 809.19 (3) (a) 1. and amended to read:

809.19 (3) (a) 1. (intro.) The respondent shall file a brief within ~~30 days~~ the later of:

a. Thirty days after the date of the service of the appellant's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail; or

b. Thirty days after the date on which the court accepts the appellant's brief for filing.

2. The brief must conform with sub. (1), except that the statement of issues and the statement of the case may be excluded.

SECTION 25. 809.19 (4) and (6) of the statutes are repealed and recreated to read:

809.19 (4) REPLY BRIEF. (a) (intro.) The appellant shall file a reply brief, or a statement that a reply brief will not be filed, within the later of:

1. Fifteen days after the date of service of the respondent's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail; or

2. Fifteen days after the date on which the court accepts the respondent's brief for filing.

(b) The reply brief under par. (a) shall comply with sub. (1) (e) and (f).

809.19 (6) CROSS-APPEAL. Briefing in a cross-appeal shall be as follows:

(a) An appellant-cross-respondent shall file a brief titled "Appellant's Brief" within the time specified by, and in compliance with, the requirements of subs. (1) and (2).

(b) 1. (intro.) A respondent-cross-appellant shall file a brief titled "Combined Brief of Respondent and Cross-Appellant" within the later of:

a. Thirty days after the date of service of the appellant-cross-respondent's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail; or

b. Thirty days after the date on which the court accepts the appellant-cross-respondent's brief for filing.

2. The front and back covers of the combined brief shall be red. The respondent portion of the combined brief shall comply with the requirements of this section for a respondent's brief, including the length limitation for such a brief set forth in sub. (8) (c) 1. The cross-appellant portion of the combined brief shall comply with the requirements of subs. (1) and (2) for an appellant's main brief, including the length limitation for such a brief set forth in sub. (8) (c) 1., except that the requirements of sub. (1) (c) and (d) may be omitted, the cross-appellant portion of the combined brief shall be preceded by a blank blue cover, and a signature shall be required only at the conclusion of the cross-appellant portion of the combined brief.

(c) 1. (intro.) An appellant-cross-respondent shall file a brief titled "Combined Brief of Appellant and Cross-Respondent" within the later of:

a. Thirty days after the date of service of the respondent-cross-appellant's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail; or

b. Thirty days after the date on which the court accepts the respondent-cross-appellant's brief for filing.

2. The front and back covers of the combined brief shall be gray. The appellant portion of the combined brief shall comply with the requirements of sub. (4) for a reply brief, including the length limitation for such a brief set forth in sub. (8) (c) 1. The cross-respondent portion of the combined brief shall comply with the requirements of sub. (3) for a respondent's brief, including the length limitation for such a brief set forth in sub. (8) (c) 1., except that the requirement of sub. (1) (c) may be omitted, the cross-respondent portion of the combined brief shall be preceded by a blank red cover, and a signature shall be required only at the conclusion of the cross-respondent portion of the combined brief.

(d) (intro.) A respondent-cross-appellant shall file either a reply brief titled "Reply Brief of Cross-Appellant" in the form required by sub. (4) for reply briefs, or a statement that a reply brief will not be filed, within the later of:

1. Fifteen days after the date of service of the appellant-cross-respondent's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail; or

2. Fifteen days after the date on which the court accepts the appellant-cross-respondent's brief for filing.

(e) Each part of a combined brief shall comply with the form and length certification requirements of sub. (8) (d).

SECTION 26. 809.19 (7) (c), (8) (a) and (b) 4. and (9) of the statutes are amended to read:

809.19 (7) (c) Except as provided in par. (b), the motion shall be filed not later than ~~10~~ 14 days after the respondent's brief is filed, and the brief shall be filed within the time specified by the court.

(8) (a) *Number.* 1. ~~Except as provided in s. 809.43, a~~ A person ~~who files~~ shall file either 22 copies of a brief or appendix in the supreme court ~~shall file 22 copies with the court,~~ or ~~such other~~ the number as that the court directs, and shall serve 3 copies on each party.

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

3. Except as provided in s. 809.43, a person who is found indigent under s. 814.29 (1) and ~~files~~ who is not represented by counsel shall file 5 copies of a brief or appendix in the court of appeals ~~shall file the original and 4 copies with the court~~

and shall serve one copy on each party. A prisoner who has been granted leave to proceed without prepayment of fees under s. 814.29 (1m) and who is not represented by counsel shall file 5 copies of a brief or appendix in the court of appeals and shall serve one copy on each party.

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

809.19 (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. Except as provided in s. 809.81 (8), the caption shall include the full name of each party in the circuit court and shall designate each party so as to identify each party's status in the circuit court and in the appellate court, if any. 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.

