
**In re Matter of the amendment of Rules of
Appellate Procedure, WIS. STAT. RULES §
809.01, 809.105, 809.11, 809.15**

**MEMORANDUM
IN SUPPORT OF
PETITION 15-**

This proposal for amendments to the Rule of Appellate Procedure comes before the Wisconsin Supreme Court upon the petition of the Clerk of the Wisconsin Supreme Court and Court of Appeals. This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

REASONS FOR PROPOSED AMENDMENTS

Effective January 1, 2013, WIS. STAT. § 807.06(2) and SCR 72.03(3) allow circuit court clerks to destroy a record document 48 hours after it has been electronically or optically stored. Both § 807.06(2) and WIS. STAT. RULE 809.15(1)(c) provides that the electronically scanned document constitutes the official court record. Increasingly, as a manner of record retention, circuit court clerks are scanning old and new circuit court files and storing them in a paperless, electronic format. As of June 2015, CCAP reports that fourteen counties use all electronic case files and that of the 72 counties in the state, 69 are doing some scanning and electronic record retention. Yet RULE 809.15(1)(c) requires the circuit court clerk to assemble a paper record for the Court of Appeals. This requires the circuit court clerk to print off all documents that may be electronically stored in order to create an appellate record that can be sent to the Court of Appeals.

The 2015 annual plan for Consolidated Court Automation Programs (CCAP), approved by the CCAP Steering Committee, prioritized an initiative to transfer electronic records between counties and the appellate court. Circuit court clerks desire the ability to electronically transmit records to save preparation time, copy expenses, and mailing expenses. CCAP is completing the

necessary programing to permit the transmittal of electronic records to the Court of Appeals in lieu of a paper record. When programing is completed appellate court justices and judges, appellate law clerks, Supreme Court Commissioners, staff attorneys, and other court personnel will have access to the record from the existing SCCA case management system by clicking on hyperlinks to documents in the record. The system will give access to multiple users at the same time and from the convenience of the desktop or laptop computers. The appellate clerk will make the public portions of the electronic record available through a public access terminal located in the clerk's office. The Court of Appeals hopes to pilot the transmittal of electronic appellate records with a handful of counties in the fall of 2015.

Currently the circuit court clerks forward or transmit records to the Court of Appeals by mailing a paper record. Electronic records can be shared with the appellate court without creating a paper record and without mailing. To facilitate the use of electronic circuit court records as appellate records changes to the Rules of Appellate Procedure are necessary and advisable. References to paper and the requirement of a paper record must be eliminated.

EXPLANATION OF EACH AMENDMENT

The proposed amendments in the context of the existing rules are attached to this memorandum as Appendix A.

The Rules of Appellate Procedure have five different sections that require the transmittal of the circuit court record to the Court of Appeals:

- WIS. STAT. RULE 809.105(3)(b) (the record in an appeal regarding parental consent shall be “forwarded” to the court of appeals),
- WIS. STAT. RULE 809.107(5)(b) (in a termination of parental rights appeal the “clerk of circuit court shall transmit the record to the court of appeals”),
- WIS. STAT. RULE 809.15(4)(a) (in all other appeals the “clerk of the circuit court shall transmit the record to the court of appeals”),
- WIS. STAT. RULE 809.30(2)(k) (in criminal appeals “clerk of circuit court shall transmit the record on appeal to the court of appeals”), and

- WIS. STAT. RULE 809.32(2) (in no-merit appeals the “clerk of the circuit court shall transmit the record in the case to the court pursuant to s. 809.15.”).

Rather than redefine what constitutes transmittal in each of the five sections, the concept of how a record is transmitted to the appellate court should be defined in the definition section of the Rules of Appellate Procedure. Section 1 of the petition creates WIS. STAT. RULE 809.01(10) to define “transmit” to include making a document or record electronically available to a court. The definition permits a clerk of the circuit court to satisfy the duty to transmit the record to the appellate court by either sending the documents or making them electronically available. It will also permit, in the future, the Clerk of the Supreme Court and Court of Appeals to electronically file the remittitur of the appellate record.

Section 1 also creates a definition of “traditional methods” because that term is used in proposed amendments to RULE 809.15(4) and (4m). The definition tracks the definition found in WIS. STAT. § 801.17(1)(g), regarding e-filing. If, in the future, appellate court e-filing is adopted, the term “traditional methods” and definition can be utilized for that additional purpose.

