

STATE OF WISCONSIN  
SUPREME COURT

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In re:

WISCONSIN STATUTES §§ 809.15, 809.19, 809.30, 809.32, and 885.42

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**MEMORANDUM IN SUPPORT OF  
PETITION OF WISCONSIN JUDICIAL COUNCIL  
FOR AN ORDER AMENDING WIS. STATS.  
§§809.15, 809.19, 809.30, 809.32, and 885.42**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

May 26, 2017

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to amend WIS. STATS. §§ 809.15, 809.19, 809.30, 809.32, and 885.42.

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

## **I. Introduction**

The Judicial Council received complaints from both the Wisconsin Department of Justice and a former State Bar President that Wis. Stat. § (Rule) 809.15 does not promote consistency and completeness of the record on appeal. The Judicial Council tasked its Appellate Procedure Committee with studying the issue and providing a recommendation.

The Appellate Procedure Committee commenced work on this project on January 17, 2014.<sup>1</sup> When the committee initially began its study, s. 809.15(1) did not require the record to include all the documents from a trial. It provided for the inclusion of orders “relevant to the appeal” and exhibits “material to the appeal.” However, on November 25, 2015, the supreme court adopted a rule amendment that resolved those concerns.<sup>2</sup> Thereafter, the committee narrowed its focus to supplementing the record on appeal, sealed documents, transcripts for audio or audiovisual recordings, and rules to address presentence investigation reports.

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<sup>1</sup> For a list of the committee’s membership, please see Appendix 1.

<sup>2</sup> *See* 2015 WI 102.

## II. Discussion

### A. Supplementing the Record

The committee discussed multiple rules from other jurisdictions regarding supplementing the record. The committee also consulted key court personnel. The court of appeals chief staff attorney indicated that the appellate court would prefer to have all the issues regarding the record resolved by the circuit court before the record is transmitted to the appellate court.<sup>3</sup>

The clerk of the supreme court and court of appeals reported that requests to supplement the record do not happen very often. When it does happen, it is usually because a transcript has been ordered, but has not been filed in the circuit court at the time the court has to forward the record to the appellate court. She suggested that this may occur because the record is due within 40 days, but the court reporter has 60 days to file the transcript.<sup>4</sup>

After further study, it did not appear to the committee that the identified issue falls squarely under "defective" or inaccurate record in current s. 809.15(3).<sup>5</sup> To address that

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<sup>3</sup> Minutes of the Wisconsin Judicial Council Appellate Procedure Committee, dated May 16, 2014 (copy on file with author).

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

<sup>5</sup> Wis. Stat. § 809.15 (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 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.

concern, the committee recommended amending the heading to sub. (3) to read, “Supplements or corrections to record on appeal.”

The recommended amendments to the text of sub. (3) are based generally on North Carolina's rule, amended to allow supplemental material.<sup>6</sup> The committee added a sentence to par. (b) to clarify where the motion to supplement or correct the record should be filed. The committee also moved the sentence that begins "The movant shall send a copy of any motion..." into par. (b). The sentence was moved from s. 809.15 (4) (c).

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<sup>6</sup> North Carolina Rules of Appellate Procedure, Rule 9, provides in part:

(5) Additions and Amendments to Record on Appeal.

(a) Additional Materials in the Record on Appeal. If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a copy of those items on opposing counsel and shall file three copies of the items in a volume captioned “Rule 9(b)(5) Supplement to the Printed Record on Appeal.” The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

(b) Motions Pertaining to Additions to the Record. On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

## **B. Sealed Documents**

Newly proposed s. 809.15(1)(d) is based on Delaware's rules regarding the sealing of court records.<sup>7</sup> The introductory phrase also recognizes the procedure for presentence investigation (PSI) report access created in proposed s. 809.15(6). Although technically a PSI report is a document that is confidential and required to be sealed by statute and not a court, sub. (6) is cross-referenced.

## **C. Transcripts for Recordings**

The committee proposed a rule amendment to s. 885.42(1) to encourage the parties to prepare a transcript in advance of the proceeding so that it can be included in the record. The committee observed that the use of audio visual recording is becoming more prevalent and depositions are no longer routinely transcribed.