SECTION 27. 809.19 (10) and (11) of the statutes are created to read:

809.19 (10) CITATION OF SUPPLEMENTAL AUTHORITIES. If pertinent authorities decided after briefing come to the attention of a party or a nonparty under sub. (7) or a guardian ad litem under sub. (8m) after the party's or nonparty's or guardian ad litem's brief has been filed, or after oral argument but before decision, the party, nonparty, or guardian ad litem may promptly advise the clerk of the court, by letter, and serve a copy of that letter on all parties to the appeal. If the new authority is a decision of the Wisconsin court of appeals, the authority is considered decided for purposes of this subsection on the date of an order for publication issued under s. 809.23 (2). The letter shall do the following:

- (a) Set forth the citations for the authority.
- (b) Identify the page of the brief or the point that was argued orally to which the citations pertain.
- (c) For each authority that is cited, briefly discuss the proposition that the authority supports.

(11) RESPONSE TO SUPPLEMENTAL AUTHORITIES. A response to the letter under sub. (10) may be filed within 11 days after service of that letter. The response shall briefly discuss the reason why each authority does not support the stated proposition, unless the proposition is not disputed.

Judicial Council Note, 2001: Subsection (1) (h) requires a signature on briefs. Subsection (1) (i) makes identification of the parties consistent and less confusing. Subsection (3) was revised to address a situation in which the appellant's brief is served on the respondent, but has not yet been accepted for filing by the court. If the respondent undertakes to prepare its brief within 30 days after service of the appellant's brief and the appellant's brief has not yet been accepted for filing, the respondent will have wasted time and energy if the appellant's brief ultimately is rejected. The last sentence of sub. (4) was added to require record references and a conclusion in a reply brief. Subsection (6) was rewritten to clarify briefing requirements in cross-appeals. The time limit in sub. (7) (c) was changed from 10 to 14 days. Please see the comment to s. 808.07 (6) concerning time limits. The reference to s. 809.43 was deleted in sub. (8)(a) 1. because the greater number of copies is needed when a single-judge appeal reaches the supreme court. Subsection (8) (a) 3. was amended to apply to pro se parties only. Subsection (8) (b) 4. was amended to allow "velobinding" of briefs, a process commonly accepted but not authorized by statute. Subsection (9) requires parties to use the complete case caption. Parties shall not abridge the caption by use of "et al" or similar phrases. Subsections (10) and (11) are new and establish a procedure for supplementing briefs or oral argument with pertinent authorities that subsequently come to the attention of a party or an amicus curiae, who is denoted a "nonparty" under sub. (7), or a guardian ad litem under sub. (8m). This procedure is based upon Federal Rule of Appellate Procedure 28 (j) and Circuit Rule 28 (e) of the Seventh Circuit Court of Appeals.

SECTION 28. 809.24 of the statutes is repealed and recreated to read:

809.24 **Rule (Reconsideration).** (1) Except as provided in

sub. (4), a party may file a motion for reconsideration in the court of appeals within 20 days after the date of a decision or order. The motion must state with particularity the points of law or fact alleged to be erroneously decided in the decision or order and must include supporting argument. No separate memorandum in support of the motion is permitted unless subsequently ordered by the court. No response to the motion is permitted unless ordered by the court. An amended decision or order will not be issued unless a response is ordered by the court. The motion and any response shall not exceed 5 pages if a monospaced font is used or 1,100 words if a proportional serif font is used.

(2) In response to a motion for reconsideration, the court shall issue an amended decision or order, or the court shall issue an order denying the motion.

(3) Nothing in this section prohibits the court from reconsidering a decision or order on its own motion at any time prior to remittitur if no petition for review is filed under s. 809.62 or, if a petition for review is filed, within 30 days after filing the petition for review.

(4) No motion for reconsideration of a court of appeals' decision or order issued under s. 809.105 is permitted.

Judicial Council Note, 2001: Section 809.24 is amended to conform with the court of appeals' internal operating procedures, and to provide an orderly procedure for

reconsideration. Reconsideration is intended for those rare cases in which the court of appeals overlooks or misapprehends relevant and material facts or law, not for cases in which a party simply disagrees with the court of appeals. Presentation of new facts or alternate legal arguments is not appropriate on reconsideration. Reconsideration is not permitted in s. 809.105 proceedings related to parental consent prior to performance of abortion due to the abbreviated appellate time periods provided in s. 809.105. Service requirements of s. 801.14 (4) apply. The time for filing a motion for reconsideration cannot be extended. See s. 809.82 (2) (e).

SECTION 29. 809.25 (1) (c) and (3) (a) of the statutes are amended to read:

809.25 (1) (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 7 11 days ~~of the~~ after service of the statement, a motion objecting to the statement of costs.

(3) (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, no later than the filing of the cross-respondent's brief. This subsection does not apply to appeals or cross-appeals under s. 809.107, 809.30, or 974.05.