Sections 2 and 3 of the petition amend WIS. STAT. RULE 809.105, which provides for an expedited appeal from an order relating to a minor’s petition for performance of an abortion without parental consent. The amendments are to make the rule consistent in terminology with WIS. STAT. RULE 809.15, relating to the record on appeal, as discussed below. Specifically, the use of the word “forward” is changed to “transmit” in order to utilize the new definition in proposed WIS. STAT. RULE 809.01(10) and to permit use of an electronic record for this appeal type.

Sections 4 and 5 of the petition utilizes “transmit” in place of “forward” in WIS. STAT. RULE 809.11(2), the provision requiring the circuit court clerk to give the appellate clerk the

notice of appeal, filing fee, and copy of the circuit court docket entries. By using the term “transmit” and the new definition of transmit, the amendment will allow the electronic transfer of those initiating documents when, in the future, the appellate court is able to accept those documents electronically. Until the appellate court is able to accept the initiating documents electronically, the clerk of the circuit court will continue to mail those documents. Also in section 5 the phrase “trial court” is changed to “circuit court” to make subsection (2) consistent with the remainder of RULE 809.11.

Sections 6 and 7 of the petition amend WIS. STAT. RULE 809.15(1)(a), relating to the content of the record, for the primary purpose of eliminating any reference to paper. The term “initiating document” in the amendment to sub. (1)(a)1. is the term used in the electronic filing provision in WIS. STAT. §801.17(1)(f), and in Petition 14-03, a proposal for mandatory efilng by creating WIS. STAT. § 801.18.

Proposed changes to WIS. STAT. RULE 809.15(1)(a)9. relating to exhibits are designed to be more inclusive in the exhibits that are included in the appellate record. The reference to “material to the appeal” is stricken because circuit court clerks are not in a position to make a determination of what is material to the appeal. As a training issue, clerks of the circuit court are told to be all inclusive in the exhibits sent to the appellate court, except for physical and oversized exhibits. The proposed amendment is consistent with training practice. Additionally, members of the Judicial Council’s Appellate Procedure Committee, which includes representatives from the Office of the State Public Defender and the Wisconsin Department of Justice, high volume appellate court practitioners, have voiced a need for all exhibits, including electronic media, to be included in the record. Because the appellate court is not in a position to accept certain types of physical evidence or oversized exhibits, the proposed amendment limits

exhibits to 8 ½ x 11 inch in size and specifies the types of exhibits to be excluded unless requested by a party.

Section 8 of the petition eliminates the requirement in WIS. STAT. RULE 809.15(1)(c) that the clerk of the circuit court must assemble a paper record for the appellate court. Elimination of the paper requirement is key to authorization for the submission of electronic records.

Section 9 of the petition amends WIS. STAT. RULE 809.15(2) as it relates to the circuit court's duty to compile the record, including the creation of an index. The index is an important tool with an electronic record because the index will include the hyperlinks for access to each document. Thus, the amendment makes the index as useful as possible by requiring the date of the filing and the title of the document to be included on the index. It is also for the purpose of obtaining uniformity in record indices. It is anticipated that the extra requirement for including the date and document title in the index will not be a burden on circuit court clerks because the index will be generated by CCAP programing.

The amendment also requires the clerk of the circuit court to make a list of exhibits that may not be electronically retained and that will have to be sent by mail or other means to the appellate court. WISCONSIN STAT. § 801.17(9)(c) recognizes that there may be some documents that are not of sufficient graphical quality to be legible when electronically scanned and must be maintained by the circuit court clerk in paper format. *See also* Petition 14-03, creating WIS. STAT. § 801.18(9)(h) and (k) (if the court requires production of an original document it shall be retained as an exhibit as provided in SCR 72.03(4)). Examples includes color photographs, contracts in which the color of ink used for signatures or amendments is relevant, or documents with fine print or partial obliterations. Other types of non-documentary exhibits, including video recordings, audio recordings, computer disks or flash drives, may be filed by parties and cannot

be electronically stored. The appellate court still needs those types of exhibits. The list of these exhibits as a separate part of the index is necessary to alert the appellate clerk that other portions of the record will be coming by other methods and to permit verification that all exhibits have been received.

Section 10 of the petition amends WIS. STAT. RULE 809.15(4) relating to the circuit court clerk's transmittal of the record. It provides that when an electronic record is used, the circuit court clerk shall send non-electronic document or exhibits by traditional methods. The term "traditional methods" is defined in the newly created RULE 809.01(9). The term "send" is not used because the circuit court clerk should not be limited to using the U.S. postal service for the delivery of non-electronic portions of the appellate record. Past experience teaches that other methods of delivery are utilized by circuit court clerks in the interest of economy of time and money. Although no time is stated in the rule for the circuit court clerk to send the non-electronic portion of the record, it is anticipated that clerks will forward the additional portion on the same day as transmittal of the electronic record.

