RECEIVED
06-01-2011
CLERK OF SUPREME COURT
OF WISCONSIN

**STATE OF WISCONSIN**
**SUPREME COURT**

---

**IN THE MATTER OF SANCTIONS IMPOSED IN**
***STATE V. GREGORY K. NIELSEN*,**

**STATE OF WISCONSIN,**

**Appeal No. 2010AP387-CR**

**Plaintiff-Respondent,**

**STATE OF WISCONSIN COURT OF APPEALS,**

**Respondent,**

**vs.**

**GREGORY K. NIELSEN,**

**Defendant-Appellant-Petitioner.**

---

**REVIEW OF A 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**

---

# BRIEF OF RESPONDENT, WISCONSIN COURT OF APPEALS

---

**Beth Ermatinger Hanan, SBN 1026989**

**GASS WEBER MULLINS LLC**
**309 North Water St., 7th Floor**
**Milwaukee, WI 53202**
**414-223-3300**

**Attorneys for Respondent,**
**Wisconsin Court of Appeals**

**June 1, 2011**

## TABLE OF CONTENTS

*Page*

## TABLE OF AUTHORITIES

**Constitution**



**Cases**

**Statutes**

**Other**

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Wisconsin Court of Appeals agrees that oral argument will aid this Court in assessing the process currently afforded, versus the relative burdens and benefits of suggested changes to that process. Publication of the Court's decision will serve to remind practitioners of the importance of the appendix rules, and will assist appellate courts and the appellate bar in clarifying appropriate procedures for those rare instances when conduct falls short of the rules.

## ISSUES PRESENTED FOR REVIEW

1. 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.
2. Is Wisconsin Statute (Rule) § 809.19(2)(a), unconstitutionally vague on its face or as applied in supplying notice of prohibited conduct prior to the imposition of costs?
    - Question first posed to this Court.
3. 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?
    - Question first posed to this Court.
4. 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.

## INTRODUCTION

The court of appeals considers – thoughtfully, and not casually – that the existing notice and opportunities to contest costs imposed for non-compliant appendices are constitutionally adequate. The court of appeals submits that the appendix content 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 an important tool for appellate decision-making. It is also a neutral and concise rule, particularly as it is understandable to lawyers of ordinary intelligence and because it can be enforced without different panels of jurists creating their own standards. This Court approved the appendix content and certification rules after a full petition process, with public comment afforded. Thus far neither the Office of the State Public Defender "(OSPD") or any amicus entity have offered alternative language, either for this rule or for the comparable appendix rule for submissions to this Court, Wis. Stat. (Rule) § 809.62(2)(f).[1] OSPD does suggest additional process. Br. at 16, 27.

For years, lawyers have been expected to familiarize themselves with supreme court rules governing appendix content and certification, as well as with the rule authorizing costs and penalties. On the rare occasion when the court of appeals imposes a sanction for an appendix rule violation, there remains a 30-day period for payment – sufficient time to

[1] Amici curiae Appellate Practice Section and Wisconsin Association of Criminal Defense Lawyers have already submitted briefs supporting review.

seek reconsideration under Wis. Stat. (Rule) § 809.24. Further review is also available through the petition process of Wis. Stat. (Rule) § 809.62.

A third issue is whether the court of appeals' characterization of appendix rule non-compliance as an ethical violation circumvents the prerogative of the Office of Lawyer Regulation to investigate and make recommendations for lawyer discipline. But courts have inherent and statutory authority to impose costs and sanction lawyers appearing before them. Moreover, Wisconsin appellate decisions have for years pointed out procedural rule violations, with no express requirement that those be referred or deferred to OLR. Describing non-compliance as unethical, or a faulty certification as false, does not deprive the lawyer of any process due, nor does it deprive OLR of any of authority granted by this Court.

While the court of appeals considers Wisconsin's current notice and process to be adequate beyond a reasonable doubt, it certainly is aware that other process exists in other jurisdictions. In all events, the court of appeals is prepared to assist this Court in assuring not only that Wisconsin courts continue to afford reasonable process, but also that adequate enforcement mechanisms remain.

## STATEMENT OF THE CASE

### A. History and Function of the Challenged Rules.[2]

Before the Wisconsin Court of Appeals was created, the appellate procedural rules required an appellant to provide a significant portion of the lower court record relevant to the issue(s) on appeal. *See*, Wis. Stat. § 251.34(5)(c) (1961):

> The appendix shall contain, arranged in the following order:
>
> (a) The opinion or decision of the trial court.
>
> (b) Such part and only such part of the pleadings, findings, verdict, judgment or order sought to be reviewed as may be material in the consideration on appeal of the questions raised.
>
> (c) An abridgment of the appeal record, including the transcript, but only so much thereof as is necessary to a consideration of the questions involved. The abridgment of the testimony shall be in narrative form with marginal page references to the record, shall follow the same order as that in which the testimony was offered and shall indicate whether the testimony was adduced on direct, cross, re-direct or re-cross examination. Asterisks or other appropriate means shall be used to indicate omissions in the instructions or in the testimony of witnesses. The names of witnesses whose testimony is referred to shall be given. An index to the entire record shall appear at the end of the appendix and shall indicate what parts of the record are not printed. As to those parts printed, the index shall specify the page of the appendix where the same may be found.
>
> (d) All exhibits whether printed or not shall be indexed at the end of the appendix, with reference to the page of the record and if printed in the appendix, the page of the appendix where the same may be found. The nature of the context of the exhibit shall be briefly stated in the index.