Judicial Council Note, 2001: The 7-day time limit in sub. (1) (c) was changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits.

SECTION 30. 809.26 (1) of the statutes is amended to read:

809.26 (1) The clerk of the court of appeals shall transmit to the ~~trial~~ circuit court the judgment and ~~opinion~~ decision or order of the court and the record in the case filed pursuant to s. 809.15 within 31 days after the filing of the decision or order 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. If a motion for reconsideration is filed under s. 809.24, the transmittal is stayed until the court files an order denying the motion, or files an amended decision or order, and the subsequent expiration of any period for filing a petition for review.

SECTION 31. 809.30 (2) (a) (title), (d) (title), (fm) (title), (j) (title) and (L) (title) of the statutes are created to read:

809.30 (2) (a) (title) *Appeal procedure; counsel to continue.*

(d) (title) *Indigency redetermination.*

(fm) (title) *Transcript request in chs. 48 and 938 proceedings.*

(j) (title) *Appeal from judgment and order.*

(L) (title) *Appeals under s. 974.06.*

SECTION 32. 809.30 (2) (b) (intro.), 1. and 6., (c), (c) 1. and 2., (e), and (f) of the statutes are amended to read:

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

1. The case name and ~~court caption~~ number.

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 to pursue postconviction relief, counsel's name and address shall be included.

(c) Clerk to send materials. Within 5 days after a notice under par. (b) is filed, the clerk of circuit court 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 that shows the date on which it was filed or entered, a copy of the judgment or order specified in the notice that shows the date on which it was filed or entered, 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~~ with the clerk of circuit court.

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 that shows the date on which it was filed or entered, 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~~ with the clerk of circuit court.

(e) State public defender appointment of counsel; transcript and circuit court case record request. Within 30 days after the ~~filing of a notice under par. (b) requesting representation by the state public defender for purposes of postconviction relief~~ state public defender appellate intake office receives the materials from the clerk of circuit court under par. (c), the state public defender shall appoint counsel for the defendant and ~~order request~~ request a transcript of the reporter's notes and a copy of the circuit court case record, except that if the defendant's indigency must first be determined or redetermined, the state public defender shall do so, appoint counsel, and ~~order request~~ request transcripts and a copy of

the circuit court case record within 50 days after the ~~notice~~
~~under par. (b) is filed~~ state public defender appellate intake
office receives the material from the clerk of circuit court
under par. (c).

(f) Defendant not represented by public defender;
transcript and circuit court case record request. A defendant
who does not request representation by the state public defender
for purposes of postconviction relief shall ~~order~~ request a
transcript of the reporter's notes, and may request a copy of
the circuit court case record, within 30 days after filing a
notice under par. (b). A defendant who is denied representation
by the state public defender for purposes of postconviction
relief shall request a transcript of the reporter's notes, and
may request a copy of the circuit court case record, within 90
days after filing a notice under par. (b).

SECTION 33. 809.30 (2) (g) of the statutes is renumbered
809.30 (2) (g) 2. and amended to read:

809.30 (2) (g) 2. The court reporter shall file the
transcript with the ~~trial~~ circuit court and serve a copy of the
transcript on the defendant within 60 days of the ~~ordering of~~
request for the transcript. Within 20 days of the ~~ordering of~~
request for a transcript of postconviction proceedings brought
under sub. (2) (h), the court reporter shall file the original
with the ~~trial~~ circuit court and serve a copy of that transcript

on the defendant. The reporter may seek an extension under s. ~~809.16 (4)~~ 809.11 (7) for filing and serving the transcript.

SECTION 34. 809.30 (2) (g) 1. of the statutes is created to read:

809.30 (2) (g) (title) *Filing and service of transcript and circuit court case record.* 1. The clerk of circuit court shall serve a copy of the circuit court case record on the defendant within 60 days after receipt of the request for the circuit court case record.

SECTION 35. 809.30 (2) (h), (i), and (k) and 809.30 (3) of the statutes are amended to read:

809.30 (2) (h) Notice of appeal or postconviction motion. The defendant shall file in circuit court and serve on the district attorney a notice of appeal or motion seeking postconviction relief within 60 days ~~of~~ after the later of the service of the transcript or circuit court case record. A postconviction motion under this section may not be accompanied by a notice of motion and is made when filed.

(i) Order determining postconviction motion. ~~The trial~~ Unless an extension is requested by the defendant or circuit court and granted by the court of appeals, the circuit court shall determine by an order the defendant's motion for postconviction relief within 60 days ~~of its~~ after the filing of the motion or the motion is considered to be denied and the

clerk of ~~the trial~~ circuit court shall immediately enter an order denying the motion.

(k) (title) Transmittal of record. ~~The~~ Except as otherwise provided in s. 809.14 (3) and 809.15 (4) (b) and (c), the clerk of ~~the trial~~ circuit court shall transmit the record on appeal to the court of appeals 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.