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<sup>7</sup> Delaware Supreme Court Rule 9, provides:

(bb) In any appeal except from Family Court, any document or other part of the record which has been sealed by order of the trial court or submitted to the arbitrator as confidential shall remain sealed unless this Court, for good cause shown, shall authorize the unsealing of such document or record. In appeals originating in the Family Court, the record and documents filed with the Clerk of this Court and all proceedings shall remain confidential unless otherwise ordered by the Court, sua sponte, or for good cause shown upon application by a party. After the filing of any brief under seal, in any appeal except from Family Court, one original and one copy of a redacted brief should be filed with the Court within 15 days.

The committee studied Wisconsin's current rules: SCR 71.01 and Wis. Stat. § 885.42.<sup>8</sup> The committee also viewed comparable rules from several other jurisdictions.

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<sup>8</sup> SCR 71.01 provides:

- (1) "Reporting" means making a verbatim record.
- (2) All proceedings in the circuit court shall be reported, except for the following:
  - (a) A proceeding before a court commissioner that may be reviewed de novo;
  - (b) Settlement conferences, pretrial conferences, and matters related to scheduling;
  - (c) In a criminal proceeding, a matter preceding the filing of a criminal complaint.
- (d) If accompanied with a certified transcript, videotape depositions offered as evidence during any hearing or other court proceeding.
- (e) Audio and audiovisual recordings of any type, if not submitted under par. (d), that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record. The court may direct a party or the court reporter to prepare the transcript of a recording submitted under this paragraph.
- (3) The director of state courts shall develop rules for the use of alternative means of making a verbatim record.

Wis. Stat. § 885.42 provides:

- (1) DEPOSITIONS. Any deposition may be recorded by audiovisual videotape without a stenographic transcript. Any party to the action may arrange at the party's expense to have a simultaneous stenographic record made. Except as provided by ss. 885.40 to 885.47, ch. 804 governing the practice and procedure in depositions and discovery shall apply.
- (2) OTHER EVIDENCE. Such other evidence as is appropriate may be recorded by videotape and be presented at a trial. The court may direct a party or the court reporter to prepare a transcript of an audio or audiovisual recording presented under this subsection in accordance with SCR 71.01(2)(e).

(continued)

The committee determined that California's rule addresses issues similar to those the committee was studying.<sup>9</sup>

In further support of the amendments, committee members noted problems associated with recordings that are difficult to understand due to problems such as poor recording quality or words that are not spoken clearly. The committee agreed that audio

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(3) ENTIRE TRIAL TESTIMONY AND EVIDENCE. All trial proceedings, including evidence in its entirety, may be presented at a trial by videotape upon the approval of all parties and the trial judge. In determining whether to approve a videotape trial, the trial judge, after consultation with counsel, shall consider the cost involved, the nature of the action, and the nature and amount of testimony. The trial judge shall fix a date prior to the date of trial when all recorded testimony must be filed with the clerk of court.

(4) TRIAL RECORD. At trial, videotape depositions shall be reported unless accompanied with a certified transcript submitted in accordance with SCR 71.01(2)(d).

<sup>9</sup> California Rules of Court Rule 2.1040 provides:

Electronic recordings presented or offered into evidence

(a) Electronic recordings of deposition or other prior testimony

(1) Before a party may present or offer into evidence an electronic sound or sound-and-video recording of deposition or other prior testimony, the party must lodge a transcript of the deposition or prior testimony with the court. At the time the recording is played, the party must identify on the record the page and line numbers where the testimony presented or offered appears in the transcript.

(2) Except as provided in (3), at the time the presentation of evidence closes or within five days after the recording in (1) is presented or offered into evidence, whichever is later, the party presenting or offering the recording into evidence must serve and file a copy of the transcript cover showing the witness name and a copy of the pages of the transcript where the testimony presented or offered appears. The transcript pages must be marked to identify the testimony that was presented or offered into evidence.

(continued)

recordings played at trial can be problematic because no one knows exactly how the jury interpreted the contents. Therefore, preparing a transcript in advance of trial is important so the appellate court knows what the jury considered. To further aid the appellate court, the proposed rule amendment requires the party to identify on the record the page and line numbers where the testimony appears in the transcript.

