STATE OF WISCONSIN
SUPREME COURT

In re:

PROPOSED AMENDMENTS TO WIS. STAT. §§ 809.30, 809.32 and 809.62

PETITION OF JUDICIAL COUNCIL FOR AMENDMENTS TO §§ 809.30, 809.32 AND 809.62 OF THE RULES OF APPELLATE PROCEDURE

The Wisconsin Judicial Council respectfully petitions this Court for an order pursuant to WIS. STAT. § 751.12, adopting these proposed amendments to §§ 809.30, 809.32 and 809.62, Rules of Appellate Procedure. The Judicial Council Appellate Procedure Committee's explanations for the proposed amendments, entitled "JUDICIAL COUNCIL COMMITTEE NOTES" and a discussion of "Matters not addressed in this petition," follow the text of the proposed amendments.

The proposed amendments to Rule 809.62 address concerns first raised by the supreme court in 1993, when it sought amendment of the rules to require identification of all issues that may be presented, whether by the petitioner or the respondent, should it grant a particular petition. The supreme court was concerned about granting a petition raising one discrete issue, only to learn after briefing that the respondent wished to argue unrelated issues in support of the court of appeals' result in its favor. *See* S. CT. ORDER 93-17 (June 7, 1993).

The rule changes proposed by the court in 1993 required a respondent to specify the issues that the respondent sought to have reviewed that were not set forth in the petition for review, prohibited argument in the briefs or at oral argument on issues not set forth in the petition for review or the response unless ordered by the supreme court, and added language consistent with the practice of presenting issues to the supreme court for review when the issues had not been decided by the court of appeals. The objectives of these proposed changes were to inform the supreme court what issues were likely to be dispositive of the case, whether the issues presented were worthy of review, and what other issues might need to be decided in the interest of judicial economy. Public hearings exposed concerns with the proposed changes that could not be overcome. Those concerns included: the changes would force the Department of Justice to file more responses, it was unclear whether it was necessary for a respondent to raise issues in a petition for cross-review, and respondents feared that requiring issues to be raised in a response to the petition would undercut the rule in *State v. Holt*, 128 Wis. 2d 110, 125 N.W.2d 679 (Ct. App. 1985) (appellate court may sustain a lower court's ruling on a theory or on reasoning not presented to the lower court.). Alternative drafts were submitted to the

court by the Department of Justice and the Office of the State Public Defender, but no changes were adopted.

In 1999, the Supreme Court asked the Appellate Practice Section of the State Bar of Wisconsin and the Judicial Council Appellate Procedure Committee to advise whether changes to the rules were necessary to clarify what must be contained in a petition for review and a petition for cross-review to preserve issues for review in the wake of *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999) (respondent cannot argue issue raised below unless the issue was raised in a petition for cross-review) and, if so, what those changes might be. The court observed that "questions continue to arise concerning whether a respondent must raise an issue by cross-petition to preserve it or may raise it in a brief." The court enclosed copies of its materials from the 1993 rule change petition.

In response to the court's 1999 request, the Appellate Practice Section solicited input from its members on these matters and deferred to the Judicial Council to propose changes to the rules. The Judicial Council committee reviewed the 1993 rule change petition materials forwarded by the court and researched the issues presented. The Judicial Council committee also sought additional input from the Criminal Law Section of the State Bar and the Wisconsin Association of Criminal Defense Lawyers.

Beginning in 2001, the Council committee created numerous drafts of proposals to address the court's concerns, and others that became apparent. The Council committee co-chairs were the Hon. Ted E. Wedemeyer, Jr., Court of Appeals, and Attorney Marla J. Stephens, Appellate Division Director for the Wisconsin Public Defender. Committee members included Margaret Carlson, Chief Staff Attorney for the Court of Appeals; Assistant Attorneys General Mary E. Burke, William Gansner, Christopher Wren and Gregory M. Weber, Wisconsin Department of Justice; First Assistant State Public Defender Joseph N. Ehmann; Attorney Beth Ermatinger Hanan, Gass, Weber, Mullins LLC; and Attorney Robert Henak, Henak Law Office, S.C., who was appointed to the committee as a representative of the Wisconsin Association of Criminal Defense Lawyers on an *ad hoc* basis for this project, and who took the lead in drafting this petition. Although the Council committee was unable to reach consensus on every proposal, this petition has been thoroughly aired and considered, is responsive to this court's request, and represents the committee's best effort.

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

809.30(2)(b) *Notice of intent to pursue postconviction or postdisposition relief.* 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 and on the day thereof. The notice shall include all of the following …

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.30:

The amendment to (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 Rule 808.04(8).