---

[2] Some of this discussion of the history and function of the appendix rules was included in Respondent's Response to the Petition. Because an understanding of this function or purpose is part of the due process analysis, the court of appeals includes this information to aid the Court in its review.

Even then, appellate lawyers did not always obey the appendix content rules, and this Court occasionally imposed or withheld costs for non-compliance. *See e.g.*, *Seifert v. Milw. & Sub. Trans. Corp.*, 4 Wis. 2d 623, 627, 91 N.W.2d 236 (1958) (allowing double costs to prevailing respondent, because appellant's appendix did not give a fair presentation of the evidence); *Carson v. Pape,* 15 Wis. 2d 300, 310-11, 112 N.W.2d 693 (1961) (finding content of appendix deficient under former SCR 6(2, 3) and 5(a-d); imposing double costs); *Kornitz v. Commonwealth Land Title Ins.*, 81 Wis. 2d 322, 333, 260 N.W.2d 680 (1978) (finding appendix "deficient to some degree" and thus declining to tax costs).

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, this Court 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). That 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). The certification rule functions as a "double-check" so that the signing lawyer will satisfy him- or herself that the appendix is complete, and not merely rely on colleagues or staff to make that assessment. The court of appeals is entitled to, and does, rely on that certification.

On only very few occasions have lawyers been sanctioned for appendix content violations. As the chart below demonstrates, the best approximation is that annually since 2005, such costs have been imposed in less than one percent of the 1,000+ appeals where appendices are filed. Of

course, the court of appeals also handles approximately 2,000 other appeal proceedings each year, where appendices are not required.

| YEAR | # CASES WHERE MONETARY SANCTIONS IMPOSED (PER OSPD BRIEF) | PROPORTION TOTAL CASES SUBMITTED[3] TO CASES WHERE SANCTIONS WERE IMPOSED | %AGE TOTAL CASES | PROPORTION CIVIL CASES | PROPORTION CRIMINAL CASES |
|---|---|---|---|---|---|
| 2010 | 4 | 4 out of 1192 | 0.34% | N/A | 4 out of 510 |
| 2009 | 10 | 10 out of 1055 | 0.94% | 4 out of 596 | 6 out of 459 |
| 2008 | 6 | 6 out of 1184 | 0.5% | 5 out of 656 | 1 out of 517 |
| 2007 | 2 | 2 out of 1231 | 0.16% | 1 out of 765 | 1 out of 466 |
| 2006 | 4 | 4 out of 1272 | 0.31% | 1 out of 799 | 3 out of 473 |
| 2005 | 1 | 1 out of 1320 | 0.07% | N/A | 1 out of 558 |

By reviewing OSPD's due process challenge to the appendix content rule, this Court is also effectively called to review the broader appellate rule addressing non-compliance with procedural rules, Wis. Stat. (Rule) § 809.83(2).[4] Any modification of the process required to impose costs presumably will affect not only those cases where the court of appeals finds an appendix rule violation, but also cases where an appellate court finds ***any*** procedural rule violation and wants to exact a monetary sanction.

[3] The "total cases submitted" includes all cases that were fully briefed to the court of appeals during the applicable calendar year. These include a limited percentage of *pro se* appeals that are not subject to the appendix certification rules. *See* http://www.wicourts.gov/other/appeals/statistical.jsp.

[4] Wis. Stat. § 809.83(2). Noncompliance with rules. Failure of a person to comply with a court order or with a requirement of these rules, other than timely filing of a notice of appeal or a cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

The appendix rules and the costs rule materially aid the work of the court of appeals as it handles its heavy caseload. Before court reorganization, this Court was a high-volume court, and it well understood the importance of the appendix:

> 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). Wisconsin is not alone in seeking to husband its appellate resources by setting appendix and briefing requirements. *See, e.g., DeSilva v. DiLeonardi*, 181 F.3d 865, 867-68 (7th Cir. 1999) ("adoption by reference amounts to a self-help increase in the length of the appellate brief. . . . A brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.").

There is no dispute that the full lower court record is transmitted to the court of appeals before a case is submitted. Wis. Stat. (Rule) § 809.15(2). But a lawyer should not be able to shirk compliance with a long-standing, clear procedural rule by supposing that an appellate jurist always can "walk down the hall" and dig through the entire record for missing appendix content. Such an attitude would fail to respect not only the purpose of the

rules, but arbitrarily elevate lawyer convenience (or misplaced advocacy) above thoughtfully developed rules promoting efficient use of limited judicial resources.

### 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 has adopted Rules of Professional Conduct to guide attorney conduct, *see Sands v. Menard, Inc.*, 2010 WI 96, ¶ 51, 328 Wis. 2d 647, 787 N.W.2d 384, and has 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.

Those regulations do not prohibit appellate courts from identifying non-compliance with the procedural rules and sanctioning counsel for that non-compliance.

## ARGUMENT

### I. THE APPENDIX RULES DO NOT VIOLATE DUE PROCESS.

#### A. Existing Process is Constitutionally Adequate.

This Court reviews independently 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. *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). The challenged appendix and costs rules must be given a strong presumption of constitutionality. *Bachowski v. Salamone,* 139 Wis. 2d 397, 404, 407 N.W.2d 533 (1987). Here, 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 opportunity to challenge it.

