

**STATE OF WISCONSIN
IN THE SUPREME COURT**

In the Matter of the proposed amendment of Wisconsin Statute § 809.85, relating to the pro hac vice admission, substitution and withdrawal of retained counsel in appellate court proceedings

**PETITION 20-____
Memorandum In Support**

The petitioner, the Wisconsin Judicial Council, submits this memorandum in support of its petition to amend the Rules of Appellate Procedure, WIS. STAT. 809.85, to establish a procedure for pro hac vice admission, substitution and withdrawal of retained counsel in appellate court proceedings. The petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

Introduction

The Wisconsin Court of Appeals asked the Judicial Council to study issues surrounding the withdrawal of retained counsel in civil appellate proceedings. SCR 20:1.16(e) requires an attorney seeking to terminate representation to “comply with applicable law requiring notice to or permission of a tribunal.” While circuit courts may have local rules regarding the withdrawal of counsel, the appellate courts have no formal procedure regarding the notice necessary or how retained counsel withdraws in civil appeals. In requesting a study of the issue, the Court of Appeals suggested there was

uncertainty as to when retained counsel's motion to withdraw in a civil appeal could and should be denied.¹

The Judicial Council referred the study project to its Appellate Procedure Committee.² The committee started the project with review of the limited Wisconsin case law addressing the withdrawal of counsel and recognizing that circuit courts exercise discretion when addressing attorney withdrawal. *See State v. Johnson*, 50 Wis.2d 280, 283, 184 N.W.2d 107 (1971) (appointed counsel is not entitled to withdraw simply because a defendant makes that request); *State v. Coleman*, 2002 WI App 100, ¶38, 253 Wis. 2d 693, 644 N.W.2d 283 (in exercising discretion when deciding to permit counsel to withdraw, the court must consider, among other things, the reason for the request, the stage of the proceedings, the amount of preparation that has been completed, the cost to the public and the need to avoid delay); *State ex rel. Dressler v. Circuit Court for Racine County*, 163 Wis.2d 622, 472 N.W.2d 532 (Ct. App.1991) (factors which circuit court may consider in exercising discretion on whether to permit retained counsel to withdraw include complexity of case, preparatory work completed, whether request is made to manipulate criminal justice system, and amount of fees paid, if any). Existing Supreme Court Rules provide generally for the substitution or withdrawal of counsel. *See* SCR 11.02(3) ("No order for the substitution of an attorney for a party may be made without consent signed by the party

¹ WISCONSIN STAT. RULES 809.107(5m), 809.30(4), and 809.32 govern the withdrawal of appointed counsel in certain appellate case types.

² Minutes of the Wisconsin Judicial Council, dated June 19, 2015, at <http://wilawlibrary.gov/judicialcouncil/docs/minutes0615.pdf> (last accessed August 5, 2020). For a list of the committee's membership, please see Appendix 1.

and his or her attorney; or for cause shown and upon such terms as shall be just, and on such notice as the court or judge shall direct.”); SCR 20:1.16(e) (“When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”). And, SCR 10.03(4)(b) addresses the admission of counsel pro hac vice. The committee observed that to aid practitioners and litigants, it is desirable to have procedures set forth in the Rules of Appellate Procedure rather than scattered throughout the Supreme Court Rules.

The committee next reviewed statutes and rules relating to the withdrawal and substitution of counsel in other appellate jurisdictions. Most of the appellate rules found by the committee were loosely drawn allowing for the withdrawal of counsel on terms and conditions set by the court and upon appropriate notice. The committee set about trying to articulate appropriate terms and conditions so as to assist practitioners and litigants and improve court efficiency.

Discussion

Applicability.