B. SECTION 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 to 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~~ 30 days after the service of the supplemental petition.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.32:

New content requirements in Rule 809.62 (3) also apply to respondents in the no-merit petition for review context. Consequently, amended Rule 809.32(4) expands the time limit for filing a response to a no-merit petition for review from 14 to 30 days.

C. SECTION 809.62 (1) of the statutes is amended to read:

809.62. Petition for review

(1) **General rule; time limit.** 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.

(1g) **Criteria for granting review.** 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:

(a) A real and significant question of federal or state constitutional law is presented.

(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.62(1) AND (1g):

Rules 809.62 (1) and (1g) 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.

D. SECTION 809.62 (1r) of the statutes is created to read:

(1r) **Adverse decision defined.** As used in this rule, an "adverse decision" is 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 the party seeking review. Where the court of appeals denied or failed to grant the full relief sought by the party, that court's denial of or failure to grant full relief or denial of the preferred form of relief constitutes an adverse decision for purposes of this rule. A party's disagreement with the court of appeals' language or rationale in granting that party's requested relief does not render that court's resolution an adverse decision.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.62(1r):

New Rule 809.62(1r) addresses confusion regarding when action by the court of appeals may be deemed sufficiently "adverse" to a party's interests to permit a petition for review. This confusion arises from a perceived conflict between the meaning of that term applied in *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997), and that previously stated in *Neely v. State*, 89 Wis. 2d 755, 757-58, 279 N.W.2d 255 (1979). The definition in s. 809.62(1r) clarifies the matter by codifying the holding in *Neely*, 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(1r) 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.

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.

E. SECTION 809.62 (2) of the statutes is amended to read:

(2) **Contents of petition.** Except as provided in s. 809.32(4), the petition must contain:

(a) A statement of the issues ~~presented for~~ on which the petitioner seeks review, 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 must also identify any issues on which the petitioner seeks review that were not decided by the court of appeals. The statement of an issue will be deemed to comprise every subsidiary issue fairly included in it.

(b) A table of contents.

(c) A concise statement of the criteria of sub. ~~(1)~~(1g) relied upon to support the petition, or in the absence of any of the criteria, a concise statement of other substantial and compelling reasons for review.

(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.

(e) An argument amplifying the reasons relied on to support the petition, arranged in the order of the statement of issues presented. All contentions in support of the petition must be set forth in the petition. A memorandum in support of the petition is not permitted.

(f) An appendix containing, in the following order:

1. The decision and opinion of the court of appeals.

2. The ~~Judgment~~ 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.

3. Any other portions of the record necessary for an understanding of the petition.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.62(2):

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).

F. SECTION 809.62 (2m) of the statutes is amended to read:

(2m) **Inapplicable to parental consent to abortion cases.** Subsection (2) does not apply to a petition for review of an appeal that is governed by s. 809.105. A petition governed by that section shall comply with s. 809.105(11).

G. SECTION 809.62 (2r) of the statutes is amended to read:

(2r) **Application to termination of parental rights cases.** This section applies to petitions for review of an appeal under s. 809.107, except as provided in s. 809.107(6)(f).

H. SECTION 809.62 (3) of the statutes is amended to read:

(3) **Response to petition for review.** Except as provided in s. 809.32(4), an opposing party may file a response to the petition within ~~14~~ 30 days after the service of the petition. A response is not mandatory except when ordered by the supreme court. A petition will not be granted unless the opposing party either files a response or fails to comply with an order to file a response. If filed, the response must contain:

(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, and

(e) any other issues the court may need to decide if the petition is granted, a statement indicating 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.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.62(3):

Rule 809.62(3) is amended to require 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 new requirement applies whether or not the court of appeals actually decided the issues to be raised.

The amendments to Rule 809.62(3), consistent with United States Supreme Court rules, require 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. *See* U.S. Sup. Ct. Rule 15.2. To ensure that the respondent has sufficient time to comply with these new content requirements, the time for response is expanded from 14 to 30 days.

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. *See* Rule 809.62(7). 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).

Acknowledging the added workload placed upon respondents by the new content requirements, amended Rule 809.62(3) explicitly recognizes the practice in the United States Supreme Court (and informally followed in the Wisconsin Supreme Court) that a response (entitled a "brief in opposition" or "opposing brief" in United States Supreme Court) is not mandatory unless ordered by the Court. *See* U.S. Sup. Ct. Rule 15.1. The amended rule also incorporates the practice in those courts that the supreme court will not grant review unless the opposing party first either files a response or fails to comply with an order to provide one.