"The fundamental or essential requirement of procedural due process is notice and hearing, that is, an opportunity to be heard . . . ." *Mid-Plains Tel., Inc. v. Pub. 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. Cent. 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).

OSPD contends that the court of appeals "urges disregard of basic due process rights." Br. at 6. That is anything but Respondent's position. Instead, the court of appeals would point this Court to long-established precedent recognizing that context is important when determining how much process is due. While the imposition of a modest penalty or cost gives rise to some measure of due process, the protection required can be

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").

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 – not discussed in the OSPD brief – 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.

*Id.*, 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 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) (adequacy of notice and hearing turns to considerable extent, on the knowledge such party may have of the consequences of his conduct). 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 Devaney,* 989 F.2d at 1161 (noting 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."); *McDonald v. State*, 146 S.W.3d 883, 889 (Ark. 2004) (explaining that "[a]n attorney is expected to know the law").

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, "[s]uch 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 have 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). 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* S. Ct. 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 prior notice of less consequence." *See Neylan*, 124 Wis. 2d at 96-97, citing *Link*, 370 U.S. at 632.

OSPD disagrees, citing *Strong v. Brushafer*, 185 Wis. 2d 812, 519 N.W.2d 668 (Ct. App. 1994), to urge more process before sanctioning, because the failure to supply a complete appendix could be the result of "inadvertence, inexperience, or misunderstanding." Br. at 7. Not only may those reasons be offered within the existing process, but the argument jars here, however, given other portions of OSPD's brief. At page 30 the brief describes defense counsel's approach to compiling the appendix by providing "the transcript portions she deemed essential to the issue she raised," Br. at 30, that she did not intend to provide "everything a court may need to consider to decide a particular issue," *id.*, and in any event

[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.

strove to avoid "highlighting aspects of the record that may only be arguably relevant to refuting the issue raised. That should be opposing counsel's job." *Id*. This is not a rationale of mistake, inadvertence or misunderstanding. In this case, OSPD had 20 days after the court of appeals issued its decision to challenge the sanction through the reconsideration process. Consequently, the existing process is not constitutionally deficient. Even if this Court determines that additional process is desirable, it should weigh the additional burdens and costs to be placed on our appellate courts and the efficient movement of all appeals to conclusion.

**1. The determination of whether an appendix certification is faulty is not analogous to a determination of frivolousness or a finding of contempt.**

Some have likened 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. *See Mars Steel Corp. v. Cont'l 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.").

Wis. 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. Alternatively, the court of appeals may make its own motion, but must allow the parties an opportunity to be heard – in writing - 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).

In contrast, evaluating whether an appendix contains the necessary materials is far more straight-forward. *See* discussion in section III, *infra,* describing the factual and legal analysis this court undertook to determine whether Nielsen's counsel met the appendix content requirements. Therefore, the determination would seem to require less process. *See Milwaukee Dist. Council 48 v. Milw. Co.,* 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").

Similarly, analogizing the process due for a contempt sanction to that required for appendix rules violations is inapt.[6] There is no dispute that persons found to be in contempt, even summary contempt, have a right to dispute the finding, via "allocution." *See, e.g., State v. Kruse*, 194

[6] The OSPD seems to argue that the process an appellate lawyer should receive when he or she violates an appendix rule is analogous to the full weight of criminal justice protections. *See, e.g.,* Br. at 11 (referring to "charge, judgment, and sentence.") Colorful rhetoric is one thing, but when a petitioner fails to undertake the full due process analysis as set forth in cases like *State v. Nordness*, *supra* at 11, mere rhetoric cannot save the day.

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." *Taylor v. Hayes*, 418 U.S. 488, 500 (1974).

But the issue presented here concerns rules applicable only to appellate lawyers, not to their clients or pro se parties. The statistics, as well as existing process, belie any "heightened potential for abuse" here. The method by which the court of appeals has enforced and applied those rules[7] is to lay out its findings of violation, determine an appropriate level of modest 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. While some jurisdictions provide other process, Wisconsin's current formula seems to adequately balance the appellate lawyer's interest in not paying modest costs without basis, the risk of erroneous deprivation of that property through existing procedures contrasted with the degree to

[7] OSPD notes that on occasion the court of appeals identifies an appendix rule violation, or conduct bordering on a violation, but does not impose a monetary sanction. Br. at 21-22. Without asking this Court to review the merits of those other circumstances, the OSPD seems to be asking this Court to require an absolutely uniform rule. But imposition of costs have always included an element of discretion, and such discretion is a necessary part of the challenged rules here. "A fair degree of definiteness is all that is required . . . a (rule) will not be voided merely by showing that the boundaries of the area of proscribed conduct are somewhat hazy." *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 32, 426 N.W.2d 329 (1988).

which the outcome would be different if additional procedures (via briefing, oral hearing, or even special fact-finding) were used, and the government's interest in fiscal and administrative efficiency not only in assessing well-founded costs but preserving its ability to bring the underlying merits to a timely close. *See, e.g., State ex rel. Attorney Gen. v. Circuit Court of Eau Claire Co.*, 97 Wis. 1, 72 N.W. 193, 194 (1897) (finding that while the court's manner of exercising its power to sanction can be prescribed, "it certainly cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which is essential to preserve its character as a judicial tribunal.") A reasonable conclusion is that in Wisconsin, the appellate lawyer already has adequate process to challenge the imposition of costs before payment is due.

