STATE OF WISCONSIN
SUPREME COURT

Case No. 2010AP387-CR

In the Matter of Sanctions Imposed by the Court of Appeals in *State v. Gregory K. Nielsen,* 2010AP387-CR:

STATE ex rel. OFFICE OF THE STATE PUBLIC DEFENDER,

Petitioner,

vs.

WISCONSIN COURT OF APPEALS,

Respondent.

REQUEST FOR REVIEW OF DECISION BY COURT OF APPEALS, DISTRICT II, ON APPEAL FROM THE CIRCUIT COURT OF RACINE COUNTY, CASE NO. 08-CF-982, THE HONORABLE FAYE M. FLANCHER, PRESIDING

RESPONSE TO PETITION FOR REVIEW AND PETITION FOR SUPERVISORY WRIT BY RESPONDENT, WISCONSIN COURT OF APPEALS

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ISSUES PRESENTED FOR REVIEW

1. Did the court of appeals erroneously exercise its discretion in imposing a cost pursuant to Wis. Stat. (Rule) § 809.83(2) for non-compliance with the appendix certification rule, Wis. Stat. (Rule) § 809.19(2)(b)?
    - Question first posed to this Court.
2. Is the imposition of costs pursuant to Wis. Stat. (Rule) § 809.83(2), for non-compliance with the appendix certification rule, an unconstitutional denial of due process?
    - Question first posed to this Court.
3. Is Wisconsin Statute (Rule) § 809.19(2)(a), unconstitutionally vague on its face or as applied for purposes of imposing a penalty or costs?
    - Question first posed to this Court.
4. When the court of appeals describes the filing of a false appendix certification as an ethics violation, does that description circumvent or supplant the procedure for resolving issues established by this Court by its creation of the Office of Lawyer Regulation?[1]
    - Question first posed to this Court.

SUMMARY OF POSITION

In responding to the Petition for review, the court of appeals will offer some historical understanding of the purpose of the appendix rules, and how the appellate costs rules have aided their enforcement. Appellate appendices are not advocacy pieces, but are intended to be useful, candid record tools for high-volume appellate courts. Appellate procedure is usually modified by a rules petition, and not by a Petition for Review.

[1] This Response addresses Petitioner's third issue second, so that the constitutional arguments are sequential.

The Petition contends that the court of appeals erroneously exercised its discretion by imposing $150 in costs on Mr. Nielsen's counsel pursuant to Wis. Stat. (Rule) § 809.83(2), for non-compliance with the supreme court rules governing appendix content and certification, Wis. Stat. (Rules) §§ 809.19(2)(a) and (b). On appeal, Nielsen's counsel challenged the circuit court's exercise of discretion in sentencing, and failed to provide the full transcript of the circuit court's sentencing rationale. The court of appeals contends that the imposition was not an erroneous exercise of discretion.

The Petition also challenges the imposition of costs pursuant to Wis. Stat. (Rule) § 809.83(2), for enforcement of the procedural rules – established by the supreme court for appendix content and certification without separate notice and opportunity to be heard – as an unconstitutional violation of due process.[2] Pet. at 2. As explained below, the court of appeals considers the existing notice and opportunity to contest costs imposed for non-compliant appendices to be constitutionally adequate.

Additionally, the Petitioner contends that the appendix content rule is unconstitutionally vague. The court of appeals submits that the rule – requiring the findings or opinion of the circuit court and portions of the record essential to an understanding of the issues raised, including oral and written rulings or decisions showing the circuit court's reasoning – is a clear one, particularly as it is meant for an audience of lawyers and not

[2] The Petition does not seek review on Mr. Nielsen's behalf of any substantive determination regarding his sentencing.

pro se parties. The appendix content and certification rules were adopted by the supreme court pursuant to petitions, with public comment afforded. To the court of appeals' knowledge, no party has sought to change the rules pursuant to the rules petition process, nor has the Petitioner suggested alternative language. Nor is the court of appeals aware of any challenge to the clarity of the comparable appendix rule for submissions to this Court, Wis. Stat. (Rule) § 809.62(2)(f).

As this Court is aware, the supreme court rules governing appendix content and certification, as well as the rule authorizing costs and penalties, have been in place for many years. These rules provide notice to attorneys throughout the State. Moreover, the court of appeals provides a 30-day period for payment – sufficient time to seek reconsideration under Wis. Stat. (Rule) § 809.24. Further review is also available through the petition process of Wis. Stat. (Rule) § 809.62. Finally, and perhaps most importantly, the Petition overlooks the fact that these rules were implemented by the supreme court pursuant to petitions to amend the rules.[3] The court of appeals submits that the rules are constitutionally sound and as such Petitioner has not established grounds for review. To the extent, however, that changes are deemed desirable, the court respectfully

[3] This Court has rule-making authority under Wis. Const., Art. VII, § 3(1) and Wis. Stat. § 751.12. Creation or modification of a rule concerning pleading, practice or procedure begins with the filing of a rules petition. The rule-making process is described in Wis. S. Ct. Internal Operating Procedures, III.A, B, and allows for public notice and participation.

suggests that the rules petition process would be an appropriate forum to consider these issues.