(3) APPEALS BY STATE OR OTHER PARTY; APPOINTMENT OF COUNSEL. 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.

SECTION 36. 809.30 (4) of the statutes is created to read:

809.30 **(4)** MOTION TO WITHDRAW AS APPOINTED COUNSEL FOR DEFENDANT.

(a) If counsel has been appointed for the defendant under ch. 977 and seeks to withdraw as appointed counsel, counsel shall serve a motion to withdraw upon the defendant and upon the appellate division intake unit in the Madison appellate office of the state public defender. If the motion is filed before the notice of appeal is filed, the motion shall be filed in circuit

court. If the motion is filed after a notice of appeal has been filed, the motion shall be filed in the court of appeals.

(b) Within 20 days after receipt of the motion under par. (a), the state public defender shall determine whether successor counsel will be appointed for the defendant and shall notify the court in which the motion was filed of the state public defender's determination.

(c) Before determining the motion to withdraw, the court shall consider the state public defender's response under par. (b) and whether the defendant waives the right to counsel.

(d) When the motion to withdraw is filed in circuit court, appointed counsel shall prepare and serve a copy of the order determining counsel's motion to withdraw upon the defendant and the appellate division intake unit in the Madison appellate office of the state public defender within 14 days after the court's determination.

Judicial Council Note, 2001: Subtitles have been added. Subsection (2) (e) was revised to amend the time for appointing appellate counsel and to clarify that a defendant represented by appointed counsel must request a copy of the circuit court case record from the circuit court. Subsection (2) (f) was amended to clarify that a defendant not represented by the state public defender may request a copy of the circuit court case record from the circuit court. The second sentence of sub. (2) (f) sets a time limit for a defendant who has unsuccessfully sought public defender representation under sub. (2) (e) to request the transcripts and circuit court case record. Subsection (2) (g) was amended to require the circuit court clerk to send the circuit court case record to the defendant within 60 days after receipt of the request. Subsection (2) (h) was revised to require the defendant to file the notice of appeal either within

60 days after service of the last transcript or the circuit court case record, whichever occurs later. The second sentence of sub. (2) (h) specifies that a notice of motion shall not be filed with a s. 809.30 postconviction motion. If the circuit court grants a hearing on the motion, the circuit court will notify the parties of the date.

The first clause of sub. (2) (i) specifies that an extension may be granted by the court of appeals.

Subsection (3) was revised to clarify that it applies in all appeals utilizing s. 809.30, including cases under chs. 48, 51, 55, and 938.

Subsection (4) establishes a procedure for making and determining motions to withdraw by appointed counsel. This rule does not change existing law concerning when a withdrawal motion is necessary. See *e.g. State ex rel. Flores v. State*, 183 Wis. 2d 587, 622-24, 516 N.W.2d 362 (1994).

Often motions to withdraw are the result of a disagreement between appointed counsel and the defendant, sometimes inaccurately called a "conflict," about the existence of a meritorious issue for appeal, or about the manner in which any such issue should be raised. It is counsel's duty to decide what issues in a case have merit for an appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). Postconviction counsel is entitled to exercise reasonable professional judgment in winnowing out even arguable issues in favor of others perceived to be stronger. *Id.* Counsel's failure to raise an issue on direct appeal may prevent the defendant from raising it in a subsequent s. 974.06 collateral review proceeding, absent "sufficient reason." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

The rules of appellate procedure require that a defendant choose whether to proceed with the assistance of appointed counsel or proceed *pro se*. *State v. Redmond*, 203 Wis. 2d 13, 552 N.W.2d 115 (Ct. App. 1996). A defendant has neither the right to appointed counsel of choice nor the right to insist that a particular issue be raised. *Oimen v. McCaughtry*, 130 F.2d 809 (7th Cir. 1997). "The defendant may terminate appellate counsel's representation and proceed *pro se* or the defendant may allow postconviction relief to continue based on counsel's brief and then seek relief on the grounds of ineffective assistance of appellate counsel." *State v. Debra A.E.*, 188 Wis. 2d 111, 137-39, 523 N.W.2d 727 (1994). On

ineffective assistance of appellate counsel claims, the court will determine whether counsel's choice of issues met the objective standard of reasonableness. *Gray v. Greer*, 778 F.2d 350 (7th Cir. 1985).

The state public defender will not appoint successor counsel where a defendant disagrees with the legal conclusions of appointed counsel or when a defendant wants a second opinion as to the merits of an appeal. To do so would unduly delay the disposition of the appeal, and would be contrary to the interests of justice. WIS. ADMIN. CODE § PD 2.04.

If a defendant elects to waive counsel and proceed *pro se*, the court must find that the defendant has been provided with clear warnings with respect to forfeiture of the right to counsel and the dangers of self-representation. *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).