**2. 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.

Any doubt must be resolved in favor of constitutionality. *Bachowski*, 139 Wis. 2d at 404. After applying that standard, if this Court considers that more process is due when enforcing the appendix rules, it likely also will have to consider whether more process is due for enforcement of an array of rules governing appellate procedure.[8]

### 3. The OSPD's Proposed Process Alternatives are Unworkable.

OSPD argues that "the process that is due in these cases *must include* notice and an opportunity to be heard *before a fact-finding body* such as a circuit court" or OLR "before any decision is reached or any sanction is imposed." Br. at 16, 27 (emphasis supplied). OSPD disputes the court's authority to find an appendix certification is false, and also find that counsel has committed an ethical violation. That dual finding did not occur in this case. App.103 n.2. Even if it had, there is no undue overlap with OLR. *See* section II, *infra*.

Moreover, such additional procedures would consume more court time and funds, and provide no benefit in the majority of cases. Presently, a lawyer's rationale for why he or she opted to exclude (or forgot to include) certain items from the appendix can be adequately explained in a motion for reconsideration. This Court or the court of appeals can then

[8] For instance, when this Court denies a petition for review, it occasionally imposes $50 in costs as part of its order. *See* Order in *Stamm v. Holter*, dated May 24, 2011 (No. 10-AP-615), SuppApp.253. Typically, no advance notice of the cost assessment is provided, nor is a reason for the costs set forth in the order. And even the existing process available to challenge an appendix sanction – reconsideration or petition for review – is not available to challenge this type of assessment.

evaluate whether such explanations adequately show that either the rule was not violated or the violation was excusable, and whether, in light of this information, sanctions should be maintained. No separate fact finding by another judicial body need occur, in order to make such a ruling. Notably, this Court's procedure for enforcing its rules against frivolous appeals also does not require remand for fact-finding, despite the relative complexity of such an analysis. *See Howell,* 2005 WI 81, ¶¶ 17-18.

In the federal system, while FRAP 46(c) includes an order to show cause procedure, and permits lawyers to request a hearing, the courts routinely impose sanctions for appellate rule violations without remanding for evidentiary hearings. *See, e.g., United States v. Evans*, 131 F.3d 1192, 1193-94 (7th Cir. 1997) (directing defendant's attorney to show why he should not be fined $1,000 for filing an inadequate appendix); *Hill v. Porter Memorial Hosp.*, 90 F.3d 220, 225-27 (7th Cir. 1996) (fining lawyers for appellant $1,000 after they filed an inadequate appendix and failed to sufficiently explain the error).

The new fact-finding process proposed by OSPD would divorce the sanctions proceeding from the appeal, leading either to the suspension and delay of the case on merits, or to the creation of two separate cases, both of which arguably could be appealed further, and potentially lead to conflict (or perceived conflict) between the two ultimate decisions. The court of appeals strongly urges this Court not to adopt a process that would divert the rules violation question to either the circuit court or OLR, and in any event, if it is established beyond a reasonable doubt that additional process

is required, it should balance the degree of benefit to be achieved versus the additional burdens placed on the appellate courts.

### B. 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 and certification rule, as presently written, are concise and provide fair warning.

To survive a vagueness challenge, a rule must be sufficiently definite to give persons of ordinary intelligence who wish to abide by the rule sufficient notice of the proscribed conduct. *See Bachowski*, 139 Wis. 2d at 406. First, courts consider "whether the statute (or rule) 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 challenger has a heavy burden of persuasion to establish the absence of both elements – sufficiently definite language, and enforceable standards – beyond a reasonable doubt. *Bachowski*, 139 Wis. 2d at 404. That is a high level of proof, not at all discussed by OSPD. The OSPD would focus this Court on only portions of Wis. Stat. § 809.19(2)(a), and not on the itemization supplied in subsection (b). Br. at 18-20. OSPD also fails to address how the highlighted 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.

OSPD juxtaposes the requirement of § 809.19(2)(a) to include a "short" appendix, with the direction to include certain items "at a minimum" in furtherance of its vagueness argument. Br. at 18-19. But the terms are not mutually exclusive. 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). Indeed, the current appendix rule is narrower and clearer than the prior, more onerous rule. Compare Wis. Stat. § 251.34(5) discussed at 4-5, *supra*. It is also more precise than the federal rule, which simply requires "relevant docket entries," and "relevant" portions of the pleadings, or opinion, and the judgment order or decision in question. Fed. R. App. Proc. 30(a). The "at a minimum" term allows for advocacy in appending record items of counsel's choice, while erasing any guesswork as to the base requirements.

The language (and the statistics, *supra* at 6-7) demonstrate that § 809.19(2) is concise and sufficiently warns appellate lawyers 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"). Nor is

there evidence that appellate courts have sanctioned lawyers for over-inclusion, further undercutting the vagueness argument.