The third issue raised by the OSPD likewise does not meet review criteria. The OSPD contends that the court of appeals' identification of procedural non-compliance with the imposition of costs, and comment as to ethical lapses usurp the prerogative of the Office of Lawyer Regulation to investigate and make recommendations for lawyer discipline. But Wisconsin appellate decisions have described substantive flaws as well as procedural non-compliance for years, with no requirement that identified concerns be referred or deferred to OLR. The court of appeals' identification of non-compliance does not deprive the lawyer of any process due, nor does it deprive OLR of any of authority granted by this Court.

In sum, the court of appeals submits that the present Petition does not meet the criteria for this Court's discretionary review because adequate notice and process already exist. Nor have the criteria for a Petition for Supervisory Writ been met because the OSPD's call for supervision – if needed – is appropriately met via a new rules petition. Nonetheless, should this Court conclude at any juncture that the appendix rules and the rule authorizing costs for non-compliance should be reconsidered, the court of appeals stands ready to comply.

STATEMENT OF THE CASE

A. Genesis of the Procedural Rules Challenged by the Petition.

Before institution of the Wisconsin Court of Appeals, the appellate procedural rules required an appellant to provide the entire lower court record relevant to the issue(s) on appeal. *See,* Wis. Stat. § 251.34(5)(c) (1961) (requiring an abridgment of the appeal record, including the transcript, but only so much thereof as is necessary and material to a consideration of the questions involved.) Even then, appellate lawyers did not always comply with the appendix content rules, and thus our supreme court occasionally sanctioned counsel for non-compliance. *See e.g.*, *Carson v. Pape*, 15 Wis. 2d 300, 310, 112 N.W.2d 693 (1961) (content of appendix deficient under former SCR 6(2, 3) and 5(a-d); double costs imposed); *Reserve Supply Co. v. Viner*, 9 Wis. 2d 530, 534, 101 N.W.2d 663 (1960) (criticizing insufficient appendix and denying costs normally available to prevailing party). After the court of appeals was created, the appendix rules were changed so as to focus on the findings, opinion and reasoning of the circuit court essential to an understanding of the issues raised. The current rule provides:

> (2) Appendix. (a) Contents. The appellant's brief shall include a short appendix containing, at a minimum, the findings or opinion of the circuit court, limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues, and a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b). If the appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix shall also contain the findings of fact and conclusions of law, if any, and final decision of the administrative

> agency. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Wis. Stat. (Rule) § 809.19(2).

In 2005, our supreme court also amended § 809.19(2), Wis. Stat., to require that attorneys certify compliance with the appendix content rule. *See* S. Ct. Order 04-11, 2005 WI 149, 283 Wis. 2d xix, cmt. at xx (effective Jan. 1, 2006). This rule provides:

> An appellant's counsel shall append to the appendix a signed certification that the appendix meets the content requirements of par. (a) in the following form:
>
> > I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

Wis. Stat. (Rule) § 809.19(2)(b).

While the instant Petition challenges the appendix content rule, it effectively seeks review of the appellate rule addressing non-compliance with procedural rules, Wis. Stat. (Rule) § 809.83(2). Any modification of the process required to impose costs presumably should affect not only those cases where the court of appeals finds an appendix rule violation, but cases where this Court or the court of appeals finds any procedural rule violation.

Practically speaking, both the appendix rule and the costs rule substantially affect the work of the court of appeals because the court of appeals, primarily an error-correcting court, processes more than 3,000 appeals each year. Before court reorganization, this Court was a high-volume court just as the court of appeals is today. At that time, this Court emphasized the importance of the appendix to its fast-paced, high-volume appellate courts:

> The volume of work to be done by this court does not leave time for the justice to search the original record for each one to discover, if he [or she] can, whether appellant should prevail. An appendix conforming to [the supreme court rule] makes readily available to each justice the matters which he [or she] must know if he [or she] is to give intelligent attention to the issues presented by the appeal. It is counsel's duty to the court as well as to his [or her] client to furnish it (citation omitted).

Dutcher v. Phoenix Ins. Co., 37 Wis. 2d 591, 609-10, 155 N.W.2d 609 (1968), describing the purpose of the former SCR 34(5) and Wis. Stat. § 251.34(5)(c) requiring an appendix.