SECTION 37. 809.31 (5) of the statutes is repealed and recreated to read:

809.31 (5) The defendant or the state may seek review of the order of the circuit court by filing a motion with the court of appeals under s. 809.14. The party seeking review must attach to its motion a copy of the judgment of conviction or other final judgment or order, the circuit court order regarding release pending appeal, the circuit court statement of reasons for the decision regarding release pending appeal, and the transcript of any release proceedings in the circuit court or a statement explaining why no transcript is available. The motion shall be filed within 14 days after the entry of the circuit court order. The opposing party may file a response within 14 days after the filing of the motion.

Judicial Council Note, 2001: Former rules required a party seeking review of a release decision to file a petition for discretionary review, and pay a separate filing fee, generating a separate appeal. The new motion procedure provides a more efficient mechanism for appellants seeking release pending appeal. No change in the substantive standards governing release decisions is intended. See *State v. Whitty*, 86 Wis. 2d 380, 272 N.W.2d 843 (1978); *State v. Salmon*, 163 Wis. 2d 369, 471 N.W.2d 286 (Ct. App. 1991).

SECTION 38. 809.32 (1) (title) of the statutes is created to read:

809.32 (1) (title) No-MERIT REPORT, RESPONSE, AND SUPPLEMENTAL NO-MERIT REPORT.

SECTION 39. 809.32 (1) of the statutes is renumbered (1) (a), 1 (d) and 1 (e) and amended to read:

809.32 (1) (a) (title) No-merit report. If an attorney appointed under s. 809.30 (2) (e) or ch. 977 ~~is of the opinion concludes~~ that ~~further appellate proceedings~~ a direct appeal 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), and the defendant requests that a no-merit report be filed or declines to consent to have the attorney close the file without further representation by the attorney, the attorney shall file with the court of appeals 3 copies of a ~~brief in which is stated.~~ no-merit report. The no-merit report shall identify anything in the record that might arguably support the appeal and a discussion of why the discuss the reasons why each identified issue lacks merit.

(d) Service of copy of no-merit report, transcript, and circuit court case record. The attorney shall serve a copy of the ~~brief~~ no-merit report on the defendant and shall file a statement in the court of appeals that service has been made upon the defendant. The attorney shall also serve upon the defendant a copy of the transcript and circuit court case record within 14 days after receipt of a request for the transcript and circuit court case record from the defendant and shall file a statement in the court of appeals that service has been made upon the defendant.

(e) Response to no-merit report. The defendant may file a response to the ~~brief~~ no-merit report within 30 days ~~of~~ after service of the no-merit report. If the defendant files a response, the clerk shall, within 5 days after the filing of the response, send a copy of the response to the attorney who filed the no-merit report.

SECTION 40. 809.32 (1) (b), (c), (f) and (g) of the statutes are created to read:

809.32 (1) (b) *Counseling and notification.* 1. (intro.) Prior to the filing of a no-merit report, the attorney shall discuss with the defendant all potential issues identified by the attorney and the defendant, and the merit of an appeal on these issues. The attorney shall inform the defendant that the defendant has 3 options:

- a. To have the attorney file a no-merit report;
- b. To have the attorney close the file without an appeal;

or

- c. To have the attorney close the file and to proceed without an attorney or with another attorney retained at the defendant's expense.

2. The attorney shall inform the defendant that a no-merit report will be filed if the defendant either requests a no-merit report or does not consent to have the attorney close the file without further representation by the attorney. The attorney shall inform the defendant that if a no-merit report is filed the attorney will serve a copy of the transcripts and the circuit court case record upon the defendant at the defendant's request. The attorney shall inform the defendant that, if the defendant chooses to proceed with an appeal or that if the defendant chooses to have the attorney close the file without an appeal, the attorney will forward the attorney's copies of the transcripts and circuit court case record to the defendant at the defendant's request. The attorney shall also inform the defendant that the defendant may file a response to the no-merit report and that the attorney may file a supplemental no-merit report and affidavit or affidavits containing facts outside the record, possibly including confidential information, to rebut

allegations made in the defendant's response to the no-merit report.

(c) *Certification by attorney.* The attorney shall append to the no-merit report a signed certification that the attorney has complied with the client-counseling and client-notification requirements of par. (b). The certification shall be in the following form:

CERTIFICATION
BY ATTORNEY

I hereby certify that I have discussed with the defendant all potential issues identified by me and by the defendant and the merit of an appeal on these issues, and I have informed the defendant that the defendant must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at the defendant's expense. I have informed the defendant that a no-merit report will be filed if the defendant either requests a no-merit report or does not consent to have me close the file without further representation. I have informed the defendant that the transcripts and circuit court case record will be forwarded at the defendant's request. I have also informed the defendant that the defendant may file a response to the no-merit report and that I may file a supplemental no-merit

report and affidavit or affidavits containing facts outside the record, possibly including confidential information, to rebut allegations made in the defendant's response to the no-merit report.

