

**SUPREME COURT OF WISCONSIN**

## NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 04-08

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**In re: Proposed Amendments to Wis. Stat.  
§§ 809.30, 809.32 and 809.62**

**FILED****JUL 30, 2008**

David R. Schanker  
Clerk of Supreme Court  
Madison, WI

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On September 30, 2004, the Wisconsin Judicial Council filed a petition seeking to amend §§ 809.30(2)(b), 809.32(4) and 809.62(1) through (7) of the Rules of Appellate Procedure. This petition was the culmination of extensive work by a Judicial Council Committee, with assistance from the Appellate Practice Section and Criminal Law Section of the State Bar, and the Wisconsin Association of Criminal Defense Lawyers.

A public hearing was conducted on the petition on March 15, 2005. At the ensuing open administrative conference, the court discussed certain aspects of the petition and took the remaining issues under advisement. The matter was discussed at subsequent open conferences on March 21, 2007, and June 25, 2008, at which time the court voted unanimously to adopt portions of the petition, as set forth herein, and to deny other aspects of the

petition. The effective date of the amendments adopted herein will be January 1, 2009.

IT IS ORDERED that effective January 1, 2009:

**SECTION 1.** 809.107 (2) (bm) (intro.) of the statutes is amended to read:

809.107 (2) (bm) *Notice of intent to pursue postdisposition or appellate relief.* (intro.) A person shall initiate an appeal under this section by filing, within 30 days after the date of entry of the judgment or order appealed from, as specified in s. 808.04 (7m), a notice of intent to pursue postdisposition or appellate relief with the clerk of the circuit court in which the judgment or order appealed from was entered. Also within that time period, the appellant shall serve a copy of the notice of intent on the person representing the interests of the public, opposing counsel, the guardian ad litem appointed under s. 48.235 (1) (c) for the child who is the subject of the proceeding, the child's parent and any guardian and any custodian appointed under s. 48.427 (3) or 48.428 (2). If the record discloses that final adjudication occurred after the notice of intent was filed, the notice shall be treated as filed after entry of the judgment or order appealed from on the day of the entry of the final judgment or order. The notice of intent shall include all of the following:

**SECTION 2.** 809.30 (2) (b) (intro.) of the statutes is amended to read:

809.30 (2) (b) *Notice of intent to pursue postconviction or postdisposition relief.* (intro.) Within 20 days after the date

of sentencing or final adjudication, the person shall file in circuit court and serve on the prosecutor and any other party a notice of intent to pursue postconviction or postdisposition relief. If the record discloses that sentencing or final adjudication occurred after the notice of intent was filed, the notice shall be treated as filed after sentencing or final adjudication on the day of the sentencing or final adjudication.

The notice shall include all of the following:

**SECTION 3.** The following Judicial Council Committee Comment to s. 809.30 (2) (b) is included to read as follows:

Judicial Council Committee Comment

The amendment to s. 809.30 (2) (b) allows a notice of intent that is filed too early to be deemed filed on the date that a judgment and sentence or other final adjudication is filed. This is consistent with the procedure applicable to civil appeals under s. 808.04 (8).

**SECTION 4.** 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 person of the reasons for this opinion and that the person has the right to file a petition for review. If requested by the person, the attorney shall file a petition satisfying the requirements of s. 809.62 (2) (d) and (f) and the person 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 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 as provided in s. 809.62 (3) within 14 days after the service of the supplemental petition.

**SECTION 5.** 809.62 (1) (intro.) of the statutes is renumbered s. 809.62 (1m) and amended to read:

809.62 **(1m)** A party may file with the supreme court a petition for review of an adverse decision of the court of appeals pursuant to s. 808.10 within 30 days of the date of the decision of the court of appeals. ~~Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:~~

**SECTION 6.** 809.62 (1) (a) to (e) of the statutes are renumbered 809.63 (1r) (a) to (e).

**SECTION 7.** 809.62 (1g) of the statutes is created to read:

809.62 **(1g)** DEFINITIONS. In this section:

(a) "Adverse decision" means a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review.

