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STATE OF WISCONSIN
SUPREME COURT
Case No. 2010AP387-CR

In the matter of sanctions imposed in
State v. Gregory Nielsen:

STATE OF WISCONSIN,

Plaintiff-Respondent,

STATE OF WISCONSIN COURT OF APPEALS,

Respondent,

v.

GREGORY K. NIELSEN,

Defendant-Appellant-Petitioner.

Review of a Decision of the Court of Appeals, District II, From the Circuit Court of Racine County, Case No. 08CF000982, the Honorable Faye M. Flancher, Presiding

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APPELLATE PRACTICE SECTION OF THE STATE BAR OF WISCONSIN'S NONPARTY BRIEF AND APPENDIX

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On behalf of the Appellate Practice Section of the State Bar of Wisconsin

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Appellate Practice Section of the State Bar of Wisconsin ("Section") is composed of attorneys who regularly practice before Wisconsin's appellate courts and have a substantial interest in the procedures that these courts employ when sanctioning counsel for alleged rule violations. It files this brief as amicus curiae in support of the State Public Defender ("SPD"). The Section proposes that this Court revise the process by which the court of appeals currently sanctions parties or counsel for rules violations.

The Section recognizes that appellate courts must enforce their rules and that enforcement necessarily imposes costs on the courts as well as on the litigants and their counsel. But, while the court of appeals' current practice of imposing sanctions for alleged rules violations without first giving notice and an opportunity to be heard may conserve judicial resources, it does so at the cost of fair process.

This Court should require a procedure ensuring that parties and their counsel have an opportunity to explain their conduct *before* the imposition of sanctions for a rules violation. Specifically, the Section proposes that the Court mandate a procedure, like that used by the United States Court of Appeals for the Seventh Circuit, requiring the court of appeals to issue an order to show cause and to

entertain the party's or counsel's response before imposing sanctions. This procedure will permit litigants and counsel to be heard while allowing the appellate courts to enforce their rules efficiently.

ARGUMENT

Appellate courts and the lawyers who practice in them are collaborators in the justice system. To be sure, events arise in the justice system that lead appellate courts to believe that litigants or counsel have violated a rule. Under the current process in Wisconsin, the court of appeals *summarily* sanctions counsel or litigants for such violations, by announcing sanctions without any prior notice in a particular case of its intent to impose them. *See, e.g., Post v. Winters Group, LLC*, No. 2009AP2665, 2010 WL 3768059, unpublished slip op. at ¶ 7 (WI App Sept. 29, 2010) ("false certification and omission of essential record documents in the appendix," $150 fine); *State v. Ballenger*, No. 2010AP664-CR, 2010 WL 4633466, unpublished slip op. at ¶ 5 n.3 (WI App Nov. 16, 2010) ("brief's appendix does not include any portion of the suppression motion hearing transcript" and "false certification," $50 fine); *State v. Voeller*, 2010 WI App 120, ¶ 9 n.3, 329 Wis. 2d 270, 789 N.W.2d 754 ($150 sanction against State for a "false appendix certification"); *State v. Zurkowski*, 2010 WI App 100, ¶ 23, 327 Wis. 2d 798, 788

N.W.2d 383 ("providing a deficient appendix and a false certification," $150 sanction). These decisions certainly are not the rarity that they once were. Equally troubling, the court of appeals is pronouncing such sanctions in the very opinions deciding the merits of the appeal, necessarily (and suddenly) impugning the alleged offending counsel or litigant. Often these sanctions are imposed for violations of rules (for example, the requirements of Wis. Stat. § 809.19(2), at issue in this appeal), which by their language tolerate reasonable differences of opinion over what is required.