OSPD contends that the court of appeals is highly subjective or "erratic" in enforcing this rule. Br. at 19-22. But OSPD mistakes discretion for subjectivity. When § 809.19(2)(b) requires 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," it is no leap to understand the rule to require 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 decision or reasoning as to that issue. Of course, how the content requirement applies in a particular appeal will depend on the issues raised in that case. But just because the application of the rule depends on individual facts, 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 541 (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"). Mathematical certainty is not required. *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 32, 426 N.W.2d 329 (1988).

OSPD points to the court of appeals per curiam decision in *State v. Knaus*, No. 2008AP2599-CR, 2009 WL 2032349 (Wis. Ct. App. July 15, 2009) for its vagueness argument. Br. at 13-14, 21-22. In *Knaus*, the defendant challenged his sentence as too harsh. His counsel provided one page of the sentencing decision, and was admonished that her filing was dangerously close to a false certification. *Id.*, ¶ 11. OSPD has not provided this Court with the actual *Knaus* appendix, or even the *Knaus* sentencing decision transcript, making its request to compare the adequacy of the appendices difficult.

But a mathematical comparison of pages required in one case versus pages necessitated by the rule and the facts in another case, is not the test. *City of Milwaukee*, 145 Wis. 2d at 32. Such a rigid approach would require this Court to set aside the strong presumptions favoring constitutionality and virtually eliminate the discretion inherent in costs statutes. OSPD has not identified any degree of "arbitrariness" to jettison those principles.

**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 rules of court were made to enable us in the limited time which we have to give due consideration to all the cases presented to us. Were each of us to search a long (record) for evidence

> supporting appellant's contention we would be left with insufficient time for consideration of the cases which are submitted with properly prepared briefs and appendices. Litigants whose attorneys comply with the rules are entitled to more than that.

*Dziengel v. Dziengel*, 269 Wis. 591, 592, 70 N.W.2d 21 (1955) (citing multiple violations of appendix content rules, criticizing a 17-page appendix as abridgment of more than 300 pages of testimony).

It is not unduly subjective to read the appendix content rule to require, in a given case, the entire sentencing decision when a sentence is being challenged, any more than it is subjective to read the rule to require a full plea hearing transcript if a plea is being challenged, or all pages of a court's competency decision if a competency determination is being challenged.

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. Br. at 31. The tension identified by OSPD is illusory, however, because appellate lawyers in Wisconsin owe a duty of candor to the courts. *See, e.g., Wisconsin Nat. Gas Co. v. Gabe's Constr. Co., Inc.*, 220 Wis. 2d 14, 19 n.3, 582 N.W.2d 118 (Ct. App. 1998) ("misleading statements in briefs" violate "SCR 20:3.3, which requires candor toward tribunals"). *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"). The appendix content requirements are designed to provide the reviewing court with the entirety of the challenged rulings or decision, and not just one party's view of things. *See, e.g., Seifert*, 4 Wis. 2d at 627 ("The rules of this court contemplate that the appendix shall contain an abridgement of so much of the bill of exceptions as is necessary and material to a consideration of the question involved, not just that part of the bill of exceptions on which the appellant relies.") Further deflating the zealous advocacy argument is the fact that costs imposed for appendix violations are not tied to the ultimate outcome. *See, e.g., State v. Bergwin*, 2010 WI App 137, ¶ 18, 329 Wis. 2d. 737, 793 N.W.2d 72 (imposing costs on counsel for defendant who prevailed on appeal); *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.).

## II. THE AUTHORITY OF OLR IS NOT SUPPLANTED WHEN AN APPELLATE OPINION IDENTIFIES ETHICAL BREACHES BY APPELLATE COUNSEL.

OSPD's third argument is directed to what it deems a "routine" practice, but not to any action actually taken by the *Nielsen* court. *See* App.103 n.2. OSPD contends that the court of appeals violates due process by identifying conduct as violative of the candor rules of SCR, instead of referring that conduct to OLR. OSPD urges that while the court of appeals "is not powerless to act," Br. at 26, the judicial code, SCR 60:04(3)(b) requires it to refer serious infractions to OLR, including the filing of false appendix certifications. OSPD cites as support a footnote in *Welytok v. Ziolkowski*, 2008 WI App 67, 312 Wis. 2d 435, 752 N.W.2d 359 (affirming

an injunction against a lawyer who was harassing other lawyers over a property dispute, and forwarding a copy of the appellate opinion to OLR).

Several examples demonstrate that when, in those rare instances, the court of appeals imposes a sanction for false certification of an appendix, it also may characterize the faulty certification as a violation of the duty of candor to the court, but need not, without more, also make referral to OLR.

First, appellate courts have inherent and statutory authority to impose costs when a lawyer violates a procedural rule. *Chevron Chem. Co. v. Deloitte & Touche,* 175 Wis. 2d 935, 946-947, 501 N.W.2d 15 (1993). Consistent with that authority, on occasion both this Court and the court of appeals have noted instances where trial or appellate counsel violated rules of candor. The court of appeals has 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); *Wisconsin Nat. Gas Co. v. Gabe's Constr. Co.*, 220 Wis. 2d at 18 n.3, 23 n.5 (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).

This Court too has acknowledged such deficient conduct:

- "[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.*, 176 Wis. 2d at 949.
>
> - 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.

None of these decisions are labeled "public reprimands" or attorney discipline. *See* Br. at 26.