The applicability provisions in the petition are very precise for the following reason. Under WIS. STAT. RULES 809.107 and 809.30(4) the State Public Defender appoints counsel for certain postconviction, postcommitment, postdisposition proceedings, and their related appeals. As noted above, RULES 809.107(5m), 809.30(4), and 809.32 govern the withdrawal of State Public Defender appointed counsel in those case types. The circuit court may also appoint counsel for postconviction, postcommitment, or postdisposition

proceedings under RULES 809.107 and 809.30. If counsel is appointed by the circuit court in those case types, the no-merit procedure under RULE 809.32 is applicable should counsel seek to withdraw. See *State v. Brown*, 2009 WI App 169, ¶10, 322 Wis. 2d 183, 776 N.W.2d 269 (“indigent criminal defendants with court-appointed appellate lawyers may pursue appellate review in the court of appeals using the procedures in WIS. STAT. RULE 809.32 when appellate counsel concludes that an appeal would lack arguable merit.”). Thus, case types where counsel is appointed by the State Public Defender or the circuit court and where the no-merit procedure applies are excluded from the substitution and withdrawal provisions in the petition (new RULES 809.85(4) and 809.85(5)).

Because circuit courts may also appoint counsel in other circumstances, as may the appellate courts, the proposed rule would retain the existing language in WIS. STAT. RULE 809.85 that counsel appointed by a lower court continues until relieved by the appellate court. It is retained as RULE 809.85(1). The proposed rule provides that when counsel is appointed by a lower court for proceedings other than postconviction, postcommitment, or postdisposition proceedings under s. 809.107, 809.30 or 809.32, the attorney may be allowed to terminate representation when appointed for a limited scope (new RULE 809.85(3)), may substitute counsel (new RULE 809.85(4)), and may withdraw by consent (new RULE 809.85(5)(b)). These are the exceptions noted in the continuation provision retained as RULE 809.85(1).

By excluding application to counsel appointed for postconviction, postcommitment, or postdisposition proceedings under s. 809.107, 809.30 or 809.32, the proposed rule changes are designed to address only the substitution and withdrawal of

retained counsel, and the termination of limited representation, substitution, or withdrawal by consent of an attorney appointed by a lower court in certain circumstances.

Pro Hac Vice Counsel.

The committee learned from key court personnel that there was no procedure for the pro hac vice admission of attorneys in the appellate courts. The appellate clerk often has to contact counsel not licensed to practice in Wisconsin to ascertain the attorney's pro hac vice status. The Court of Appeals uses court orders to inform admitted counsel that sponsoring Wisconsin counsel needs to sign every document filed with the court. *See* SCR 10.03(4)(b) (nonresident counsel may be allowed to appear "in association with an active member of the state bar of Wisconsin who appears and participates in the action or proceeding."). The appellate clerk suggested a separate provision be included to remind attorneys of the necessity of confirming pro hac vice admission or applying for it.

Section 3 of the petition creates a procedure for the admission of pro hac vice counsel in the appellate courts consistent with the requirements of SCR 10.03(4)(b). First, it requires counsel already admitted pro hac vice in the circuit court to provide the appellate clerk with a copy of the circuit court admission order. Second, it allows an attorney not admitted to practice law in Wisconsin to move for admission by affidavit and demonstration of compliance with the requirements of SCR 10.03(4)(b)2. (requiring the payment of certain fees). Both provisions set forth that an attorney admitted to appear pro hac vice in the appellate courts must have Wisconsin counsel sign every document filed in the appellate court. The newly created section also confirms that an appellate court may revoke the pro hac vice privilege. That is consistent with SCR 10.03(4)(e).

Notice of Limited Appearance.

Effective January 1, 2015, the court created WIS. STAT. § 802.045, permitting limited scope representation by attorneys. Under § 802.045(4), upon completion of the limited scope representation, counsel files a notice of termination of limited appearance and counsel's role is terminate without further order of the court. Section four of the petition creates WIS. STAT. RULE 809.85(3) to incorporate the termination of counsel's limited appearance in appeals by notice and without further order of the court. The provision is included so that the proposed rule is a comprehensive appellate procedure rule addressing all circumstances of withdrawal of retained counsel.