Dutcher has not lost its vitality over the years. In fact, when this Court adopted Wis. Stat. (Rule) § 809.19(2) as a result of a rules petition submitted by the court of appeals in 2001, *see* Petition 01-04, it approved as comment the following:

> As the number of appeals has increased, the court's reliance on appendices during the decision-making process has increased. The Court of Appeals requests that Wis. Stat. § (Rule) 809.19(2)(b) be created to require that appellant's counsel certify compliance with Wis. Stat. § (Rule) 809.19(2)(a) as renumbered by this order, that requires an appellant's brief to include an appendix and sets forth the contents of the appendix. The Court of Appeals believes that a certification requirement, similar to the form and length

> certification required by Wis. Stat. § (Rule) 809.19(8)(d) will result in increased compliance with renumbered Wis. Stat. § (Rule) 809.19(2)(a) and improve the quality of appendices that are filed with the court.

Comment, October 2005, to Wis. Stat. (Rule) § 809.19(2)(b).

B. The Scope of OLR Authority.

This Court has supervisory authority over the practice of law in Wisconsin. Wis. Const. Art. VII, § 3(1). Pursuant to that authority, the Court established the Office of Lawyer Regulation. OLR's scope of responsibility is set out at SCR 21:02:

> The office receives and responds to inquiries and grievances relating to attorneys licensed to practice law or practicing law in Wisconsin and, when appropriate, investigates allegations of attorney misconduct or medical incapacity, and may divert a matter to an alternative discipline program. The office is responsible for the prosecution of disciplinary proceedings alleging attorney misconduct and proceedings alleging attorney incapacity and the investigation of license reinstatement petitions.

As currently framed, those regulations do not prohibit appellate courts from noting and sanctioning non-compliance with the procedural rules by the work lawyers submit to them.

ARGUMENT

I. SUPREME COURT REVIEW IS UNNECESSARY.

A. Review of the Discretionary Decision to Impose Costs in *Nielsen* is not Necessary.

The OSPD asks that, at a minimum, the costs imposed against Mr. Nielsen's counsel be reviewed and reversed. A court's imposition of costs as a sanction is a discretionary matter, and is subject to review "for an

erroneous exercise of discretion." *Schultz v. Sykes*, 2001 WI App 255, ¶ 8, 248 Wis. 2d 746, 638 N.W.2d 604.

This Court ordinarily does not review an exercise of the court of appeals' discretion. *Raz v. Brown*, 2003 WI 29, ¶ 14, 260 Wis. 2d 614, 660 N.W.2d 647. The question is not whether this Court as an original matter would have imposed the costs, but whether the court of appeals erred in the exercise of its discretion in doing so. *See Raz*, 2003 WI 29, ¶ 15 ("A discretionary decision will be upheld if the court being reviewed examined the relevant facts, applied a proper standard of law, and used a demonstrative rational process in reaching a decision that a reasonable judge could reach.")

The Petition does not meet the criteria for discretionary review of the costs reached in the appeal below. To begin, the court of appeals examined the facts, applied the proper standard, and reached a reasonable decision in concluding that the appendix was non-compliant. Mr. Nielsen raised only one issue on appeal – that the circuit court violated *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, by sentencing him without adequately explaining its rationale. *See* App. at 106, 108. A *Gallion* claim requires the court of appeals to examine the circuit court's ruling setting forth its sentencing rationale to evaluate whether the circuit court adequately set forth the basis for the sentence. *See Gallion*, 2004 WI 42, ¶ 76, (requiring the court of appeals to "more closely scrutinize the record" when examining the rationales of sentencing judges). In this circumstance, the requirement of Wis. Stat. (Rule) § 809.19(2)(a) that counsel supply all

of the applicable "portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues" is especially important – it is precisely that ruling that is being challenged and considered on appeal.

In the appeal below, Mr. Nielsen's counsel included only a limited portion of the circuit court's sentencing ruling, specifically failing to include portions where the court discussed Nielsen's character, including his history of lying to authority figures and his prior rejection of substance-abuse treatment. *See State v. Nielsen*, at 3 n.2, App. 103. Counsel included only three pages of transcript for a sentencing where Mr. Nielsen was sentenced to nine years in prison, *see* App. at 123-25, even though his appeal was based solely on the claim that the circuit court failed to adequately explain his sentence. Given this material shortcoming in the appendix, the court of appeals reasonably concluded that counsel had violated Wis. Stat. (Rule) § 809.19(2)(a). *See State v. Nielsen*, at 3 n.2, App. 103. It then sanctioned counsel, as specifically allowed by Wis. Stat. (Rule) § 809.83(2), and imposed a modest fine, *see* *Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185, 187 (7th Cir. 1995) (characterizing a $100 sanction as "very modest"). Such actions were not an improper exercise of discretion.[4]

[4] The Petition itself fails to provide the "missing" sentencing transcript that the court of appeals determined should have been provided originally. This deficit does not seem to comply with the supreme court's appendix rule, Wis. Stat. (Rule) § 809.62(2)(f), which requires inclusion of "the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court . . . necessary for an understanding of the petition," as well as "any other portins of the record necessary for an understanding of the petition." *State v. Nielsen*, at 3 n.2, App.103.