#### **D. Presentence Investigation Reports**

In 2006, the legislature changed the confidentiality provisions of s. 972.15 by amending subsection (4) and creating subsection (4m) to s. 972.15.<sup>10</sup> This change provides that an unrepresented defendant may have personal access to the presentence investigation (PSI) report after sentencing without court authorization. It further provides that an unrepresented defendant may not possess a copy of the PSI report and must keep its contents confidential.

The Wisconsin Supreme Court first addressed the defendant's access to the PSI report under s. 972.15(4m) in *State v. Parent*. Parent requested a copy of his PSI report for purposes of a no-merit appeal.<sup>11</sup> The circuit court denied his request. Parent then filed a motion with the court of appeals, which was also denied.

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(3) If the court reporter takes down the content of all portions of the recording in (1) that were presented or offered into evidence, the party offering or presenting the recording is not required to provide a transcript of that recording under (2).

<sup>10</sup> 2005 Wis. Act 311, §§ 1 and 2 (effective April 21, 2006).

<sup>11</sup> *State v. Parent*, 725 N.W.2d 915, 2006 WI 132.



*Parent* essentially involved a conflict between two statutes: Wis. Stat. § (Rule) 809.32(1)(d), which provides that appointed appellate counsel who files a no-merit report in the defendant's appeal must serve a copy of the record on the defendant, and Wis. Stat. § 972.15(4), which provided generally that PSI reports are confidential and may be disclosed only upon authorization of the circuit court.<sup>12</sup> The supreme court concluded that under s. 972.15(4m), the defendant was entitled to a meaningful viewing of the PSI report, but was not entitled to retain a copy of it.<sup>13</sup>

A question surrounding the use of PSI reports arose again in *State v. Buchanan* when the supreme court was asked to review an order of the court of appeals requiring defense counsel to seek permission from the circuit court to reference information from a PSI report in an appellate brief.<sup>14</sup>

The court held that “in a merit appeal, parties who are entitled ‘to have and keep a copy’ of a PSI pursuant to s. 972.15(4m) need not ask any court’s permission to reference a PSI in an appellate brief.”<sup>15</sup> The court clarified that parties “may reference information from the PSI that does not reveal confidential information and that is relevant to the appeal.” However, the court urged parties “to be abundantly cautious when deciding

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<sup>12</sup> *Id.* at ¶ 3.

<sup>13</sup> *Id.* at ¶ 43.

<sup>14</sup> *State v. Buchanan*, 346 Wis.2d 735, 828 N.W.2d 847, 2013 WI 31.

<sup>15</sup> *Id.* at ¶ 3.

whether it is necessary to cite sensitive information and when choosing how to cite such content.”<sup>16</sup>

The proposed amendments found in the accompanying petition are intended to recognize s. 972.15(4m) and the court’s holdings in *Parent* and *Buchanan*, and incorporate them into the appellate rules. These proposed amendments also reflect the work of the committee on a comprehensive revision of s. 972.15, relating to presentence investigation procedure and reports. The proposed amendments which relate solely to appellate procedure are based on provisions in a draft bill that has yet to be introduced in the legislature.

The proposed amendments require the inclusion of the PSI report in the appellate record.<sup>17</sup> However, the proposal also contains a provision to maintain confidentiality of the PSI report when transmitted as part of the appellate record and when used on appeal.<sup>18</sup> Under the proposed amendments, PSI reports are available only to the court, the attorneys, and unrepresented defendants.<sup>19</sup> The amendments allow citation to and discussion of the PSI report in briefs and no merit reports and allow inclusion of transcript portions pertaining to the PSI report in the appendix, but prohibit reproduction of the PSI report in the appendix.<sup>20</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *See* proposed Wis. Stat. § 809.15 (1) (am) in the accompanying petition.

<sup>18</sup> *See* proposed Wis. Stat. § 809.15 (6).

<sup>19</sup> *Id.*

<sup>20</sup> *See* proposed Wis. Stat. § 809.19 (14) and 809.32(1)(h).