Signed: .._____

Signature: .._____

(f) *Supplemental no-merit report.* If the attorney is aware of facts outside the record that rebut allegations made in the defendant's response, the attorney may file, within 30 days after receipt of the defendant's response, a supplemental no-merit report and an affidavit or affidavits, including facts outside the record. The supplemental report and affidavit or affidavits shall be served on the defendant, and the attorney shall file a statement in the court of appeals that service has been made upon the defendant.

(g) *Remand for fact-finding prior to decision.* If the defendant and the attorney allege disputed facts regarding matters outside the record, and if the court determines that the defendant's version of the facts, if true, would make resolution of the appeal under sub. (3) inappropriate, the court shall remand the case to the circuit court for an evidentiary hearing and fact-finding on those disputed facts before proceeding to a decision under sub. (3).

SECTION 41. 809.32 (2) of the statutes is renumbered 809.32 (2) (intro.) and amended to read:

809.32 (2) (intro.) NOTICE OF APPEAL, STATEMENT ON TRANSCRIPT, SERVICE OF COPIES. The attorney also shall file in ~~the trial circuit~~ court a notice of appeal of the judgment of conviction and of any order denying a postconviction motion. The notice of appeal shall be identified as a no-merit notice of appeal and shall state the date on which the no-merit report is due and whether the due date is calculated under par. (a) or (b). The clerk of ~~the trial circuit~~ court shall transmit the record in the case to the court pursuant to s. 809.15. The attorney also shall file a statement on transcript complying with the requirements of s. 809.11 (4), except that copies of the transcript need not be provided to other parties. All papers filed with the court under this subsection, except the transcript, shall be served on the state in accordance with s. 809.80(2) (b). ~~The no merit brief and~~ no-merit report, notice of appeal, and statement on transcript must be filed within ~~180~~ whichever of the following is later:

(a) One hundred eighty days ~~of~~ after the service upon the defendant of the transcript and circuit court case record requested under s. 809.30 (2) ~~(g)~~ (e).

SECTION 42. 809.32 (2) (b) of the statutes is created to read:

809.32 (2) (b) Sixty days after the entry of the order determining a postconviction motion.

Judicial Council Note, 2001: Titles and subtitles were added. Subsection (1) was subdivided into paragraphs (1) (a) through (g).

Subsection (1) (a) was amended to specify that the no-merit procedure applies only to direct appeals and that no-merit reports should be filed only when the defendant requests submission of a no-merit report or does not consent to closing the file without further representation by the appointed attorney.

Subsection (1) (b) creates new counseling and notification requirements for appointed attorneys. Before filing a no-merit report, the appointed attorney must discuss each identified issue with the defendant and explain why the issue lacks arguable merit. The attorney must inform the defendant of the defendant's options: file a no-merit report, close the file without filing an appeal or a no-merit report, or file an appeal without the assistance of appointed counsel. The attorney must inform the defendant that a no-merit report will be filed if the defendant requests submission of a no-merit report or if the defendant does not consent to closing the file without further representation by the appointed attorney. The attorney must inform the defendant that, if a no-merit report is submitted, the attorney will furnish copies of the transcript and circuit court case record to the defendant upon request. The attorney must notify the defendant that, if a no-merit report will not be submitted, the attorney will forward the attorney's copies of the transcript and circuit court case record to the defendant upon request. The attorney must also advise the defendant of the no-merit procedures set forth in this section, including the defendant's right to file a response to the attorney's no-merit report, and the attorney's right to file a supplemental no-merit report and affidavit containing facts outside the record, possibly including confidential information, to rebut allegations made in the defendant's response to the no-merit report.

Subsection (1) (c) creates a new certification rule that requires the appointed attorney to certify that the attorney has complied with the counseling and notification requirements of sub. (1) (b).

Subsection (1) (d) contains the no-merit report service rule from former sub. (1) (a) and creates a new transcript and circuit court case record service rule. The attorney must serve a copy of the no-merit report on the defendant. If the defendant requests a copy of the transcript and circuit court case record, the attorney must forward the copies within 14 days after receipt of the defendant's request. The attorney must file a statement in the court of appeals that service has been made on the defendant.

Subsection (1) (e) contains the response to the no-merit report rule from former sub. (1) (a). Subsection (1) (e) also creates a new rule that requires the clerk of the court of appeals to send a copy of the defendant's response to the no-merit report, within 5 days of the filing of the response, to the attorney who filed the no-merit report.