Moreover, the imposition of costs is directly in line with other instances of appendix rule non-compliance. *See* *State v. Bons*, 2007 WI App 124, ¶ 23-25, 301 Wis. 2d 227, 731 N.W.2d 376. This conformity demonstrates that a "reasonable judge" could impose (and, in fact, has imposed) similar costs.

In short, the Petition fails to show that the court of appeals erroneously exercised its discretion by imposing costs on Mr. Nielsen's counsel for her plain violation of Wis. Stat. (Rule) § 809.19(2)(b). The court of appeals submits that review is not necessary.

B. Existing Process is Constitutionally Adequate.

Determining whether the court of appeals has the authority to impose costs for non-compliance under Wis. Stat. (Rule) § 809.83(2) pursuant to existing process is a question of law this Court reviews independently. *See* *Christensen v. Sullivan*, 2009 WI 87, ¶ 42, 320 Wis. 2d 76, 768 N.W.2d 798 (reviewing circuit court's imposition of remedial sanctions for contempt of court). Review is unnecessary because the court of appeals' authority to impose costs on appendix rule violators is supported by the adequate, existing opportunities for notice of the penalty and the potential to challenge it.

"The fundamental requirements of procedural due process are notice and an opportunity to be heard." *Mid-Plains Telephone, Inc. v. Public Serv. Comm'n*, 56 Wis. 2d 780, 785-86, 202 N.W.2d 907 (1973). Notice "must be of such a nature as to reasonably convey the required information" and must "afford a reasonable time for those interested" to

act. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Yet, "[d]ue process is flexible and requires only such procedural protections as the particular situation demands." *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 512, 261 N.W.2d 434 (1978); *Neylan v. Vorwald*, 124 Wis. 2d 85, 90, 368 N.W.2d 648 (1985).

While the imposition of a modest penalty or cost gives rise to some measure of due process, arguably the protection required is narrowly defined. *See, e.g., Devaney v. Cont'l Am. Ins. Co.*, 989 F.2d 1154, 1161 (11th Cir. 1993) (explaining that "monetary sanctions" are an area "where due process protection is narrowly defined" and that a reduced level of process was adequate where a lawyer "was or should have been aware that his conduct in the litigation would likely result in sanctions against him.").

Once a protectable interest is confirmed, the court balances three factors to determine what process is due. *State v. Nordness*, 128 Wis. 2d 15, 30, 381 N.W.2d 300 (1986). Those factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Nordness, 128 Wis. 2d at 31-32, citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The United States Supreme Court has explained that actual notice and a hearing may not be necessary where the party has constructive notice through other means, orders or rules of the court as to what the specific

consequences of his conduct might be. *Neylan*, 124 Wis. 2d at 90, citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962). Here the private interest in process is satisfied, because the appellate lawyer has had at least constructive notice of the appendix content and non-compliance rules. Lawyers generally are expected to be aware of the local and procedural rules of the court in front of which they practice. *See McDonald v. State*, 146 S.W.3d 883, 889 (Ark. 2004) (explaining that "[a]n attorney is expected to know the law" in a case where the counsel for a criminal defendant failed to properly file a notice of appeal).

Rule 809.83(2) unambiguously describes the array of potential consequences when a person does not comply with procedural rules such as § 809.19(2). The fact that § 809.83(2) permits "imposition of a penalty or costs on a party or counsel" is constructive notice that a lawyer who does not comply with the appendix rules may be assessed a monetary penalty.

In addition, § 809.83(2) is closely akin to § 805.03, Wis. Stat., which deals "with the failure of a party to comply with statutes governing procedure in civil actions or to obey any order of a court." *Neylan*, 124 Wis. 2d at 93. Deeming the latter rule to provide constructive notice of potential penalties, this Court reasoned, "such conduct requirement is precise and ascertainable by a party and therefore subject to the sanction of § 804.12(2)(a)." *Id.* Similarly, because §§ 809.19(2) and 809.83(2) are published, are clear, and are repeatedly enforced in public decisions, counsel such as Nielsen's has constitutionally sufficient notice of the implications of their conduct.

