

SUPREME COURT OF WISCONSIN

NOTICE

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No. 20-05

In the Matter of the Proposed Amendment of Wisconsin Statute § 809.85, Relating to the Pro Hac Vice Admission, Substitution, and Withdrawal of Retained Counsel in Appellate Court Proceedings

FILED

MAR 9, 2021

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On October 14, 2020, the Wisconsin Judicial Council, by its Chair and Acting Secretary, Attorney William C. Gleisner, III, filed a rule petition asking the court to amend Wis. Stat. § (Rule) 809.85 to establish a procedure to govern pro hac vice admission, substitution, and withdrawal of retained counsel in appellate court proceedings.

The court discussed the rule petition on December 17, 2020 in a closed administrative rule conference. The court voted to solicit written comments and schedule a public hearing. Letters were sent to interested persons on December 22, 2020. Kathleen A. Brost, President, State Bar of Wisconsin, filed a comment advising the court that the Board of Governors voted unanimously to support the petition. The court conducted a public hearing on February 24, 2021, via videoconference. Attorney William Gleisner and the Honorable Thomas Hruz presented the petition to the court on behalf of the Wisconsin Judicial Council.

The court discussed the petition at a closed administrative conference and voted to grant the petition.

IT IS ORDERED that, effective July 1, 2021, Wis. Stat. § (Rule) 809.85 is amended to read:

SECTION 1. 809.85 (title) of the statutes is amended to read:

809.85 Rule (~~Counsel to continue~~ Continuation, appearance, substitution or withdrawal of counsel).

SECTION 2. 809.85 of the statutes is renumbered 809.85(1) and amended to read:

809.85(1) APPOINTED COUNSEL TO CONTINUE. An attorney appointed by a lower court in a case or proceeding appealed to the court shall continue to act in the same capacity in the court until the court relieves the attorney or as allowed under subs. (3), (4), or (5)(b).

SECTION 3. 809.85(2) of the statutes is created to read:

809.85(2) NONADMITTED COUNSEL. (a) Counsel not admitted to practice law in Wisconsin but admitted pro hac vice in the circuit court case shall provide the clerk with a copy of the circuit court's order admitting counsel pro hac vice and then may appear before the court in association with counsel admitted to practice law and in good standing in Wisconsin. Wisconsin counsel shall sign every document filed in the court and shall be present in person in all proceedings unless excused by the court.

(b) Counsel not admitted to practice law in Wisconsin may move the court for pro hac vice admission and shall state by affidavit that counsel is admitted to practice law and is in good standing to practice law in another jurisdiction and that counsel has complied with SCR 10.03(4). If the motion is granted, counsel may appear before the

court in association with counsel admitted to practice law and in good standing in Wisconsin. Wisconsin counsel shall sign every document filed in the court and shall be present in person in all proceedings unless excused by the court.

(c) For good cause the court may revoke the privilege granted herein of any counsel admitted pro hac vice to appear in any proceeding.

SECTION 4. 809.85(3) of the statutes is created to read:

809.85 (3) NOTICE OF LIMITED APPEARANCE. If an attorney's scope of representation is limited, notices under s. 802.045 of limited appearance and of termination of limited appearance shall be filed with the court and served on the client and all parties. Upon the filing of the notice of termination of limited appearance, the clerk shall enter the withdrawal of counsel on the court docket without a court order.

SECTION 5. 809.85(4) is created to read:

809.85 (4) SUBSTITUTION OF COUNSEL. (a) *Applicability.* This subsection does not apply to counsel appointed for a person under ss. 809.107, 809.30(2)(e) or ch. 977 or by the circuit court for postconviction, postcommitment, or postdisposition proceedings under ss. 809.107, 809.30 or 809.32.

(b) *Substitution by mutual consent.*

1. An attorney for a party to an appeal or other appellate court proceeding may withdraw upon the party's consent by filing a notice of withdrawal signed by the party and withdrawing counsel and accompanied by a notice of substitution of counsel signed by substitute counsel. The notice of substitution of counsel must provide the substitute attorney's name, mailing address, electronic mail address, if any, and telephone number. Upon the filing of a notice of withdrawal and notice

of substitution of counsel, the clerk shall enter the substitution on the court docket without a court order.

2. Substitution of counsel without the signature of withdrawing counsel may be allowed for good cause shown and upon such terms as shall be just.

(c) *Entry of appearance by members or employees of law firms, professional corporations, legal assistance clinics, and agencies.* The entry of an appearance as attorney of record by an attorney who is a member or an employee of a law firm, professional corporation, legal assistance clinic, or agency representing a party to the appeal or other appellate court proceeding shall relieve other members or employees of the same law firm, professional corporation, legal assistance clinic, or agency from the necessity of filing a notice of withdrawal and substitution of counsel. Upon entry of such appearance, the clerk shall enter the substitution of counsel on the court docket without a court order unless the entry of appearance indicates that the attorneys will serve as co-counsel.

SECTION 6. 809.85(5) is created to read:

809.85 (5) WITHDRAWAL OF COUNSEL. **(a)** *Applicability.* This subsection does not apply to counsel appointed for a person under ss. 809.107, 809.30(2)(e) or ch. 977 or by the circuit court for postconviction, postcommitment, or postdisposition proceedings under ss. 809.107, 809.30 or 809.32.