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).

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

~~(7)~~ (3m) **Petition for Cross-Review.** (a) **When required; time limit.** A party who seeks ~~a modification of~~ to reverse, vacate or modify an adverse decision of the court of appeals ~~may~~ 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) **When not necessary.**

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.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.62(3m):

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), and generalized confusion over whether something is a separate "issue" or merely another "argument" supporting a party's position on a single issue. Compare, for instance, the majority and dissenting opinions in *State v. Weber*, 164 Wis. 2d 788, 476 N.W.2d 867 (1991), *originally reported at* 163 Wis. 2d 116, 471 N.W.2d 187 (1991).

Rule 809.62(3m)(b) resolves the tension between *Scheidell* and *Jamie L.* by clarifying 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 (7), and the failure to do so may be deemed a waiver.

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).

J. SECTION 809.62 (4) of the statutes is amended to read:

(4) **Form and length requirements.** The petition for review and response, if any, shall conform to s. 809.19(8)(b) and (d) as to form and certification, shall be as short as possible, and may not exceed 35 pages in length if a monospaced font is used or 8,000 words if a proportional serif font is used, exclusive of appendix. The petition for review and the response shall have a white cover and a party shall file 10 copies with the clerk of the supreme court.

K. SECTION 809.62 (5) of the statutes is created to read:

(5) **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.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.62(5):

New Rule 809.62(5) 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.

L. SECTION 809.62 (6) of the statutes is created to read:

~~(5)~~ (6) **Effect on court of appeals proceedings.** Except as provided in s. 809.24, the filing of the petition stays further proceedings in the court of appeals.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.62(6):

Rule 809.62(6) is former Rule 809.62(5) renumbered.

M. SECTION 809.62 (7) of the statutes is created to read:

~~(6)~~ (7) **Conditions of grant of review.** 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 or response 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 or a response 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.

JUDICIAL COUNCIL COMMITTEE NOTE TO RULE 809.62(7):

Rule 809.62(7) is former Rule 809.62(6) renumbered and amended. The last sentence 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(7) 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.

N. Matters not addressed in this petition:

There are circumstances in which new matters are raised in a response to the petition for review that demand a reply from the petitioner. The purpose of such a reply is to avoid misleading the supreme court regarding facts or alleged defects that could prevent review of an issue on the merits if review is granted. Explicitly requiring a respondent to raise any alternative grounds for affirming the court of appeals' decision will enhance the need for such a reply. Because current Wisconsin procedure does not expressly provide for a reply, the Judicial Council Appellate Procedure Committee considered a new rule that would allow a brief reply, limited to addressing matters first raised in the response:

> Within 14 days of the service of the response, the petitioner may file a reply limited to addressing new points raised in the response. The reply shall conform to s. 809.19(8)(b) and (d) as to form and certification and shall not exceed 13 pages in length if a monospaced font is used or 3,000 words if a proportional serif font is used.

The United States Supreme Court has a similar provision, *see* U.S. Sup. Ct. Rule 15.6, as do several other states. *See* Ala. R. App. P. 39(f)(3); Calif. App. R. 28(d); CO App. R. 53(d); Ind. R. App. P. 57(E); Kan. R. S&A Cts. Rule 8.03(d); OK S. Ct. Rule 1.179(c); Tex. R. App. P. 53.5; Utah R. App. P. 50(e); Wash. R. App. P. 13.4(d). *But see* Az. R. Civ. App. P. 23(e) (reply not permitted); Ill. S. Ct. R. 315(e) (same); Ohio S. Ct. Rule III (3)(B) (same); Tenn. R. App. P. 11(d).

Upon further consideration, however, the council committee determined that an express rule would be unnecessary, as parties already may seek leave by motion to file such a reply in the extraordinary circumstance when one may be necessary to avoid misleading the supreme court. *See* Rule 809.14.

Finally, the council committee also considered addressing the distinction between "issues" and "arguments," *see Weber*, *supra*, but determined that any effort to do so in the rules would be more confusing than helpful.

O. CONCLUSION:

The Judicial Council respectfully requests that this Court adopt the proposed amendments to §§ 809.30, 809.32 and 809.62, Rules of Appellate Procedure.

Further, the Judicial Council respectfully requests that this Court publish the Judicial Council Committee Notes to the adopted amendments.

RESPECTFULLY SUBMITTED,

JUDICIAL COUNCIL

_____ _____

by: James C. Alexander Date
State Bar #1013971
110 East Main Street, Suite 606
Madison, WI 53703-3328
(608) 266-7637