Under existing process, the value of any additional procedure is unlikely to reduce the already low risk of erroneous deprivation and must be weighed against the additional burden and cost on the courts. *See* *In re Commitment of Kaminski*, 2009 WI App. 175, ¶¶ 15-16, 322 Wis. 2d 653, 777 N.W.2d 654 (weighing state's significant interest in preventing predatory conduct with minimal risk of erroneous deprivation under existing procedure and negligible additional value of adding a new preliminary relevance standard). Given the lawyer's expected knowledge of the rules, the lawyer's intimate knowledge of the issues in his or her appeal and consequently which record items should be included in the appendix, as well as the appellate court's familiarity with the particular legal issues on appeal, adding more procedure to Wis. Stat. (Rule) § 809.83(2) is unlikely to reduce the risk of erroneous deprivation.

Moreover, aggrieved lawyers found to be in non-compliance with a procedural rule already have the opportunity to file a motion for reconsideration. *See* Wis. Stat. (Rule) § 809.24(1).[5] The rule providing for reconsideration has been in place since 2001. *See* Order No. 00-02. Before that time, parties and lawyers filed motions for reconsideration pursuant to the court of appeals Internal Operating Procedures. *See* Judicial Council Note, 2001, to Wis. Stat. (Rule) § 809.24.

Reconsideration of appellate costs is similar to the "escape hatch" of a motion for relief from judgment, a process which renders any lack of

[5] A motion under § 809.24 must state with particularity the points of law or fact alleged to be in error and must include supporting argument.

prior notice of less consequence. *See Neylan*, 124 Wis. 2d at 96-97, citing *Link*, 370 U.S. at 632. Reconsideration as a process to challenge imposition of the OSPD's costs in the *Nielsen* case was available up to 20 days after the *Nielsen* decision issued. Consequently, the court of appeals does not view the existing process to be constitutionally deficient. But to the extent this Court deems additional process desirable, we submit that any analysis should include weighing the additional burdens and costs to be placed on our appellate courts.

1. The determination of whether to impose costs for a faulty appendix certification/procedural violation is not analogous to a determination of frivolousness.

Some might liken the process afforded in sanctioning frivolous appeals to the process afforded in imposing costs for deficient appendices. But ascertaining whether an appeal is frivolous is far more fact intensive than determining whether an appendix is deficient. Consequently, less process is required for the latter determination.

Wisconsin Stat. (Rule) § 809.25(3) requires a party to file a motion alleging that an appeal is frivolous. *See* *Howell v. Denomie*, 2005 WI 81, ¶ 19, 282 Wis. 2d 130, 698 N.W.2d 621. The court of appeals may make its own motion, but must allow the parties an opportunity to be heard on the frivolousness question before making its determination. *Id.* In the event an appeal is determined to be frivolous, costs, fees and reasonable attorney fees may be awarded to the respondent. Wis. Stat. (Rule) § 809.25(3)(a).

Determining whether an appeal is frivolous is usually a complicated and fact-intensive analysis. *See* *Mars Steel Corp. v. Continental Bank N.A.*,

880 F.2d 928, 933 (7th Cir. 1989) (explaining that "whether a legal position is far *enough* off the mark to be 'frivolous'" is a "fact-bound dispute" (emphasis in original)); *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 591 (6th Cir. 1987) (explaining that "[f]rivolity, like obscenity, is often difficult to define" and describing the effect of frivolous appeals on "courts struggling to remain afloat in a constantly rising sea of litigation."). A determination of frivolousness on appeal is a mixed question of law and fact, which includes a determination that the appellant should have known that the appeal had no reasonable basis in law or in equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *Howell*, 2005 WI 81, ¶¶ 8-9, quoting Wis. Stat. (Rule) § 809.25(3)(c)2 (alterations omitted). Under this objective standard, the appellate court looks to what a reasonable party or lawyer knew or should have known under the same or similar circumstances. *Id.*, 2005 WI 81, ¶ 9 (citations omitted).

The straight-forward determination of an appendix content and certification violation is simply not comparable to a determination of frivolousness. Therefore, the determination requires less process. *See Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶ 49, 244 Wis 2d 333, 627 N.W.2d 866 (explaining that "[t]he type of hearing [required by due process] depends upon the nature of the case").

2. Imposing costs for appendix violations is not the same as finding contempt.

Analogizing the process due for a contempt sanction to that required for appendix rules violations is also inapt. The differences are meaningful in a due process analysis which considers the particular circumstances.

There is no dispute that persons found to be in contempt, even summary contempt, have a right to dispute the finding, otherwise known as "allocution." *See, e.g.*, *State v. Kruse*, 194 Wis. 2d 418, 435, 533 N.W.2d 819 (1995). Persons found in contempt have included lawyers, and often persons not familiar with court rules and decorum such as litigants, witnesses and observers. The United States Supreme Court has recognized that opportunity for allocution is "essential in view of the heightened potential for abuse posed by the contempt power." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968). But the issue presented here concerns rules applicable only to appellate lawyers, hardly a "heightened potential for abuse." As explained above, the method by which the court of appeals has enforced and applied those rules is to lay out its findings of violation, determine an appropriate level of costs, and set a 30-day deadline for payment of those costs. Within that 30-day timeframe is the 20-day window to file a motion for reconsideration, as well as the 30-day window for filing a petition for review. In short, the lawyer has adequate process to challenge the imposition of costs before payment is due.