(b) "Adverse decision" includes the court of appeals' denial of or failure to grant the full relief sought or the court of appeals' denial of the preferred form of relief.

(c) "Adverse decision" does not include a party's disagreement with the court of appeals' language or rationale in granting a party's requested relief.

**SECTION 8.** The following Judicial Council Committee Comment to s. 809.62 (1g) is included to read as follows:

Judicial Council Committee Comment

The definition in s. 809.62 (1g) codifies the holding in Neely v. State, 89 Wis. 2d 755, 757-58, 279 N.W.2d 255 (1979), to the effect that a party cannot seek review of a favorable result merely because of disagreement with the court of appeals' rationale. At the same time, s. 809.62 (1g) underscores the fact that a court of appeals' decision that is generally favorable to a party remains adverse to that party to the extent that it does not grant the party all the relief requested, i.e., the full relief or the preferred form of relief sought by the party. See also State v. Castillo, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

As an example, a criminal defendant seeking reversal of his conviction or, if that is not granted, resentencing, would be entitled to seek review of the court of appeals' failure to grant a new trial, even if it did order resentencing. Similarly, a civil appellant challenging a verdict finding liability and, should that be denied, the amount of damages, would be entitled to seek review of the court of appeals' failure to grant a new trial on liability, even if the court of appeals did order reassessment of damages.

**SECTION 9.** 809.62 (1m) (title) of the statutes is created to read:

809.62 (1m) (title) GENERAL RULE; TIME LIMIT.

**SECTION 10.** 809.62 (1r) (intro.) of the statutes is created to read:

809.62 (1r) CRITERIA FOR GRANTING REVIEW. (intro.) Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully

measuring the court's discretion, indicate criteria that will be considered:

**SECTION 11.** The following Judicial Council Committee Comment to s. 809.62 (1m) and (1r) is included to read as follows:

Judicial Council Committee Comment

Rules 809.62 (1m) and (1r) are former Rule 809.62 (1), divided into subsections and subtitled. Subtitles are added throughout Rule 809.62 to help practitioners and parties locate particular provisions.

**SECTION 12.** 809.62 (2) (title) of the statutes is created to read:

809.62 (2) (title) CONTENTS OF PETITION.

**SECTION 13.** 809.62 (2) (a), (d) and (f) 2. of the statutes are amended to read:

809.62 (2) (a) A statement of the issues ~~presented for review~~ the petitioner seeks to have reviewed, the method or manner of raising the issues in the court of appeals and how the court of appeals decided the issues. The statement of issues shall also identify any issues the petitioner seeks to have reviewed that were not decided by the court of appeals. The statement of an issue shall be deemed to comprise every subsidiary issue as determined by the court. If deemed appropriate by the supreme court, the matter may be remanded to the court of appeals.

(d) A statement of the case containing a description of the nature of the case; the procedural status of the case leading up to the review; the dispositions in the ~~trial~~ circuit court and court of appeals; and a statement of those facts not included in

the opinion of the court of appeals relevant to the issues presented for review, with appropriate ~~references~~ citation to the record.

(f) 2. ~~Judgment~~ The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition.

**SECTION 14.** The following Judicial Council Committee Comment to s. 809.62 (2) (a) is included to read as follows:

Judicial Council Committee Comment

Rule 809.62(2)(a) is amended to require the petitioner to identify all issues on which it seeks review, including issues raised in the court of appeals but not decided in the court of appeals. The amendment to Rule 809.62(2)(a) also clarifies that the statement of an issue incorporates all subsidiary issues. This amendment is adapted from the United States Supreme Court's rules. See U.S. Sup. Ct. Rule 14.1(a). See also In the Interest of Jamie L., 172 Wis. 2d 218, 232-33, 493 N.W.2d 56 (1992).