A policy shift appears to be the motivating force for imposing sanctions without a prior opportunity to be heard. The court of appeals first admonished counsel regarding its strict enforcement of appendix rules (the domain where sanctions are predominantly being imposed) in *State v. Bons*, 2007 WI App 124, ¶¶ 24-25, 301 Wis. 2d 227, 731 N.W.2d 367. The concurring opinion's statements echoed, more forcefully, the court's consternation with apparent rules violations and its warning to appellate practitioners. It candidly stated: "The [appendix] rule was amended to require certification of a proper appendix for a reason: we hoped to finally spur all appellate attorneys—not just the good ones—to give us the information we need. *It is time that the rule was enforced*." *Id.*, ¶ 29 (Brown, J., concurring) (emphasis added). Yet, the court's

ardent warning did little to provide any guidance for well-meaning counsel faced with uncertainty, on the margin, as to the rule's requirements, nor did it affect the benefits of having sufficient process in the rule's enforcement.

As the Section explains below, a rules violation (or the good or bad faith behind such violation) is not always self-evident. Accordingly, it makes sense for a brief dialogue to occur between court and counsel as to whether, in fact, a rule has been violated before a party or its counsel is sanctioned. That dialogue requires notice and an opportunity to respond before the court imposes sanctions. With such a process, appellate courts preserve the collaborative relationship by affording an opportunity to defend the conduct at issue or present extenuating circumstances.

I. Appellate Courts Should Afford Notice and an Opportunity to Respond Whenever Sanctions for the Violation of Appellate Rules Are Considered.

The fundamental, yet false, premise in the court of appeals' current practice of issuing sanctions without first providing an opportunity to be heard (and in its arguments supporting this practice) is that there is no (or very little) benefit in more fully vetting a particular imposition of sanctions—at least not unless and until the sanctioned party has the will to fight, through a motion for reconsideration, the court's predetermination that sanctions are

warranted. As explained more below, see *infra* Part II, affording an opportunity to be heard before deciding whether to impose sanctions promotes more accurate and fair enforcement of the rules.

The court of appeals' position necessarily includes certain other related, but misguided, presumptions. For example, it assumes that *no* meritorious explanation can exist for a perceived violation. The court of appeals' argument also presumes that the opportunities to be heard before imposing a sanction (such as through an order to show cause) and after (such as through a motion for reconsideration or in a petition for review) are equal. Finally, although perhaps of lesser importance, the practice presumes that no mitigating circumstances might exist under which equity would dictate that sanctions are inappropriate, even where there may be an actual rules violation.

These presumptions lead to a deficient process. This is not just a matter of notice or constructive notice based on a particular rule's having been codified (the scenario upon which the court of appeals relies, *see* Respondent's Brief at 11). Fairness and prudence dictate that one be given a chance to explain one's conduct and attempt to justify it before being sanctioned (especially before one suffers a monetary forfeiture *and* a de facto public reprimand in a written decision). Only the process of a pre-sanction opportunity to

be heard avoids the appearance of a rush to judgment. Indeed, there are certainly instances in which reasonable people would excuse noncompliance.[1]

The system is better served by allowing those circumstances to be presented before imposing sanctions rather than, as the court of appeals proposes, entertaining them only after the fact in a motion for reconsideration or petition for review. These procedural devices, which were not adopted for the purposes of affording post-deprivation sanction process, are ill-suited for affording a fair opportunity to defend against the imposition of sanctions. Even if a post-sanction defense could be considered without the unavoidable weight afforded by the sanction's imposition, no after-the-fact reversal of a sanction can truly undo the reputational effect of having a written court of appeals' decision announce that counsel violated the court's rules.

For these reasons, the Section asks that this Court articulate a rule under which some basic, yet meaningful, opportunity to be heard is afforded *before* the court of appeals imposes sanctions. This approach takes into account the court of appeals' interest in being

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[1] For example, presumably, an attorney who failed to timely file a brief due to his or her involvement in a horrific car accident on the way to filing the brief with the court would be treated differently than an attorney who just wanted an extra day to work on the brief or even one who miscalculated the deadline to file.

able efficiently to impose sanctions in an informed, relatively low-cost, and fair manner, while also protecting the interests of well-intending (and often competently performing) appellate counsel in not being summarily and publicly reprimanded for an alleged rule violation.