(b) *Withdrawal by consent.* Other than in an appeal under ss. 809.107 or 809.30, an attorney for a party to an appeal or other appellate court proceeding may withdraw as counsel of record upon the party's consent by filing a notice of withdrawal signed by the party

indicating consent. The notice shall indicate the party's last known address unless disclosure of the address would violate a standard of professional responsibility. Upon the filing of a notice of withdrawal indicating the party's consent, the clerk shall enter the withdrawal on the court docket without a court order.

(c) *Withdrawal by motion.* An attorney desiring to withdraw as counsel of record for a party to an appeal or other appellate court proceeding who is unable to obtain the party's consent under sub. (5)(b), or in an appeal under ss. 809.107 or 809.30, must file a motion to withdraw. The motion shall be filed in the court in which the appeal or other appellate court proceeding is pending.

(d) *Referral for appointment of counsel by the state public defender.* If the appeal or other appellate court proceeding is one in which the client may be eligible for the appointment of counsel under ss. 809.107, 809.30(2)(e) or ch. 977, and if the client requests representation by the state public defender, the attorney shall serve a copy of the motion to withdraw on the appellate division intake unit in the Madison appellate office of the state public defender and refer the client to the appellate division intake office for indigency determination and the possible appointment of counsel. When a client is referred to the state public defender, within 20 days after receipt of a motion to withdraw filed and served under par. (e), the state public defender shall notify the court in which the motion was filed of the status of the determination of the client's indigency and whether the state public defender will appoint counsel.

(e) *Content of motion to withdraw as counsel.* A motion to withdraw as counsel must include all of the following items:

1. The client's name and last known address, unless disclosure of the address would violate a standard of professional responsibility.

2. A statement that at least 14 days before the motion was filed the client was notified in person, by mail, by electronic mail, or by phone of all of the following information:

a. Counsel's intent to withdraw.

b. Of the right to object to the motion within 11 days after service of the motion.

c. That unless the client retains or obtains new counsel, the client is personally responsible for keeping the court and the other parties informed where notices, briefs, or other papers may be served and complying with all court orders and time limitations established by the rules of appellate procedure or by court order, and that if the client fails or refuses to comply with court orders and established time limitations, the client may suffer possible dismissal, default or other penalty.

d. The date of any pending deadline or required filing in the appeal or other appellate proceeding.

e. If the client is not a natural person, that the client must be represented by counsel unless the appeal is taken from a small claims case.

3. When referral to the state public defender is required under par. (d), a statement that the referral was made and the date it was made.

4. A statement that the motion was served on the client, all parties to the appeal, and the appellate division intake unit in the

Madison appellate office of the state public defender when referral to the state public defender is required under par. (d).

5. If counsel was unable to give the client the notice required under subd. 2., a statement that attempts to give notice have failed and an explanation of what good faith efforts counsel made to satisfy the notice requirement.

6. The reasons for withdrawal under SCR 20:1.16 and the facts relevant to the reasons or factors in the withdrawal determination under par. (f), unless an explanation of the reasons and facts would violate a standard of professional responsibility.

(f) *Factors in withdrawal determination.* The court may approve withdrawal under appropriate terms and conditions. The court may consider the following factors in deciding the attorney's motion to withdraw:

1. Whether the client has been given reasonable notice and opportunity to obtain substitute counsel.

2. Complexity of the case, the length of time the attorney has served as counsel of record, and preparatory work completed.

3. The amount of fees paid or owed.

4. Whether the request is made to manipulate the appellate process.

5. Whether the attorney-client relationship is irrevocably broken.

6. Prejudice to any party.

7. Delay caused by the withdrawal of counsel of record.

8. Whether the office of the state public defender will appoint counsel.

9. Such other factors as the court may determine to be relevant.

(g) *Time tolled.* The filing of a motion to withdraw under this section automatically tolls the time for performing an act required by the rules of appellate procedure or court order from the date the motion was filed until the date motion is disposed of by order. The time for filing a petition for review under s. 808.10 is not tolled.

(h) *Motion not necessary.* Upon the filing of a petition for review by a self-represented person or new counsel, the clerk shall enter the withdrawal of counsel or substitution of counsel on the court docket without a court order.

SECTION 7. 809.85(6) of the statutes is created to read:

809.85 (6) CLIENT'S FILE. The withdrawing attorney shall surrender to the client or successor counsel the papers and property to which the client is entitled within 14 days of counsel's receipt of the client's or successor counsel's request, unless the court orders otherwise.

SECTION 8. Judicial Council Note to 809.85 of the statutes is created to read:

JUDICIAL COUNCIL NOTE

Subsection (5)(a) is not intended to supersede Rule 809.30(4), which governs the withdrawal of appointed counsel. Subsection (6) is consistent with SCR 20:1.16(d) and only adds a time limit in which counsel must act. Subsection (6) allows the court to defer the surrender of papers and property to the client when the appointment of new counsel is anticipated.

IT IS FURTHER ORDERED that the Judicial Council Note to Wis. Stat. § 809.85 is not adopted but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 9th day of March, 2021.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