3. Imposing costs for non-compliant appendices is akin to imposing costs and fees against a party under Wis. Stat. (Rule) §§ 809.50 or 809.51.

A more appropriate analogy to appendix rule costs are the costs imposed under Wis. Stat. §§ 809.50 and 809.51. Those rules also grant the court of appeals wide discretion to impose costs against parties in petition-for-leave-to-appeal and writ proceedings, respectively. *See* Wis. Stat. § 809.50(2) ("Costs and fees may be awarded against any party in a petition for leave to appeal proceeding"); Wis. Stat. § 809.51(3) ("Costs and fees may be awarded against any party in a writ proceeding."). Neither sections 809.83(2), 809.50, nor 809.51 expressly require a court to grant separate notice and a hearing before imposing sanctions, costs, or fees. The Petition thus calls into question the enforcement of a broad range of rules governing appellate procedure.

C. The Appendix Rules are not Unconstitutionally Vague.

1. The appendix content rules are sufficiently clear.

The court of appeals respectfully submits that the appendix content rule, as presently written, is clear enough.

As the OSPD notes, Wisconsin courts use a two-part test when determining whether a statute is unconstitutionally vague. Pet. at 14. First, courts consider "whether the statute sufficiently warns persons wishing to obey the law that their conduct comes near the proscribed area." *See* *Larson v. Burmaster*, 2006 WI App 142, ¶ 29, 295 Wis. 2d 333, 720 N.W.2d 134. "The second prong is concerned with whether those who

must enforce and apply the law may do so without creating or applying their own standards." *Id.*

The OSPD's argument for review focuses on only portions of Wis. Stat. § 809.19(2)(a), and not the itemization supplied in subsection (b). *See* Pet. at 13-15. The Petition also fails to address how inclusion of the language "including oral or written rulings or decisions *showing the circuit court's reasoning* regarding those issues" is a significant part of the rule's clear directive.

The OSPD juxtaposes the provisions in § 809.19(2)(a) to include a "short" appendix, with the direction to include certain items "at a minimum." *See* Pet. at 14-15. The terms are not oxymoronic. It is no secret that the use of the term "short" is relative, used to distinguish this rule from the earlier requirement for "an abridgment of the appeal record, including the transcript." *See* Judicial Council Committee Note (1978) to Wis. Stat. (Rule) § 809.19(2). The "at a minimum" term arguably allows for advocacy in appending record items of counsel's choice, while erasing any guesswork as to the base requirements, particularly when read in conjunction with the itemized list in the certification rule, subsection (b). In sum, the subsection sufficiently warns persons wishing to obey the law when their conduct comes near the proscribed area. *See Cemetery Servs., Inc. v. Wis. Dep't. of Regulation & Licensing*, 221 Wis. 2d 817, 829, 586 N.W.2d 191 (Ct. App. 1998) (explaining that "a statute is not void for vagueness simply because in some particular instance some type of conduct may create a question about its impact under the statute").

The OSPD contends that the court of appeals must "create or apply [its] own standards" in order to enforce this rule. This is flatly wrong. If the claim is that the circuit court erred in its ruling or decision, as most appeals claim, it is easy for the lawyer to find that ruling or decision in the record and put it in an appendix. But even the arguably least definite portions of § 809.19(2)(b) – that the appendix include "portions of the record essential to an understanding of the issues raised" including those "showing the circuit court's reasoning regarding those issues" – provide sufficiently clear direction. Simply put, the rule requires counsel to supply that portion of the record which provides the context in which the issue arose, and to show the circuit court's full reasoning as to that issue. Of course, how the content requirement applies in a particular appeal will depend on the issues raised in each case. But just because the application of the rule depends on the facts of each appeal, or relies to some extent on the discretion of the court, does not mean that the court is "creating or applying [its] own standards." *See* *County of Jefferson v. Renz*, 222 Wis. 2d 424, 434-37, 588 N.W.2d 267 (Ct. App. 1998) (holding that a statute prohibiting mufflers from making "excessive or unusual noise" was not unconstitutionally vague), *rev'd on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 501 (1999); *State v. Hahn*, 221 Wis. 2d 670, 677, 586 N.W.2d 5 (Ct. App. 1998) (rejecting a vagueness challenge to a statute defining a "gambling machine," and explaining that "[w]ith respect to the enforcement element of the test, a statute is vague only if a trier of fact must apply its own standards of culpability rather than those set out in the

statute."). The Petition would transform the discretion involved in applying this rule into an unconstitutional "arbitrariness," but the clear language of the appendix rules belies that characterization.

