

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2010AP387-CR

In the matter of Sanctions Imposed by the Court of Appeals in *State*
v. Gregory K. Nielsen, Appeal No. 2010AP387-CR

STATE EX REL. OFFICE OF THE STATE PUBLIC DEFENDER,

Petitioner,

v.

WISCONSIN COURT OF APPEALS,

Respondent.

**NONPARTY BRIEF OF WISCONSIN ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS IN SUPPORT
OF PETITION FOR REVIEW**

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ARGUMENT

**REVIEW IS APPROPRIATE TO HARMONIZE
COURT OF APPEALS PRACTICE REGARDING
IMPOSITION OF SANCTIONS WITH THE
REQUIREMENTS OF DUE PROCESS
AND JUDICIAL ETHICS RULES**

The Wisconsin Association of Criminal Defense Lawyers (“WACDL”), submits this non-party brief in support of the State Public Defender’s Petition for Review or, in the Alternative, Petition for Supervisory Writ to address the Court of Appeals practice of imposing summary sanctions in its written decisions for what it deems to be violations of court and ethics rules. In addition to the reasons set forth in the Public Defender’s Petition, review is appropriate because the Court of Appeals’ application of Wis. Stat.

(Rule) 809.83(2) conflicts with SCR 60:04(1)(g).¹

By imposing sanctions on an attorney for what it subjectively perceives is a violation of either a court or ethics rule, without giving the attorney an opportunity to respond, the Court of Appeals deprives the attorney of his or her rights to notice and to be heard. That right is based not merely on constitutional guarantees of due process, as addressed in the State Public Defender's Petition, but on judicial ethical rules as well.

The Rules of Appellate Procedure provide that the “[f]ailure of a person to comply with . . . a requirement of these rules . . . is grounds for imposition of a penalty or costs on a party or counsel or other action as the court considers appropriate.” Wis. Stat. (Rule) 809.83(2). The Court's ability to impose such sanctions is important to deter violation of rules necessary to the fair and efficient working of the appellate process. *E.g.*, **State v. Bons**, 2007 WI App 124, 301 Wis.2d 227, 731 N.W.2d 367. At the same time, however, SCR 60:04(1)(g), governing judicial duties, states in relevant part: “[a] judge *shall accord* to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law.” (Emphasis added).

A harmonious existence of SCR 60:04(1)(g) and Wis. Stat. (Rule) 809.83(2) is possible. Whether by Order to Show Cause or other process allowing attorneys to be heard on the issue *prior* to the imposition of sanctions, the result required in Wis. Stat. (Rule) 809.83(2) is entirely attainable while protecting the rights of appellate attorneys against mistaken or misguided sanctions. *See, e.g.*, **Howell v. Denomie**, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621 (Court of Appeals may on its own motion raise a court rules violation issue, “but it must give notice that it is considering the issue and grant an opportunity for the parties and counsel to be heard before it makes a determination”). Such a process also protects the

¹ WACDL here addresses only the Court of Appeals' procedure for imposing sanctions, not the substantive question of whether the attorney in fact failed to comply with Wis. Stat. (Rule) 809.19.

Court of Appeals judges from themselves being sanctioned for violating SCR 60.04(1)(g).

The Court of Appeals' current practice of summarily sanctioning attorneys for perceived violations does not provide such harmony. Under that practice, wrongly sanctioned attorneys are limited to seeking reconsideration under Wis. Stat. (Rule) 809.24 or, as here, a petition for review to this Court. However, the right to be heard under SCR 60:04(1)(g) contemplates a right to be heard *before* the decision is made, not merely a post-decision request that the Court of Appeals exercise its discretion to undo what it just did, or a request that this Court exercise its discretion to hear the case.

A recent example of the damage caused by the Court of Appeals' current practice is *State v. Jones*, 2010 WI App 133, ___ Wis.2d ___, 791 N.W.2d. 390. Although the Court of Appeals did not impose a financial sanction in that case, it twice alleged that Jones' counsel had violated specific ethical rules requiring candor to the Court. *Id.* ¶25 n.5, ¶29. The Court of Appeals provided no prior notice that it believed there was anything inappropriate about counsel's presentation, and nothing in the state's response brief suggested as much. The Court nonetheless made those allegations in its decision and recommended it for publication. The Court of Appeals then summarily denied the motion of Jones' counsel for reconsideration addressing those points.

Despite undersigned counsel's motion to the Publication Committee explaining the clear errors in the *Jones* Court's analysis of the alleged ethical lapses and the impropriety of the Court's own actions absent prior notice and an opportunity to be heard on the matter, it nonetheless ordered the opinion published. Jones' petition for review currently is pending before this Court. Absent action by this Court on that petition, therefore, Jones' attorney will forever be saddled with a published decision wrongfully alleging her violation of ethical standards. The Court of Appeals effectively imposed a public reprimand, for which she had no notice and no opportunity to be heard, let alone the other rights that the attorney ethics procedures

are supposed to guarantee.

CONCLUSION

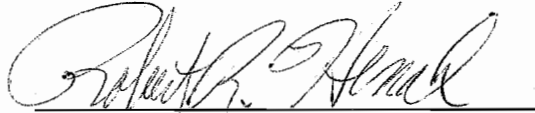
For these reasons, therefore, WACDL joins the State Public Defender in asking that the Court to grant review of the Court of Appeals' practice of imposing sanctions for perceived violations of ethics or appellate rules without prior notice or an opportunity to be heard.

Dated at Milwaukee, Wisconsin, February 3, 2011.

Respectfully submitted,

WISCONSIN ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,
Amicus Curiae

HENAK LAW OFFICE, S.C.



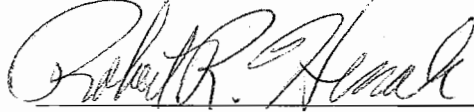
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RULE 809.19(8)(d) CERTIFICATION

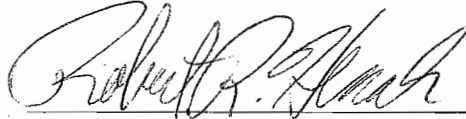
This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 877 words.

A handwritten signature in cursive script, reading "Robert R. Henak", written over a horizontal line.

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

A handwritten signature in cursive script, reading "Robert R. Henak", written over a horizontal line.

Robert R. Henak