**SECTION 15.** 809.62 (2m) (title) of the statutes is created to read:

809.62 **(2m)** (title) INAPPLICABLE TO PARENTAL CONSENT TO ABORTION CASES.

**SECTION 16.** 809.62 (2r) (title) of the statutes is created to read:

809.62 **(2r)** (title) APPLICATION TO TERMINATION OF PARENTAL RIGHTS CASES.

**SECTION 17.** 809.62 (3) of the statutes is 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 14 days after

the service of the petition. If filed, the response may contain any of the following:

(a) Any reasons for denying the petition.

(b) Any perceived defects that may prevent ruling on the merits of any issue in the petition.

(c) Any perceived misstatements of fact or law set forth in the petition that have a bearing on the question of what issues properly would be before the court if the petition were granted.

(d) Any alternative ground supporting the court of appeals result or a result less favorable to the opposing party than that granted by the court of appeals.

(e) Any other issues the court may need to decide if the petition is granted, in which case the statement shall indicate whether the other issues were raised before the court of appeals, the method or manner of raising the issues in the court of appeals, whether the court of appeals decided the issues, and how the court of appeals decided the issues.

**SECTION 18:** 809.62 (3) (title) of the statutes is created to read:

809.62 (3) (title) RESPONSE TO PETITION.

**SECTION 19.** The following Judicial Council Committee Comment to s. 809.62 (3) is included to read as follows:

Judicial Council Committee Comment

Rule 809.62(3) is amended to advise the respondent to apprise the supreme court, in the response to the petition, of any issues the court may need to decide if it grants review of the issue(s) identified in the petition. This applies whether or not the court of appeals actually decided the issues to be raised.



The amendments to Rule 809.62(3) also advise the respondent to identify in its response any perceived misstatements of law or fact, or any defects (such as waiver, mootness, or estoppel) that could prevent the supreme court from reaching the merits of the issue presented in the petition. Compare U.S. Sup. Ct. Rule 15.2.

Rule 809.62(3)(d) addresses the circumstance in which the respondent asserts an alternative ground to defend the court of appeals' ultimate result or outcome, whether or not that ground was raised or ruled upon by the lower courts.

Rule 809.62(3)(d) also addresses the circumstances in which the respondent asserts an alternative ground that would result in a judgment less favorable than that granted by the court of appeals but more favorable to the respondent than might be granted for the petitioner (e.g., remand for a new trial rather than a rendition of judgment for the petitioner). The language is modified from Tex. R. App. P. 53.3(c)(3).

Rule 809.62(3)(d) and (e) are intended to facilitate the supreme court's assessment of the issues presented for review, not to change current law regarding the application of waiver principles to a respondent. See State v. Holt, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) (An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.)

Implicit in these amendments, although not expressly stated as in the federal rule, U.S. Sup. Ct. Rule 15.2, is the understanding that a respondent may be deemed to have waived issues or defects that do not go to jurisdiction if they are not called to the attention of the supreme court in a response to the petition. The supreme court retains its inherent authority to disregard any waiver and address the merits of an unpreserved argument or to engage in discretionary review under Wis. Stat. §§ 751.06 or 752.35. See State v. Mikrut, 2004 WI 79, ¶38. The possible invocation of waiver for failure to raise such alleged defects in the response will encourage the respondent to inform the supreme court of such defects before the supreme court decides whether to expend scarce judicial resources on the case. See Oklahoma City v. Tuttle, 471 U.S. 808, 815-16 (1985).

A number of other states have rules requiring the respondent to identify other issues it seeks to raise if review is granted, and either expressly or impliedly limiting the issues before the supreme court on a grant of review to those set forth in the petition and response. See Ariz. R. Civ. App. P. 23(e); Calif. App. R. 28(e)(2) & (5); Kan. R.S. & A. Cts. Rule 8.03(g)(1); N.C. R. App. P. 15(d) & 16(a); Oregon R. App. P. 9.20(2); Wash. R. App. 13.4(d).

