

STATE OF WISCONSIN  
SUPREME COURT

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In re:

WISCONSIN STATUTES §§ 809.107 AND 809.19

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OF WISCONSIN

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**MEMORANDUM IN SUPPORT OF PETITION  
OF WISCONSIN JUDICIAL COUNCIL  
FOR AN ORDER AMENDING WIS. STATS.  
§§ 809.107 AND 809.19**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

May 4, 2017

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to amend WIS. STATS. §§ (Rules) 809.107 and 809.19 to address some ambiguity in the appellate rules relating to the size, number, and timing of briefs that may be filed in multiparty cases.

This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

### **I. Issue**

In *Henshue Construction, Inc. v. Terra Engineering & Construction Corp.*, the court of appeals noted that "there is some ambiguity in the appellate rules relating to the size and number of briefs that may be filed in multiparty cases because, while Wis. Stat. § (Rule) 809.19(5) explicitly authorizes co-appellants to file either separate or joint briefs, there is no companion provision explicitly authorizing co-respondents to file joint or separate briefs, and nothing that explicitly addresses whether a single respondent can file a separate responsive brief to each brief filed by a separate appellant or group of appellants, or whether an appellant can file a separate reply brief to each respondent's brief filed."<sup>1</sup>

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<sup>1</sup> *Henshue Construction, Inc. v. Terra Engineering & Construction Corp.*, 2012 AP 1038, August 21, 2012 Order.

## II. Project History

In response to the concerns expressed by the court of appeals in the *Henshue Construction* case, the Judicial Council tasked its Appellate Procedure Committee with studying Wis. Stat. § (Rule) 809.19 and proposing a rule amendment to address appellate briefing in multiparty cases.<sup>2</sup>

The committee sought drafting assistance from the chief staff attorney for the court of appeals, who agreed that questions regarding the size and number of briefs that may be filed in multiparty cases arise frequently. Those questions would be easier to address if the rules provided guidance for the court.<sup>3</sup>

During the course of its study, the committee also noted that the current rules do not establish clear time limits for filing response and reply briefs specific to multiparty cases.<sup>4</sup>

## III. Discussion of Proposed Rule Amendments

The committee began its work by reviewing rules from other jurisdictions regarding briefing in multiparty cases. While not all states have adopted specific rules, approximately fifteen states use a form of the language found in Rule 28(i) of the Federal

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<sup>2</sup> Minutes of the Wisconsin Judicial Council, dated September 21, 2012 at <http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes0912.pdf> (last accessed February 8, 2017). For a list of the committee's membership, please see Appendix 1.

<sup>3</sup> Minutes of the Wisconsin Judicial Council Appellate Procedure Committee, dated September 18, 2015 (copy on file with author).

<sup>4</sup> *Id.*

Rules of Appellate Procedure.<sup>5</sup> After studying the rules from a number of jurisdictions, the committee selected Colorado's rule to use as a drafting model.

Rule 28(h) of the Colorado Appellate Rules provides:

(h) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a single brief, and any party may adopt by reference any part of another's brief, but a party may not both file a separate brief and incorporate by reference the brief of another party. Parties may also join in reply briefs. In cases involving a single appellant or appellee with multiple opposing parties, the single party must file a single brief in response to multiple opposing parties' briefs. Except by permission of the court, such a brief is restricted to the page and word limits set forth in C.A.R. 28(g), regardless of the cumulative page and word counts of the opposing parties' briefs. Multiple parties represented by the same counsel must file a joint brief.<sup>6</sup>

The committee noted that Wisconsin does not allow the incorporation by reference of briefs. The closest Wisconsin comes to that practice is allowing a respondent to file a letter that it will not file a brief because another respondent's brief adequately represents its interest.<sup>7</sup>

The committee determined that the lack of clarity in Wisconsin's rules should be addressed by amending s. 809.19(5), the subsection of the briefing rule that addresses

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<sup>5</sup> FED. R. APP. P. 28(i) states, "Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs."

<sup>6</sup> C.A.R. 28(h).

<sup>7</sup> See WIS. STAT. § (Rule) 809.19(3)(a)3. ("Within the time limits for filing a respondent's brief, a party who has been designated as a respondent may file a statement with the court that it will not be filing a brief because its interests are not affected by the issues raised in the appellant's brief or because its interests are adequately represented in another respondent's brief.").

consolidated and joint appeals, because consolidated and joint appeals often create a multiple appellant situation. The proposed amendment to s. 809.19(5)(a) and the addition of sub. (5)(b) through (d) are intended to codify current practice in Wisconsin by establishing a rule for respondents consistent with the rule for appellants and generally limiting an appellant to a single reply brief despite the filing of multiple respondent briefs.