On appeal or in collateral review proceedings, the proposal provides that an unrepresented defendant may request access to the PSI report and the court of appeals shall specify the manner in which the defendant shall have access so as to allow meaningful and timely review of the materials.<sup>21</sup> This provision applies only to the copy of the PSI report in the record on appeal and is not intended to contravene the provisions of s. 972.15 or prohibit the defendant or the department of corrections from using the presentence investigation report as permitted by law. This provision gives authority to the appellate court to provide access to the presentence investigation report. The committee believes the court does not have this authority currently.

### **III. Feedback on Proposed Changes**

On April 22, 2016, the proposed rule draft was circulated for comment to the entities listed in Appendix 2. Potentially interested groups were given until June 10, 2016 to provide comments. With the exception of some concerns that the PSI provisions did not reference or reflect the most recent case law, feedback was generally favorable.<sup>22</sup>

Based on the comments, the committee further modified the proposed amendments to more fully reflect the court's guidance in *State v. Buchanan*.<sup>23</sup> Department of Justice and State Public Defender representatives on the committee both indicated that the concerns of their respective agencies were satisfactorily addressed by the changes.

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<sup>21</sup> See proposed Wis. Stat. § 809.15 (6).

<sup>22</sup> Written comments are on file with the author.

The proposal was forwarded on to the full Judicial Council. The Council discussed several concerns voiced by members and approved two changes. The Council returned the draft to the committee for consideration of the additional changes.<sup>24</sup>

On November 2, 2016, the proposed rule draft was circulated for public comment to a much broader group of potentially interested groups, as listed in Appendix 3. Potentially interested groups were given until December 7, 2016 to provide comments.

Feedback was received from the court of appeals, the Legislative Reference Bureau, and the Appellate Practice Section of the State Bar. The committee carefully reviewed and responded to the comments, resulting in further amendments to the proposal.<sup>25</sup>

Once the committee unanimously approved the proposed amendments, the recommendation was returned to the full Judicial Council. It was reviewed again and approved unanimously by the full Council prior to filing this petition.<sup>26</sup>

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<sup>23</sup> 346 Wis.2d 735, 828 N.W.2d 847, 2013 WI 31.

<sup>24</sup> Minutes of the Wisconsin Judicial Council, dated September 16, 2016 at <http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes0916.pdf> (last accessed May 16, 2017).

<sup>25</sup> Minutes of the Wisconsin Judicial Council Appellate Procedure Committee, dated December 16, 2016 (copy on file with author).

<sup>26</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 16, 2017).

#### **IV. 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 26, 2017.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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# Appendix 1

## JUDICIAL COUNCIL -- Appellate Procedure Committee Members

Hon. Gerald Ptacek, Chair  
Racine County Circuit Court Judge

Sarah Walkenhorst Barber (2016-present)  
Drafting Attorney  
Legislative Reference Bureau

Tracy Kuczenski (2014-2015)  
Drafting Attorney  
Legislative Reference Bureau

Devon Lee (2014-2015)  
Legal Counsel  
State Public Defender's Office

Dennis Myers  
Washington County Supervisor

Atty. Greg Weber (2014-2015)  
Director of the Criminal Appeals Unit  
Department of Justice

Hon. Maxine A. White (2014)  
Milwaukee County Circuit Court Judge

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

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

Karla Keckhaver (ad hoc) (2015-present)  
Assistant Attorney General  
Department of Justice

Jenny Krueger (ad hoc) (2014-2015)  
Boardman & Clark LLP  
State Bar Appellate Practice Section  
Designee

Jeremy Perri (ad hoc) (2015-present)  
Appellate Division Director  
State Public Defender's Office

Matt Robles (ad hoc) (2014-2015)  
Hawks Quindel, S.C.

Prof. Meredith Ross (ad hoc) (2014-2015)  
Past Director of Frank J. Remington Center  
Univ. of Wisc. Law School

## **Appendix 2**

Wisconsin Judicial Council  
Appellate Procedure Committee  
Potentially Interested Parties  
April 22, 2016

State Bar Criminal Law, Family Law, Children & the Law, and Appellate Practice Sections  
Attn: Lynne Davis

Court of Appeals Judges  
Attn: Chief Judge Lisa Neubauer

Wisconsin Department of Justice  
Attn: Karla Keckhaver

Wisconsin State Public Defender  
Attn: Jeremy Perri

## Appendix 3

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

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