Second, from time to time Wisconsin courts disqualify lawyers from serving as counsel in a particular case. To do so, courts routinely rely on SCR disciplinary rules, such as 20:1.7 and 20:1.9. *See e.g. Mathias v. Mathias*, 188 Wis. 2d 280, 282, 525 N.W.2d 81 (Ct. App. 1994); *Foley-Ciccantelli v. Bishop's Condo Ass'n*, 2011 WI 36, ¶ 86, n.59 ("Appellate courts have often cited the Rules of Professional Conduct for guidance in ***non-disciplinary*** cases, including disqualification cases." (emphasis supplied)). Invocation of SCR rules in a disqualification proceeding is not seen as usurping OLR's role.

OSPD protests a supposed 'dual track' of discipline. Br. at 27. But as *Foley-Ciccantelli* explicates, a citation to the conduct rules outside of OLR is not a disciplinary proceeding. Costs for violation of the appendix content and certification rules are much like other costs available under the procedural rules. Not only has this Court noted ethical breaches in its

written opinions without express referral to OLR, but it has implicitly recognized the potential for a "dual track" in certain instances. *See Sommer v. Carr*, 99 Wis. 2d 789, 795, 200 N.W.2d 856 (1981) (discussing fact-finding and costs under frivolous claims statute while recognizing BAPR announcement of intent to investigate attorneys assessed costs for frivolous actions). In short, there is no "dual track," although in some cases, there may be sequential, non-duplicative evaluations of that conduct. *See Welytok*, 2008 WI App 67, ¶ 41 n.5.

OSPD objects to use of the term "false" when the court of appeals concludes that a certified appendix actually is incomplete, contrary to the lawyer's certification. But as the Appellate Practice Section has pointed out, even the Seventh Circuit regularly fines lawyers who violate the court's rule regarding required appendix content "yet falsely certify compliance," citing *Kunz v. DeFelice*, 538 F.3d 667, 674, 682 (7th Cir. 2008).[9] APS Br. at 5. Use of that label is not limited to post-show cause proceedings. *See, e.g.*, *DeSilva v. diLeonardi*, 181 F.3d 865, 867 fn.† (7th Cir. 1999) (noting that the certificate as to brief length was false, and ordering counsel to explain why they filed a brief exceeding the volume limitation and made a false representation); *see also Abner v. Scott Mem'l Hosp.*, 634 F.3d 962, 963 (7th Cir. 2011) (describing order to show cause why a "brief should not be stricken and/or sanctions imposed for failing to

[9] As described elsewhere in this Response, the Seventh Circuit employs a show cause procedure to allow lawyers to contest sanctions for false certification.

comply with Rule 32 and *making a false representation to the court*." (emphasis supplied)).

Other courts likewise do not preemptively muzzle appellate courts in the face of unethical lawyer conduct, monetarily-sanctioned or not. 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 possible ethical violations which surface during litigation are generally better addressed by the state and federal bar. But the Eighth Circuit confirmed the district court's 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. OSPD's request for relief should not result in a requirement that appellate courts must turn a blind eye to SCR chapter 20.

## III. THE COURT OF APPEALS APPROPRIATELY EXERCISED ITS DISCRETION WHEN IT IMPOSED COSTS ON NIELSEN'S COUNSEL.

OSPD asserts that not only does the court of appeals' manner of issuing sanctions violate due process, but specifically that the court of appeals wrongly imposed sanctions against Nielsen's counsel. Br. at 27-31. If this Court maintains the presumption that the current procedure for

imposing sanctions affords due process and that the challenged rules are not unconstitutionally vague, then it also should hold that the court of appeals did not err by imposing sanctions in this case.[10]

Imposition of sanctions 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. Ordinarily, this Court will not review an exercise of the court of appeals' discretion. *See Raz v. Brown*, 2003 WI 29, ¶ 14, 260 Wis. 2d 614, 660 N.W.2d 647. When it does review such discretionary decisions, this Court upholds them if the court of appeals "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." *See id.* at ¶ 15; *Foley-Ciccantelli*, 2011 WI 36, ¶¶ 82-83. Whether the court of appeals applied the applicable law is a question of law reviewed independently. *Id.* The court of appeals met these standards.

First, the court of appeals examined the relevant facts. It related Mr. Nielsen's conviction and sentence. It then reviewed the circuit court's rationale for the sentence – noting the circuit court's discussion of the circumstances of the crime, Mr. Nielsen's age, his blood-alcohol level, his past criminal record, his record of behavior while on probation, his past attempts to deny his problems with alcohol and his need for treatment, and

[10] Alternatively, even if this Court concludes that more process was due, the facts and arguments are presently before it, and it can proceed, as it did in *Howell v. DeNomie*, 2005 WI 81, 282 Wis. 2d 130, 698 N.W.2d 621, to affirm the court of appeals.

his post-crime interactions with the police. App.102-03. Next, the court of appeals highlighted the factors the circuit court used in fashioning Mr. Nielsen's sentence, including how Mr. Nielsen's behavior and character led the circuit court to believe he was a public safety risk, how society's needs for deterrence and retribution played a role, and how Mr. Nielsen's "rehabilitative needs" should be addressed "in light of his past minimization and dishonesty." *Id.* at 103.