Section 11 of the petition amends WIS. STAT. RULE 809.15(4m) relating to the notice parties receive from the appellate clerk that the record has been transmitted and filed in the appellate court. In appeals in which the electronic record is utilized and original documents or exhibits not electronically retained must also be transmitted by traditional methods, the entire record will not be received on the same day. The appellate clerk will use the transmission of the electronic portion as the day the record is filed. This allows for uniformity in determining what day the record has been filed because most electronic records will not require the submission of original documents or exhibits by traditional methods. Further, delay in receipt of the original documents or non-electronic exhibits will not affect the next steps in appellate process—the

jurisdiction check and briefing. Even though the appellate clerk sends a notice of the filing date to the appellate parties, including how the filing date is determined in the rule gives parties information relevant to briefing deadlines and permits parties to calculate the filing date on their own.

IMPACT OF PROPOSAL ON PROCEDURAL OR SUBSTANTIVE RIGHTS

The proposed amendments to authorize and implement the use of electronic appellate records would not affect any person's procedural or substantive rights. Parties to an appeal will still get notice from the circuit court clerk that the record is available for inspection. Parties to an appeal will still get notice of the date the record has been filed in the appellate court. Parties to an appeal will still have access to the appellate record in the appellate clerk's office. Parties who e-file their appellate briefs will have access to the record via the Appellate Court eFiling System. The public will still have access to the public portions of the appellate record in the appellate clerk's office. There is no change in timing with respect to the when the record must be filed and when briefing commences.

FISCAL AND ADMINISTRATIVE IMPACT

The proposed amendments to authorize and implement the use of electronic appellate records would have positive fiscal and administrative impacts. Currently appellate clerk staff time is used to receive the paper version of the appellate record, to label and place the record in appropriate file folders or boxes, to send the record to the staff attorney office for jurisdiction check, to receive the record back after the jurisdiction check and place it in the appropriate storage place, to package the record and mail it by UPS to the appropriate Court of Appeals district office when briefing is complete, to receive the record back from the district office after release of the opinion, and finally, to package the record and mail it back to the circuit court

clerk upon remittitur. The time required to complete each of these steps is drastically reduced when the electronic record is available to all court personnel through the SCCA case management system. Gone, in the majority of appeals, is the need to box and file papers documents. Gone is the need to mail records to district offices or back to circuit courts.

In fiscal year 2014 the Court of Appeals incurred \$28,226 in UPS costs related to the movement of the appellate record between necessary court offices. In January through May 2015, the cost incurred was \$17,797. It is anticipated that cost savings will be generated by the use of electronic records. It is unlikely that the first year of the use of electronic records would cut the costs by half, but there should be noticeable savings. Savings would increase as the use of electronic records increases. The use of electronic records would also save storage space in the appellate clerk's and district Court of Appeal offices.

Circuit courts should also experience cost savings. Paper copies will no longer have to be created when the record is electronically retained. Although circuit court clerks are authorized to charge the appellant the actual cost of mailing the record, a significant number of appeals are by indigent pro se litigants who usually do not pay the actual cost of mailing. Electronic transmission of the record should generate postage saving costs for circuit courts.

There would be no additional expense in relation to CCAP programing for the use of electronic appellate records as the project is already part of CCAP's 2015 annual plan. Necessary programing has been planned for and will be completed with existing resources.

RELATED PENDING PETITION

The petition for mandatory circuit court e-filing, Petition 14-03, is pending before the Wisconsin Supreme Court. The proposed amendments in this petition, while not entirely based on e-filing in the circuit court, would be even more desirable if mandatory circuit court e-filing

was adopted. Even without mandatory e-filing, many circuit courts are creating electronic records either through e-filing or manually scanning paper filings to create an electronic file.

OTHER INTERESTED COMMITTEES, ASSOCIATION, INDIVIDUALS
CONSULTED

The proposed amendments were reviewed by the Judicial Council's Appellate Procedure Committee when that committee was in the final stages of recommending proposed amendments to the rule regarding the content of the record. Specifically, the committee was apprised of the proposal in section 7 of the petition to amend the language about exhibits in WIS. STAT. RULE 809.15(1)(a)9. The committee itself has drafted a proposed change to remove the "material to the appeal" language in recognition that the circuit court clerk is not in a position to know what exhibits are material to the appeal. The committee has also drafted language to require all exhibits in the appellate record while still excluding physical and oversized exhibits. The committee only questioned how to handle cases in which the circuit court clerk needs to send original documents or non-documentary exhibits by traditional methods. Sections 9, 10, and 11 clarify how the separate transmittal will be handled and address the committee's questions on that point.