A leading handbook on United States Supreme Court practice describes the procedure in that Court as follows:

A respondent may also choose to waive the right to oppose a petition, which seems clearly without merit. This will save time and money, without any

substantial risk if respondent feels certain that certiorari will be denied. In order that the waiver will clearly be understood as based upon the lack of merit in the petition, the statement filed with the Court—which may be in the form of a letter to the Clerk—should contain language to this effect: "In view of the fact that the case clearly does not warrant review by this Court [as is shown by the opinion below], respondent waives the right to file a brief in opposition." The letter may also request leave to file a response to the petition if the Court wishes to see one. This will seldom be necessary, since if the respondent has not filed a response, or has affirmatively waived the right to file, and if the Court believes that the petition may have some merit, the respondent will usually be requested to file a response—usually within 30 days from the request.

In recent years, in order to expedite the filing of responses in the more meritorious cases, the Solicitor General has waived the right to file opposition briefs in many cases deemed to be frivolous or insubstantial. States often do the same thing, especially in criminal cases. Such waivers should be filed promptly, in order to speed up the distribution of the petition and the disposition of the case. Usually such petitions are denied, even though the Court may call for a response if any of the Justices so request.

Stern, R., et al., Supreme Court Practice §6.37 at 374-75 (7th ed. 1993) (footnote omitted).

**SECTION 20.** 809.62 (3m) of the statutes is created to read:

809.62 **(3m)** PETITION FOR CROSS-REVIEW. (a) *When required; time limit.* A party who seeks to reverse, vacate, or modify an adverse decision of the court of appeals shall file a petition for cross-review within the period for filing a petition for review with the supreme court, or 30 days after the filing of a petition for review by another party, whichever is later.

(b) *No cross-petition required.* 1. A petition for cross-review is not necessary to enable an opposing party to defend the court of appeals' ultimate result or outcome based on any ground, whether or not that ground was ruled upon by the lower

courts, as long as the supreme court's acceptance of that ground would not change the result or outcome below.

2. A petition for cross-review is not necessary to enable an opposing party to assert grounds that establish the party's right to a result that is less favorable to it than the result or outcome rendered by the court of appeals but more favorable to it than the result or outcome that might be awarded to the petitioner.

(c) *Rights and obligations of parties.* A party seeking cross-review has the same rights and obligations as a party seeking review under ch. 809, and any party opposing a petition for cross-review has the same rights and obligations as a party opposing review.

**SECTION 21.** The following Judicial Council Committee Comment to s. 809.62 (3m) is included to read as follows:

Judicial Council Committee Comment

Rule 809.62(3m) is former Rule 809.62 (7) renumbered and amended. The requirements governing petitions for cross-review fit more logically after the requirements for the petition and the response, contained in Rules 809.62(2) and (3).

Amended Rule 809.62(3m)(a) replaces the permissive "may" with the mandatory "shall" to clarify that a petition for cross-review is mandatory if the respondent seeks to reverse, vacate, or modify an adverse decision of the court of appeals.

Amended Rule 809.62(3m) also clarifies when a respondent must raise an issue in a petition for cross-review, rather than raising the issue in a response to the petition or merely arguing it in the brief. Compare State v. Scheidell, 227 Wis. 2d 285, 288 n.1, 595 N.W.2d 661 (1999) (respondent cannot argue issue raised below unless the issue was raised in a petition for cross-review), with, e.g., In the Interest of Jamie L., 172 Wis. 2d 218, 232-33, 493 N.W.2d 56 (1992) (noting "general rule" that a petition for cross-review is not necessary to defend a judgment on any ground previously raised). Complicating these matters are holdings that a party may not petition for review (or cross-review) if it receives a favorable

outcome from the court of appeals, State v. Castillo, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

Rule 809.62(3m)(b) clarifies that a respondent need not file a petition for cross-review to raise alternative issues or grounds in support of either (1) the court of appeals' ultimate result or (2) a judgment less favorable than that granted by the court of appeals but more favorable to the respondent than might be granted for the petitioner. Any such alternative grounds for affirmance or lesser relief should, however, be identified in the response. See Rules 809.62(3)(d), (3)(e) and (6).