During this discussion, the court of appeals explained that Mr. Nielsen's counsel had submitted an appendix that included "only a select portion of the sentencing court's pronouncement and excludes the portion where the court discussed" relevant aspects of Mr. Nielsen's character. *Id.* at 103 n.2. The court also noted that Mr. Nielsen's counsel had certified that the appendix to her brief complied with Wis. Stat. (Rule) § 809.19(2). *Id.*

These statements were accurate. The appendix was certified by counsel. More importantly, counsel had included only three pages of the 8-page sentencing decision. App.122-24. The first page of the appended transcript picks up in the middle of the circuit court's sentencing discussion. App.122. Omitted pages contain the circuit court's discussion of Mr. Nielsen's mental health, his criminal history, his level of family support, his interactions with probation officials, his interaction with police after the crime, the effect of the crime on the victim's family, and how these factors affected the sentence. App.201-205. Thus, the court of appeals' statement that the appendix failed to include portions of the

sentencing transcript where the circuit court discussed relevant "aspects of Mr. Nielsen's character," and instead contained only a select portion, was correct. *See* App.103, 123-25, 201-205.

The court of appeals then applied a proper standard of law to these facts. *See Raz*, 2003 WI 29, ¶ 15. First, it explained that Mr. Nielsen was raising only one claim – that the circuit court sentenced him without adequately explaining its rationale, and thus violated *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. App.102.

In *Gallion*, as in the present case, the defendant had been convicted of homicide by intoxicated use of a motor vehicle. *See Gallion*, 2004 WI 42, ¶ 7. He contended that the circuit court had failed to provide an adequate explanation of his sentence. *Id.* This Court disagreed, but took the opportunity to reinvigorate the rule that when a circuit court exercises its discretion to fashion a sentence for a defendant, it must explain, *on the record*, how its reasoning led it to impose that particular sentence. *See id.* at ¶ 51 ("The rationale for sentencing decisions must be made knowable and subject to review."). Wisconsin defendants raise claims under *Gallion* by arguing that the sentencing court failed to adequately explain its decision, and by analyzing the transcript of the sentencing hearing. Raising a *Gallion* claim on appeal makes the full sentencing decision *the* crucial part of the record.

The court of appeals in *Nielsen* also reviewed Wisconsin's rules for appellate certifications. App.103, n.2. It explained that Wis. Stat. (Rule) § 809.19(2)(a) requires that appellant's counsel supply all of the applicable

portions of the record "including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues." *Id.* The court explained that "omission of essential record documents in the appendix places an unwarranted burden on the court and is grounds for a penalty." *See id.*, citing *State v. Bons*, 2007 WI App 124, ¶ 25, 301 Wis. 2d 227, 731 N.W.2d 376; Wis. Stat. (Rule) § 809.83(2).

Finally, the court of appeals "used a demonstrative rational process in reaching a decision that a reasonable judge could reach." *See Raz*, 2003 WI 29, ¶ 15. After discussing the legal basis for Mr. Nielsen's *Gallion* claim, and reviewing the specific factors the circuit court discussed at sentencing, the court of appeals raised the appendix issue. App.102-03. It noted that Mr. Nielsen's counsel did not provide a full version of the circuit court's sentencing decision, instead leaving out portions where the trial court discussed several "aspects of Nielsen's character." App.103, n.2. The court of appeals noted that Mr. Nielsen's counsel had certified that the appendix contained the "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." *Id.* (quoting Wis. Stat. (Rule) § 809.19(2)(a)). Since the court of appeals had found that required portions of the record were *not* included in the appendix, it stated that "the certification is false," explained the burden that such omissions place on the court, and imposed costs of $150 on the OSPD.

Taken together, the court of appeals adequately delineated the factors that influenced its decision to impose sanctions. *See Anderson v.*

*Circuit Court for Milw. County*, 219 Wis. 2d 1, ¶ 26, 568 N.W.2d 653 (1998). Mr. Nielsen's *Gallion* claim, made the full sentencing decision an item of key importance. But counsel chose to exclude portions of the transcript where the circuit court addressed how issues such as Mr. Nielsen's criminal history, his earlier behavior while on probation, and his interactions with law enforcement after the accident influenced the sentence. *See id.* at 201-05. This discussion formed a core part of the circuit court's sentencing rationale. *See id.* at 201-08. In short, Mr. Nielsen's counsel omitted pages of the decision where the basis for the sentence was discussed, while at the same time arguing that the circuit court *did not explain* how it reached the sentence it imposed. *Compare id.* at 201-208 *with id.* at 123-25. The court of appeals correctly determined that this excluded material should have been included because it was "essential to an understanding of the issues raised" and showed "the circuit court's reasoning regarding those issues." *See id.* at 103, n.2 (quoting Wis. Stat. (Rule) § 809.19(2)(a)). The court's explanation for the sanction was far more detailed than in *Kornitz* (finding appendix "deficient to some degree"). The court of appeals acted reasonably in imposing standard costs of $150. *See Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185, 187 (7th Cir. 1995) (characterizing a $100 sanction as "very modest").[11] This cost was

[11] OPSD argues that the Court of Appeals lacks authority to sanction OPSD directly. It argues that costs can be levied only on individual OSPD attorneys, which leads to financial hardship for OPSD staff attorneys and appointed counsel. OSPD Br. at 13-15. But no Wisconsin case law holds that the courts lack authority to sanction the State or its agencies. OPSD cites *Martineau v. State Conservation Comm.*, 54 Wis. 2d 76, 194 N.W.2d 664 (1972), Br. at 13 n.3, but that case deals with the taxation of costs payable to an opposing party, not a court's inherent authority to impose costs or sanctions payable to

directly in line with those imposed for other incorrect appendix certifications. *See* App.155-65. In sum, the court of appeals acted well within its discretion in this case, and the sanction should be affirmed.