The Court of Appeals judges were provided a draft of proposed amendments in conjunction with a presentation by CCAP on the potential use of electronic appellate records. No concerns were raised about proposed changes to the Rules of Appellate Procedure to permit the use of electronic appellate records.

Key court personnel who have reviewed the proposed amendments include Marcia Vandercook, Court Operations, Jean Bousquet, CCAP, and the Supreme Court Commissioners. No outstanding concerns exist regarding the proposed amendments.

The proposed amendments have also been reviewed by the president of the Wisconsin Clerks of Circuit Court Association and several member clerks, who are also members of the CCAP Steering Committee. CCAP demonstrated the program for all of the clerks at the Association's June 2015 conference. The Association supports the proposed amendments and the utilization of electronic appellate records.

Bruce Hoesly, Senior Revising Attorney, Legislative Reference Bureau, reviewed the proposed amendments. He assisted in the formatting the petition in rule form. He also suggested that the term "traditional methods" be defined in CH. 809.

CONCLUSION

The Clerk of the Wisconsin Supreme Court and Court of Appeals respectfully submits this petition and supporting memorandum for the court's consideration.

Dated this 23rd day of June, 2015.

Diane M. Fremgen, Clerk of the Wisconsin Supreme Court
and Court of Appeals

APPENDIX A

809.01 Rule (Definitions). In this chapter:

...

(9) “Traditional methods” means those methods of filing, serving, and transmitting documents, other than electronic filing or transmittal, provided under statutes and local rules.

(10) “Transmit” means to send or transfer documents and records from one court to another and may be completed by making the documents and records electronically available to the other court.

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

...

(3) PERFECTING THE APPEAL.

...

(b) *Forwarding to court of appeals.* The clerk of the trial court shall ~~forward~~ transmit 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).

...

(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~~ documents upon which that other order is based.
- (e) Exhibits ~~material to the appeal~~, whether or not received in evidence, including photographs, video recordings, audio recordings, computer media such as disks or flash drives, except that physical evidence, models, charts, diagrams, and photographs exceeding 8 ½ x 11 inches in size shall not be included unless requested by the minor to be included in the record.
- (f) Any other ~~paper document or exhibit~~ document 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.

809.11 Rule (Items to be filed and ~~forwarded~~transmitted).

...

(2) ~~FORWARDING TO COURT OF APPEALS~~ TRANSMITTAL OF NOTICE OF APPEAL. The clerk of the ~~trial circuit~~ court shall ~~forward-transmit~~ 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 circuit~~ court record of the case maintained pursuant to s. 59.40 (2) (b) or (c).

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~~ initiating document 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~~ documents upon which the order is based;
9. Exhibits ~~material to the appeal~~ whether or not received in evidence, including photographs, video recordings, audio recordings, computer media such as disks or flash drives, except that physical evidence, models, charts, diagrams, and photographs exceeding 8 ½ x 11 inches in size shall not be included unless requested by a party to be included in the record.
10. Any other ~~paper document or exhibit~~ document 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.

...

(c) For purposes of preparing the record on appeal, if the original record has been discarded as permitted under SCR 72.03 (3), the electronically scanned document constitutes the official court record. ~~The clerk of circuit court shall assemble a paper record under sub. (2).~~

(2) COMPILATION AND APPROVAL OF THE RECORD. The clerk of circuit court shall assemble the record in the order set forth in sub. (1)(a), identify by number, date of filing, and title each ~~paper~~

document, and prepare a list of the numbered papers-documents. If the record is in an electronic format, the clerk shall also include in the list of numbered documents a list of exhibits not electronically retained that are part of the record on appeal. At least 10 days before the due date for filing the record in the court, the clerk shall notify in writing each party appearing in the 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~~ documents constituting the record.

...

(4) PROCESSING THE RECORD. (a) *Transmittal of the record.* The clerk of the 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. If additional portions of the transcript are requested under s. 809.11(5), the clerk of the circuit court shall transmit the record to the court of appeals within 20 days after the date of the filing of the additional portions of the transcript. If the record is transmitted electronically, the clerk of the circuit court shall transmit by traditional methods any original documents or exhibits not electronically retained.

...

(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. When the record is transmitted electronically and the clerk of the circuit court must transmit original documents or exhibits not electronically retained by traditional methods, the date on which the record was filed is the date the electronic transmission and index was received by the clerk of the court of appeals.