Amended Rule 809.62(3m)(c) clarifies that a party opposing a petition for cross-review has the same rights and obligations as a respondent under Rule 809.62(3).

**SECTION 22.** 809.62 (4) (title) of the statutes is created to read:

809.62 (4) (title) FORM AND LENGTH REQUIREMENTS.

**SECTION 23.** 809.62 (4m) of the statutes is created to read as follows:

809.62 (4m) COMBINED RESPONSE AND PETITION FOR CROSS-REVIEW. When a party elects both to submit a response to the petition for review and to seek cross-review, its submission shall be titled "Combined Response and Petition for Cross-Review." The time limits set forth in sub. (3m) shall apply. The response portion of the combined document shall comply with the requirements of subs. (3) and (4). The cross-review portion of the combined document shall comply with the requirements of subs. (2) and (4), except that the requirement of sub. (2) (d) may be omitted. The cross-review portion shall be preceded by a blank white cover. A signature shall be required only at the conclusion of the cross-review portion of the combined document.

**SECTION 24.** The following Judicial Council Committee Comment to s. 809.62 (4m) is included to read as follows:

Judicial Council Committee Comment

New Rule 809.62(4m) is created to permit a combined document when a party elects both to respond to the petition for review and to submit a petition for cross-review. The content and format requirements of the combined document are similar to the requirements for a combined brief of respondent and cross-appellant found in s. 809.19(6)(b)2.

**SECTION 25.** 809.62 (5) (title) of the statutes is created to read:

809.62 (5) (title) EFFECT ON COURT OF APPEALS PROCEEDINGS.

**SECTION 26.** 809.62 (6) of the statutes is amended to read:

809.62 (6) The supreme court may grant the petition or the petition for cross-review or both upon such conditions as it considers appropriate, including the filing of additional briefs. If ~~the~~ a petition is granted, the ~~petitioner~~ parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court. The supreme court may limit the issues to be considered on review. If the issues to be considered on review are limited by the supreme court and do not include an issue that was identified in a petition and that was left undecided by the court of appeals, the supreme court shall remand that issue to the court of appeals upon remittitur, unless that issue has become moot or would have no effect.

**SECTION 27.** 809.62 (6) (title) of the statutes is created to read:

809.62 (6) (title) CONDITIONS OF GRANT OF REVIEW.

**SECTION 28.** The following Judicial Council Committee Comment to s. 809.62 (6) is included to read as follows:

Judicial Council Committee Comment

The last sentence of Rule 809.62(6) is new and is intended to preserve, for review by the court of appeals following remand, any issue raised at the court of appeals but not decided by that court or by the supreme court on review. For instance, after a civil jury verdict, an insured party might appeal issues relating to liability and damages. The insurer might appeal issues relating to coverage and damages. If the court of appeals reverses on the liability issue, without deciding the coverage and damages issues, and the supreme court accepts review on the liability issue only, amended Rule 809.62(6) preserves the damage and coverage issues raised in the court of appeals and identified in the petition or response for consideration by the court of appeals following remand and remittitur from the supreme court. Remand of a preserved issue will not occur if the supreme court's decision renders the issue moot or of no effect.

**SECTION 29.** 809.62(7) of the statutes is repealed.

IT IS FURTHER ORDERED that the Judicial Council Committee Comments are not adopted, but will be published and may be consulted for guidance in interpreting and applying Wis. Stat. §§ 809.30, 809.32 and 809.62.

IT IS FURTHER ORDERED that notice of these amendments to Wis. Stat. §§ 809.30, 809.32, and 809.62 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.

ANNETTE KINGSLAND ZIEGLER, J., did not participate.

Dated at Madison, Wisconsin, this 30th day of July, 2008.

BY THE COURT:

David R. Schanker  
Clerk of Supreme Court