OPSD attempts to excuse its sparse appendix by arguing that the rule mandates a "limited" portion of the record be appended. OSPD Br., at 28. *See* Wis. Stat. (Rule) § 809.19(2)(a). But that is a red herring. OSPD overlooks, throughout its brief, the fact that the rule requires inclusion in the appendix of material showing the circuit court's *reasoning*, instead focusing only on materials "necessary to an understanding" of the issue. When OSPD asserts that the whole point of Mr. Nielsen's appeal "was that the circuit court's oral ruling or decision did not show the court's reasoning," it essentially says that when proving a negative (*i.e.*, no circuit court reasoning) that no transcript must be supplied. Br. at 28. That is not the rule. An appendix is not argument. If a party argues that a circuit court's reasoning was deficient, it must supply the court of appeals with those portions of the decision that show what facts and legal principles the court considered – or reasoned – for it to reach the sentence it did.

---

the court. More to the point, *see Narloch v. State*, 115 Wis. 2d 419, 442, 340 N.W.2d 542 (1983) (remanding for consideration of whether to assess State costs for appendix which allegedly was insufficient to provide fair and accurate portrayal of record). In August 2007, this Court granted certification on the issue of "whether courts have inherent authority, notwithstanding sovereign immunity, to impose a monetary sanction against the State for its conduct as a litigant." *See* SuppApp.254-55, Case History for *La Crosse Co. Dist. Attorney's Off. v. Bockorny*, No. 2006AP001694 at 1-2. SuppApp.254-55. But the parties moved to dismiss that appeal, so the issue never was resolved. Since then the State has been directly sanctioned for appendix violations, however, without apparent controversy. *See, e.g., State v. Voeller*, No. 2009AP1596-CR, 2010 WL 2924373, at *3 n.3 (Wis. Ct. App. July 28, 2010) Supp.App.260.

## CONCLUSION

Given existing notice, process, and the clarity of the appendix rules, there should be no reasonable doubt that current practice is constitutional. By imposing costs against Nielsen's counsel, and by enforcing the appendix content and certification rule in other –albeit rare - cases via the costs statute, the court of appeals has hewed to established precedent as well as the rationale behind this Court's rule-making. OSPD fails to suggest alternative, clearer language, and minimizes the utility of the existing procedural mechanisms to challenge such costs.

If after affording the challenged rules a strong presumption of constitutionality this Court concludes that additional process is required, the court of appeals respectfully submits that any new mechanism preserve the enforceability of the appendix rules and avoid undue delay in the decision-making process.

Dated this 1st day of June, 2011.

GASS WEBER MULLINS LLC
Attorneys for Respondent,
Wisconsin Court of Appeals

309 North. Water Street, 7th Floor
Milwaukee, WI 53202
(414) 223-3300
(414) 224-6116 Facsimile

_____
Beth Ermatinger Hanan, f_WI SBN
1026989

## FORM AND LENGTH CERTIFICATION

I hereby certify that this Response Brief complies with the rules contained in Section 809.19(8)(b) and (d) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this Response Brief is 9,931 words.

Dated this 1st day of June, 2011.

GASS WEBER MULLINS LLC
Attorneys for Respondent,
Wisconsin Court of Appeals

309 North. Water Street, 7th Floor
Milwaukee, WI 53202
(414) 223-3300

Beth Ermatinger Hanan, WI SBN 1026989

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

Dated: June 1, 2011.

GASS WEBER MULLINS LLC
Attorneys for Respondent,
Wisconsin Court of Appeals

309 North. Water Street, 7th Floor
Milwaukee, WI 53202
(414) 223-3300

Beth Ermatinger Hanan, WI SBN 1026989

## CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on June 1, 2011, I caused to be delivered to and filed with the Court by First Class Mail, and served upon counsel for the parties by first class mail, copies of Respondent's Response Brief and Supplemental Appendix, as follows:

**Petitioner**
Joseph N. Ehmann
First Assistant State Public Defender
Devon M. Lee
Assistant State Public Defender
State Public Defender's Office
PO Box 7862
Madison WI 53707-7862

**State of Wisconsin**
Mark Neuser
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Michael E. Nieskes
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

**Appellate Practice Section, State Bar of Wisconsin**
Anne Berleman Kearney
Appellate Consulting Group
P.O. Box 2145
Milwaukee, WI 53201-2145

**WI Association Criminal Defense Lawyers**
Robert R.Henak
Rebecca R. Lawnicki
Henak Law Office, S.C.
316 North Milwaukee Street, #535
Milwaukee, WI 53202

Gass Weber Mullins LLC
309 North Water Street, 7th Floor
Milwaukee, WI 53202
(414) 223-3300
(414) 224-6116 Facsimile

Jan Schlichting, Secretary to
Beth Ermatinger Hanan, SBN 1026989
Attorney for Respondent,
Wisconsin Court of Appeals