The committee also recommends including a cross-reference in s. 809.19(6), addressing briefing in cross-appeals, because a cross-appeal also could have multiple parties on either side.

The committee recommends amendments specifically addressing briefing in cases involving guardians ad litem (GAL's) because the Office of the State Public Defender indicated that there is some confusion currently regarding the timing of the filing of briefs in appellate cases involving GAL's. The proposed changes to s. 809.107(6) specifically address termination of parental rights (TPR) cases to clarify when briefs are due in cases in which a GAL files a brief.

The committee noted that under s. 48.235(7), the GAL does not have to participate in an appeal in a TPR case. The committee incorporated a reference to s. 48.235(7) in the proposed amendment to s. 809.107(6)(d) because it can be difficult to calculate the deadline for a response when the party does not know whether the GAL is intending to file a brief. To further address that issue, the proposed rule also includes an amendment to s. 809.107(6)(d) to set a deadline for the GAL to file a statement of non-participation.

#### IV. Feedback from the Bench and Bar

The committee approved a draft of the proposed amendments and circulated it to the Wisconsin State Bar's Appellate Practice, Criminal Law, Family Law, and Children and the Law Sections; the Wisconsin Department of Justice; the Office of the State Public Defender; the Wisconsin Legislative Reference Bureau; and the Wisconsin Court of Appeals. To the extent the committee received feedback, it was generally favorable.

The State Bar Appellate Practice Section Board indicated its support for the amendments regarding guardian ad litem (GAL) participation on appeal, but questioned what happens when the GAL does not take the position of either party on appeal. The Board also noted that in some cases, the GAL is the sole appellant, and requested that the rules address such a situation. The Judicial Council's Appellate Procedure Committee discussed the questions and noted that if the GAL is not aligned with either party, then the GAL is the appellant or respondent, and is subject to the applicable deadlines already set in the rules.<sup>8</sup> At the request of the State Bar Appellate Practice Section Board, a cross reference to s. 809.107 was added to s. 809.19(8m) to assist GAL's in determining deadlines and other requirements.<sup>9</sup>

The draft was again circulated for comments to a larger number of potentially interested groups as listed in Appendix 2. No groups or individuals submitted any opposition to the proposed amendments. The Appellate Procedure Committee's final

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<sup>8</sup> Minutes of the Wisconsin Judicial Council Appellate Procedure Committee, dated June 24, 2016 (copy on file with author).

<sup>9</sup> Minutes of the Wisconsin Judicial Council Appellate Procedure Committee, dated January 20, 2017 (copy on file with author).

recommendations were forwarded to the full Judicial Council for consideration. The amendments contained in the accompanying petition were approved unanimously.<sup>10</sup>

### V. Conclusion

The Judicial Council urges the court to adopt the proposed amendments contained in the accompanying petition. The proposed changes are designed to clarify the rules for practitioners and parties, and improve court efficiency.

Dated: May 4, 2017

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL



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<sup>10</sup> Minutes of the Wisconsin Judicial Council, dated February 17, 2017 at <http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes0217.pdf> (last accessed May 2, 2017).

# Appendix 1

## JUDICIAL COUNCIL -- Appellate Procedure Committee Members

Hon. Gerald Ptacek, Former Chair (retired 2017)  
Racine County Circuit Court Judge

Atty. Jennifer Andrews, Current Chair (ad hoc)  
Chief Staff Attorney  
Court of Appeals

Sarah Walkenhorst Barber  
Drafting Attorney  
Legislative Reference Bureau

Dennis Myers  
Germantown Trustee

Hon. Robert Van De Hey (2017-present)  
Grant County Circuit Court

Diane Fremgen (ad hoc)  
Clerk of Court  
Wisconsin Supreme Court and Court of Appeals

Karla Keckhaver (ad hoc)  
Assistant Attorney General  
Department of Justice

Jeremy Perri (ad hoc)  
Appellate Division Director  
State Public Defender's Office

## Appendix 2

Judicial Council Appellate Procedure Committee  
Proposed Amendments Impacting Appellate Procedure  
Request for Comments -- Potentially Interested Parties  
*November 2, 2016*

Department of Justice  
Attn: Brad Schimel, Attorney General  
[Schimelbd@doj.state.wi.us](mailto:Schimelbd@doj.state.wi.us)  
Attn: AAG Karla Keckhaver  
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Wisconsin State Bar  
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Court of Appeals  
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Wisconsin Association for Justice  
Bryan Roessler, Executive Director  
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Wisconsin Defense Counsel  
(formerly CTCW)  
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Wisconsin District Attorneys Association  
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Association of State Prosecutors  
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State Public Defender's Office  
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