2. There is no tension between zealous advocacy and compliance with the appendix certification rule.

An appellate appendix is not the place for advocacy. The appendix exists to aid the court's understanding of the record, not to promote one side's legal position.

The OSPD suggests that Nielsen's attorney was forced to choose between zealous advocacy by selectively including only certain portions of the sentencing rationale, versus her own interests in avoiding potential costs, and that such professional tension should be eliminated by providing another level of process. Pet. at 15, 18. The tension identified by the OSPD is illusory, however, because appellate lawyers in Wisconsin have owed a duty of candor to the courts virtually since statehood. *See also*, *Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986) ("these standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct"). Moreover, costs imposed for appendix violations are not tied to the ultimate outcome. *See, e.g.*, *State v. Bergwin*, 2010 WI App 137, ¶ 18, 793 N.W.2d 72 (imposing costs on counsel for defendant who prevailed on appeal) and *S.C. Johnson & Son, Inc. v. Morris*, 2010 WI App 6, ¶ 5, n.1, 322 Wis. 2d

766, 719 N.W.2d 19 (imposing costs on both sets of counsel in the same case.).

D. The Authority of OLR is not Supplanted when an Appellate Court Identifies Ethical Lapses by Appellate Counsel in a Written Opinion.

In Wisconsin, long before the appendix certification rule was effective – with the resultant false certifications – this Court and the court of appeals had noted instances where trial or appellate counsel violated rules of candor in a variety of ways. The courts have identified misstatements in briefs, *see* *State v. Lass*, 194 Wis. 2d 591, 605, 535 N.W.2d 904 (Ct. App. 1995) (citing SCR 20:3.3) and *Wisconsin Natural Gas Co. v. Gabe's Constr. Co.*, 220 Wis. 2d 14, 18 n.3 and 23 n.5, 582 N.W.2d 118 (Ct. App. 1998) (citing SCR 20:3.3 to admonish conduct of two different parties' counsel); and also cited SCR 20:3.3 when a lawyer failed to include record citations in his or her brief. *See, e.g.*, *Mogged v. Mogged*, 2000 WI App 39, ¶ 24, 233 Wis. 2d 90, 607 N.W.2d 662 (striking reply brief and dismissing cross-appeal as sanction under Wis. Stat. (Rule) § 809.83).

Indeed, this Court too has acknowledged such deficient conduct on at least several occasions. For example,

> - "[B]esides revealing a cavalier attitude toward the court and a callous disregard of its warnings and orders, this conduct reveals a violation of one of the most basic ethical precepts under which attorneys operate. . . . Deloitte's intentional misrepresentation of Mr. Nelson's availability violated the Attorney's Oath. This conduct also violated Supreme Court Rule 20:3.3 which requires candor toward the court. At the

very least, part of the remainder of the Deloitte misconduct we have discussed ran afoul of Supreme Court Rule 20:3.4's requirement of fairness to the opposing party and counsel." *Chevron Chem. Co. v. Deloitte & Touche*, 176 Wis. 2d 935, 946, 501 N.W.2d 15 (1993).

- Agreeing that unfamiliarity with the rules of procedure amounts to incompetence, and such incompetence was a reasonable basis for *pro hac vice* revocation under SCR 10:03(4); purpose of the rule is to "assure that the public 'is not put upon or damaged by inadequate or unethical counsel.'" *Filppula-McArthur ex rel. Angus v. Halloin*, 2001 WI 8, ¶¶ 36, 42, 241 Wis. 2d 110, 622 N.W.2d 436.

See also,

- Confirming circuit court's determination that contingent fee agreement "did not run afoul of our ethics code." *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 212, 496 N.W.2d 57 (1993).

- Declining to address arguments concerning ethical charges because those charges had not been raised earlier. The Court's reservation was not limited to ethical concerns raised only within OLR. *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 503, 577 N.W.2d 617 (1998).

None of these decisions identify themselves as a "public reprimand." *See* Pet. at 3.

Other courts likewise do not restrict the discussion of unethical lawyer conduct to disciplinary bodies. For example, in *Harlan v. Lewis*, 982 F.2d 1255, 1257 (8th Cir. 1993), the court considered whether a district court's imposition of sanctions pursuant to motion was an abuse of discretion, and whether it instead should have referred the matter to state disciplinary authorities. The district court had concluded that the lawyer's conduct violated the Model Rules of Conduct, and even if it did not violate

the Rules, it "was impermissible and unethical." 982 F.2d at 1260. The defendant argued that "the business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice before it unless the questioned behavior taints the trial of the cause." *Id.* He urged that possible ethical violations which surface during litigation are generally better addressed by the state and federal bar. But the Eighth Circuit recognized that the district court had inherent authority to preserve the integrity of its proceedings by imposing sanctions: "state disciplinary authorities may act in such cases if they choose, but this does not limit the power or responsibility of the district court." 982 F.2d at 1261.