The proposed process is similar to the one this Court articulated in *Howell v. Denomie*, 2005 WI 81, 282 Wis. 2d 130, 698 N.W.2d 621. *Howell* requires that before the court of appeals may impose sanctions for a frivolous appeal, it must, in the absence of a sanctions motion, provide notice of the perceived transgression, by way of an order to show cause. *Id.*, ¶¶ 18-20. The litigant (and its counsel) alleged to have committed a violation then have an opportunity to respond in writing before sanctions are imposed.

The court of appeals apparently argues that a greater need for an opportunity to be heard when deciding whether an appeal is frivolous justifies not providing that opportunity before sanctioning for rules violations. (Respondent's Brief at 14-17.) But the need for fair process is just as strong in the rule-violation context as in the frivolous-appeal context. On at least one occasion, the court of appeals apparently agreed. In *State v. Neal*, No. 2010AP986-CR, 2011 WL 2135595, unpublished slip op. at ¶ 18 & n.2 (WI App June 1, 2011), the court of appeals gave counsel the option to "show cause in

writing" why counsel should not have to pay a sanction for an allegedly false certification.

The process proposed is that used by the United States Court of Appeals for the Seventh Circuit. In its brief, the court of appeals gives a nod to that process. (Respondent's Brief at 28); *see also Kunz v. DeFelice*, 538 F.3d 667, 674, 682 (7th Cir. 2008) (noting that the Seventh Circuit "regularly fines lawyers who violate" the court's rule requiring an appellant to file an appendix containing the judgment and other relevant pleadings "yet falsely certif[ies] compliance," and affords counsel an opportunity "to show cause why they should not be fined or otherwise disciplined for this violation").

The Seventh Circuit commonly provides an opportunity to show cause for alleged rules violations, and even in relation to the seemingly objective failure to timely file a brief. *See* Seventh Cir. Rule 31(c). The court's practice is to issue the order to show cause and review any response before imposing sanctions. The Seventh Circuit uses this process both to determine if, in fact, a rules violation occurred *and* whether any such violation warrants sanctions. *See, e.g., Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1047-48 (7th Cir. 2007) (finding a rules violation but opting not to impose sanctions).

The approach—applied by the Seventh Circuit and urged here by the Section—affords needed process and is otherwise grounded in sound policy. It is consistent with other Wisconsin rules that govern the imposition of sanctions (*e.g.*, Wis. Stat. § 802.05(3)), and it advances the due-process principle that notice and the opportunity to be heard should precede the imposition of sanctions. *See generally Roadway Express Inc. v. Piper*, 447 U.S. 752, 766-67 (1980). It is, in short, a small price to pay to ensure that the court of appeals is exercising its discretion to impose sanctions fairly. (*See* Respondent's Brief at 17, 22.)

II. Affording Notice and an Opportunity to Be Heard Before Issuing Sanctions for Rules Violations Offers Significant Benefits to All Interested Parties.

The procedure advocated by the Section benefits all affected parties: the litigant and counsel linked to the alleged rules violation, appellate courts, and the judicial system as a whole.

Most obviously, the litigants or counsel connected with the alleged rules violation are afforded the opportunity to explain their conduct (and, perhaps, to dissuade a court of the need for sanctions) and to create a corresponding record. Of course, this places a burden (as should be the case) on appellate practitioners to defend their conduct in relation to the courts' appellate rules. Fearful should be the appellant (or its counsel) who fails to offer a colorable

reason in response to a show-cause order or, worse yet, who advances an obnoxious one for a perceived violation. *Cf. Abner v. Scott Mem. Hosp.*, 634 F.3d 962, 963-65 (7th Cir. 2011) (castigating counsel for filing an oversized brief). Such counsel will find little solace in this opportunity to show cause. The Section does not look to serve as an apologist for parties or practitioners who willfully or plainly violate the rules.