Subsection (1) (f) was created to allow the attorney to reply to the defendant's response to a no-merit report. The rule allows the attorney to file a supplemental no-merit report and affidavit(s) disclosing information that is outside the record and relevant to the attorney's no-merit determination without violating confidentiality rules. The supplemental report and affidavit procedure is in accordance with SCR 20:1.6 (c) (1), which allows disclosures of otherwise confidential communications "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;" SCR 20:1.6 (c) (2), which allows disclosures "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client...or to respond to allegations in any proceeding concerning the lawyer's representation of the client;" and SCR 20:3.3, which requires candor toward the tribunal.

Subsection (1) (g) creates a new rule that requires fact-finding upon a remand to the circuit court if the defendant's response to the no-merit report and the attorney's supplemental no-merit report and affidavit allege facts outside the record; and if the facts alleged by the defendant, if true, would make resolution of the appeal under sub. (3) inappropriate.

The second sentence in sub. (2) requires the attorney to state, in the no-merit notice of appeal, ~~of~~ the time limit for filing the no-merit report and the calculation used to determine that time limit. The fourth sentence in sub. (2) requires the attorney to file a statement on transcript with the clerk, but exempts counsel from serving a transcript on other parties. The

fifth sentence in sub. (2) requires counsel to serve copies of all other papers on the state.

Subsection (2) (a) establishes the time limits if a no-merit report is not preceded by a postconviction motion. The cross-reference was changed from s. 809.30 (2) (g) to (e) because only the original transcript and circuit court case record request triggers the 180-day time limit.

Subsection (2) (b) establishes the time limits if a no-merit report follows a postconviction motion.

SECTION 43. 809.32 (3) (title) of the statutes is created to read:

809.32 (3) (title) DECISION ON NO-MERIT REPORT.

SECTION 44. 809.32 (4) of the statutes is amended to read:

809.32 (4) NO-MERIT PETITION FOR REVIEW. 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~~ after the date of the decision or order of the court of appeals. An opposing party may file a

response to the petition and supplemental petition within ~~10~~ 14 days ~~of~~ after the service of the supplemental petition.

Judicial Council Note, 2001: The 10-day time limit in sub. (4) was changed to 14 days. Please see the comment to s. 808.07.

SECTION 45. 809.40 (3) of the statutes is amended to read:

809.40 (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)~~ (d) and may be eligible for the expedited appeals program in the discretion of the court.

SECTION 46. 809.41 (1) and (4) of the statutes are amended to read:

809.41 (1) MOTION FOR 3-JUDGE PANEL. If an appellant or a petitioner requesting the court of appeals 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~~ 14 days ~~of~~ after 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~~ 11 days ~~of~~ after service.

809.41 (4) MOTION FOR HEARING IN COUNTY OF ORIGIN. 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~~ 14 days ~~of~~ after service of the notice of appeal. The failure to file a motion under this ~~rule~~ subsection waives the right to request the appeal be heard in the county where the case or action originated.

Judicial Council Note, 2001: Titles were added. The time limits in sub. (1) and sub. (4) have been changed from 7 to 11 and 10 to 14 days. See the comment to s. 808.07.

SECTION 47. 809.41 (2) and (3) (title) of the statutes are created to read:

809.41 (2) (title) DECISION ON MOTION FOR 3-JUDGE PANEL.

(3) (title) THREE-JUDGE PANEL ON COURT'S OWN MOTION.

SECTION 48. 809.43 of the statutes is amended to read:

809.43 Rule (Number of briefs) (1) A person ~~who files a~~ ~~brief or appendix~~ shall file ~~8~~ 10 copies ~~with the court, or such~~

~~either~~ of a brief and appendix in the court of appeals, or the number as that the court directs, and shall serve 3 copies on each party. If the opposing party is not represented by counsel, only one copy need be served on that party.

(2) A person who is found indigent under s. 814.29 ~~and files a brief or appendix~~ and who is not represented by counsel shall file the original and 2 copies with the court 3 copies of a brief and appendix in the court of appeals and shall serve one copy on each party. A prisoner who has been granted leave to proceed without prepayment of fees under s. 814.29 (1m) and who is not represented by counsel shall file 3 copies of a brief or appendix in the court of appeals and shall serve one copy on each party.

Judicial Council Note, 2001: Subsection (1) was revised to simplify statutory language. The last sentence in sub. (1) reduces the number of copies required for a *pro se* party. Subsection (2) was revised to simplify the language and to specify that this section applies only to *pro se* parties.

SECTION 49. 809.50 (1) (intro.), (2) and (3) of the statutes are amended to read:

809.50 (1) (intro.) 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~~ 14 days ~~of~~ after 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:

(2) An opposing party in ~~the trial~~ circuit court shall file a response with supporting memorandum, if any, within ~~10~~ 14 days ~~of~~ after 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~~. The entry of the order granting leave to appeal has the effect of the filing of ~~the~~ a notice of appeal. The court may specify the issue or issues that it will review in the appeal.