In some instances, the conduct noted by the appellate courts may lead to investigation by OLR, but there is no evidence that OLR withholds investigations it otherwise would conduct, nor does the court's reference to a breach automatically mean that an OLR investigation will follow. To the extent the Petition asks for a new rule expressly prohibiting appellate courts from identifying unethical practice in the form of procedural violations, the court of appeals respectfully submits that such a rule is not needed. Even if it were, the better route would be via a rules petition, whereby all affected entities can contribute to the discussion.

II. THE CRITERIA FOR A PETITION FOR SUPERVISORY WRIT ARE NOT MET.

Normally, a petition for supervisory relief is not available to obtain review of discretionary acts. *State ex rel. Dressler v. Racine County Cir. Court*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991). Imposition

of modest costs is a discretionary act, whether imposed by a circuit court or an appellate court. To the extent the request for supervisory relief seeks review of the scope of the court of appeals' authority to impose costs for non-compliance, that is a question of law, but as explained below, still does not meet the criteria for supervisory relief.

Rule 809.71, Wis. Stat., allows a party to seek a supervisory writ from this Court if seeking the same relief from the court of appeals is "impractical." Here, the Petitioner had a practical opportunity for relief from the court of appeals – to file a motion for reconsideration pursuant to Wis. Stat. (Rule) § 809.24. Because the OSPD did not pursue that efficient and practical form of relief, its request for discretionary supervisory relief from this Court may be denied. *See* *Alt v. Cline*, 224 Wis. 2d 72, ¶ 49 *et seq.*, 589 N.W.2d 21 (1999).

Even if filing such a motion is deemed "impractical," the OSPD has adequate relief in pursuing a Petition for Review under Wis. Stat. § 809.62, as reflected by its direct challenge to the court of appeals' discretion in imposing the costs against Mr. Nielsen's counsel. *See Alt*, 224 Wis. 2d 72, ¶ 51 (direct appeal of a discretionary sanctions order was not an inadequate remedy). The same direct relief is available to challenge questions of law, such as whether the existing notice and process are constitutionally sufficient.

A second criterion for supervisory writ is that the asserted harm be "irreparable." Under the instant facts, the OSPD has been ordered to pay costs of $150 for violating a clear procedural rule. A financial obligation,

particularly a modest one, is seldom regarded as an "irreparable" harm. *Pure Milk Prod. Coop v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (an irreparable harm is one that cannot be adequately compensated by monetary damages). There is no indication that the OSPD has paid the $150, but instead within the time for payment has opted to file a Petition for Review.

The third criterion is that the court of appeals must have acted in clear violation of a plain duty. *See Alt*, 224 Wis. 2d 72, ¶ 53. For all the reasons discussed above in response to the Petition for Review, the court of appeals respectfully submits there is no "plain duty" to afford more notice, or more process, than already exists when an appellate court finds a violation of a well-established procedural rule and exercises its discretion to impose a modest fee (from an array of available sanctions) or to identify that violation in a decision on the merits.

For all of the reasons discussed above, the court of appeals respectfully requests dismissal of the Alternative Petition for Supervisory Writ.

CONCLUSION

In imposing costs against defense counsel's firm in the *Nielsen* case, and by enforcing the appendix content and certification rule in other cases via the costs statute, the court of appeals has hewed to established precedent as well as the rationale behind the rule-making undertaken by this Court over the last several decades. The Petition overlooks familiar, long-

standing procedural mechanisms to challenge such costs, when they are imposed.

The Wisconsin Court of Appeals acknowledges there may be broad interest in the issue presented, despite the existing, available process. If review is granted, or the questions posed are redirected to a rules petition, the court of appeals respectfully submits that neither mechanism should result in diminished enforceability of the appendix rules, because of their direct relation to the efficient administration of justice.

Dated this 18th day of February, 2011.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Response to Petition for Review, or, in the alternative, Petition for Supervisory Writ complies with the rules contained in Section 809.19(8)(b) and (d) of the Wisconsin Statutes for a Petition produced with a proportional serif font. The length of this Response is 7,019 words.

Dated this 18th day of February, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this response to petition, which complies with the requirements of § 809(12). I further certify that this electronic response to petition is identical in content and format to the printed form of the response to petition filed as of this date. A copy of this certificate has been served with the paper copies of this response to petition filed with the court and served on all opposing parties.

Dated: February 18, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2011, I filed with the Court by courier and served copies of Respondent's Response to Petition for Review, or, in the alternative, Petition for Supervisory Writ upon counsel for the parties by first class mail:

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