But the litigants and counsel caught up with alleged rules violations may very well be those who acted in good faith or who have complied with the rule but on a basis that the court of appeals misapprehended. Indeed, this case shows the benefits of affording a pre-sanction opportunity to be heard. There is value in a brief didactic process in which litigants and counsel can explain their decision-making process—such as this case, in which the SPD has finally been allowed to explain its decision regarding what it included in the appendix required of an appellant.

For their part, appellate courts will be absolved from using the broad-brush approach to imposing sanctions. They will learn whether there is an explanation for the questioned conduct and can better tailor their sanctions to address both the reasons for the perceived rule-breaking conduct and any mitigating circumstances. The litigants and counsel who are connected with alleged rules

violations will be sanctioned where warranted in light of the explanations provided in response to the orders to show cause. *Cf. A.M. v. Butler*, 365 F.3d 571, 572 (7th Cir. 2004) ("An intent to deceive the court is not a precondition to imposing a monetary sanction against an attorney for violating Rule 30 [relating to appendices], but its absence is certainly a factor we consider, along with others, in deciding how best to proceed.").

Finally, affording this basic due process has systemic benefits for the court system. The appearance of fairness and deliberation, especially in a context in which individuals are sanctioned by our courts, is of sufficient value in and of itself. Because they are addressing more-particularized conduct, the appellate courts can provide better guidance to future litigants and counsel regarding what (particularly on the margins) is permissible versus impermissible conduct. While there will always remain questions on the margins, the natural consequence will be a clearer articulation of expected conduct.

III. The Costs of Requiring Notice and Opportunity to Be Heard Are Warranted to Engender Greater Confidence in the Judicial System.

The proposed procedure of requiring an order to show cause that provides notice and an opportunity to be heard is well worth its cost. The order to show cause will afford litigants and counsel an

opportunity to explain their position in writing, limited in length. Deciding whether that writing changes the court's view on the merits of the infraction should not detain the court long. One might suppose that if the party's response makes the case a close one, sanctions will not be imposed. But, even if there were more time and resources to be devoted, "it is not the policy of the law to choose expediency over due process when it should be afforded." *State v. King*, 82 Wis. 2d 124, 138, 262 N.W.2d 80, 86 (1978); s*ee also Anderson v. Circuit Court for Milwaukee County*, 219 Wis. 2d 1, 10, 568 N.W.2d 633 (1998) (stating, among other things, that "[a] court should use caution in imposing sanctions against attorneys" and "courts should tailor sanctions to the severity of the misconduct.").

The Section appreciates the courts' interest in employing a process that will not be burdensome (and thus will be unlikely to discourage the courts from the important task of enforcing their rules). Still, the current process does not adequately protect the litigants and counsel connected with an alleged rules violation and does not permit the appellate courts to provide the particularized guidance that may deter prospective rules violations. The proposed process, a traditional show-cause procedure, best accommodates the interests of litigants and the courts.

CONCLUSION

For these reasons, the Section respectfully suggests that the Court require a party or its counsel be given notice and an opportunity to be heard before the court of appeals imposes sanctions for alleged rules violations.

Dated: July 7, 2011.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b) and (c) for a nonparty brief and appendix produced with a proportional serif font. The length of this brief is 2,709 words.

_____
Thomas M. Hruz

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic 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 brief filed with the court and served on all opposing parties.

Signed: Thomas M. Hruz

Signature: _____

CERTIFICATE OF FILING

Pursuant to Wis. Stat. §§ 809.80(3)(b) and 809.80(4), I hereby certify that on this 7th day of July, 2011, I caused the requisite copies of the foregoing nonparty brief to be delivered to Federal Express, a third-party commercial carrier, for delivery to the Clerk of Court on the immediately following weekday.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2011, I caused the requisite copies of the foregoing nonparty brief to be served on the following individuals by properly addressed, postage-prepaid first-class mail.

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