Judicial Council Note, 2001: The time limits in subs. (1) and (2) were changed from 10 to 14 days. Please see the comment to s. 808.07. Subsection (3) specifies that the court may grant discretionary review on specified issues. This rule codifies *Fedders v. American Family Mut. Ins. Co.*, 230 Wis. 2d 577, 601 N.W.2d 861 (Ct. App. 1999), which held a grant of leave to appeal from a nonfinal order or judgment does not authorize cross-appeals as of right from the same or from another nonfinal order or judgment; cross-appeals require a separate petition for leave to appeal.

SECTION 50. 809.51 (2) of the statutes is amended to read:

809.51 (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~~ 14 days ~~of~~ after 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.

Judicial Council Note, 2001: The time limit in sub. (2) was changed from 10 to 14 days. See the comment to s. 808.07.

SECTION 51. 809.60 (1) and (2) of the statutes are amended to read:

809.60 (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~~ 14 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~~ 14 days ~~of~~ after the service of the petition.

Judicial Council Note, 2001: The time limits in subs. (1) and (2) have been changed from 10 to 14 days. Please see the comment to s. 808.07.

SECTION 52. 809.62 (3) and (4) of the statutes are amended to read:

809.62 (3) Except as provided in s. 809.32 (4), an opposing party may file a response to the petition within ~~10~~ 14 days ~~of~~ after the service of the petition.

(4) The petition for review 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~~, and may 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. The petition for review and the response shall have a white cover and a party shall file 10 copies with the clerk of the supreme court.

Judicial Council Note, 2001: The time limit in sub. (3) has been changed from 10 to 14 days. Please see the comment to s. 808.07. The last sentence of sub. (4) specifies the color of the cover that should accompany a petition for review and the number of copies required.

SECTION 53. 809.64 of the statutes is amended to read:

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~~ after the ~~filing~~ date of the decision of the supreme court.

Judicial Council Note, 2001: This section has been changed to specify that the time limit for filing motions for reconsideration of supreme court opinions is calculated from the date, not the filing, of the decision.

SECTION 54. 809.70 (2) of the statutes is amended to read:

809.70 (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~~ 14 days ~~of~~ after the service of the order.

Judicial Council Note, 2001: The time limit in sub. (2) was changed from 10 to 14 days. Please see the comment to s. 808.07.

SECTION 55. 809.80 (1) of the statutes is amended to read:

809.80 (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. The clerk of the court is located at 110 E. Main Street, Madison, Wisconsin 53703. The mailing address for the clerk of the supreme court and the court of appeals is P.O. Box 1688, Madison, Wisconsin 53701-1688.

Judicial Council Note, 2001: Subsection (1) was amended to provide the correct address of the clerk of the supreme court and court of appeals.

SECTION 56. 809.81 (2) of the statutes is amended to read:

809.81 (2) NUMBER OF COPIES. ~~An original and 4~~ Five copies in the court of appeals, ~~an original and 8~~ 9 copies in the supreme court. ~~A party shall file an original and 2,~~ and 3 copies of a motion filed under s. 809.14 in the court of appeals ~~when~~ if the

appeal or other proceeding is one of the types of cases specified in s. 752.31 (2).

SECTION 57. 809.81 (8) of the statutes is created to read:

809.81 (8) CONFIDENTIALITY. Every notice of appeal or other document that is filed in the court and that is required by law to be confidential shall refer to individuals only by their first name and the first initial of their last name.

Judicial Council Note, 2001: Subsection (2) was amended to eliminate the distinction between "original" and "copy," because current technology produces copies of quality as good as the original. Subsection (8) requires that only the first name and last initial be used in all documents in confidential cases.

SECTION 58. 809.82 (2) (d) and (e) of the statutes are created to read:

809.82 (2) (d) A copy of any motion to enlarge time limits under this subsection shall be served on the clerk of circuit court.

(e) Notwithstanding par. (a), the time for filing a motion for reconsideration under s. 809.24 may not be enlarged.

Judicial Council Note, 2001: Subsection (2) (d) was created to provide notice to the clerk of any motion affecting time limits. Subsection (2)(e) was created to facilitate computation of due dates on petitions for review.

SECTION 59. 809.83 (2) of the statutes is amended to read:

809.83 (2) NONCOMPLIANCE WITH RULES. Failure of a person to comply with a court order or 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.

Judicial Council Note, 2001: Subsection (2) is changed to allow appellate courts to sanction parties who violate court orders.

IT IS FURTHER ORDERED that the Judicial Council Notes submitted with the petition are not adopted but shall be printed for informational purposes.

IT IS FURTHER ORDERED that notice of these amendments of the rules of appellate procedure shall be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 30th day of April, 2001.

BY THE COURT:

Cornelia G. Clark
Clerk