Substitution of Counsel.

Consulting with key court personnel, the committee learned that the Wisconsin appellate courts freely allow the substitution of counsel because potential delay in the appellate process from the substitution is not usually a hardship on the courts' submission calendar. For court efficiency, it is desirable that under certain circumstances the substitution of counsel not require a court order.

It is necessary that any provision addressing substitution be consistent with SCR 11.02(3), which prohibits substitution "without consent signed by the party and his or her attorney." The committee first had to determine whether the required attorney signature in SCR 11.02(3), was that of the attorney being substituted or that of the newly retained attorney. Researching the issue, the committee learned the provision dated back to 1902

and was interpreted in 1903 to mean the signature of the party's existing attorney. *See McMahon v. Snyder*, 117 Wis. 463, 466 (1903). In *McMahon* the court explained:

The rule ... contemplates consent in writing, signed by the party and his or her *attorney of record*, before any substitution is permissible. Such concurrence of attorney and client in the matter of substitution is to prevent obtrusion and secure the orderly administration of justice.

Id. (emphasis added).

When the attorney of record refuses to consent to substitution, SCR 11.02(3) allows a substitution of attorney upon cause shown, that is, to force the attorney out. *Touchett v. Sutherland*, 274 Wis. 35, 36–37, 79 N.W.2d 80 (1956) explains:

This rule seems to provide for two different situations. First, it provides that substitution of attorneys may be made upon written consent signed by the client and his attorney. Second, the statute provides that a court may enter an order for substitution of attorneys for cause shown but upon such terms as shall be just. This rule does not cover the ordinary situation. It does not recognize the absolute right of a client to have a substitution of attorneys whether his attorney consents or not. In so far as the rule is applicable it merely recognizes that the court retains jurisdiction in the original action to protect the attorney in his lien or for his fees and disbursements.

Section five of the petition creates WIS. STAT. RULE 809.85(4) to address the substitution of counsel in the two scenarios contemplated by SCR 11.02(3). When substitution is by consent, the signature of both the existing and new attorneys are required. The provision allows for the filing of two separate documents—a notice of withdrawal and a notice of appearance—to avoid the difficulty of getting both attorneys to sign the same document. The provision also allows for substitution without the signature of the withdrawing attorney upon good cause shown.

The provision permits by a simple notice of appearance the substitution of an attorney of record by a member or an employee of the same law firm, professional corporation, legal assistance clinic, or agency representing the client. If a member of the same firm is joining as co-counsel, the notice of appearance shall indicate that so the clerk's office can simply enter co-counsel. The committee specifically added the phrase "as attorney of record" to the provision allowing the substitution of counsel by a member or employee of the law firm already representing the client. By including the phrase "as attorney of record," substitution will not be made if an attorney from the same law firm merely makes an appearance to fill in for a colleague in an emergency situation or a temporary basis.

Withdrawal of counsel.

Initial discussion and review of the sources identified above led the committee to focus on the primary concerns regarding the withdrawal of retained counsel: notice to the client, notice to parties, and how to manage the withdrawal of retained counsel in an appeal in which the client might qualify for appointed counsel. Section six of the Petition creates WIS. STAT. RULE 809.85(5) to address those concerns surrounding the withdrawal of retained counsel.

Under the new provision in proposed WIS. STAT. RULE 809.85(5)(b), counsel may withdraw with consent of the client upon filing a notice of withdrawal signed by the client. Notice to the client is not a concern when the client signs the notice of withdrawal.

A motion to withdraw is necessary when the attorney and client do not agree about the termination of counsel's representation. Court personnel explained to the committee that the withdrawal process is most often started by the attorney when there is a communication breakdown with the client or nonpayment of fees. Under proposed WIS. STAT. RULE 809.85(5)(c), a motion to withdraw must be filed in the court in which the appeal or other appellate proceeding is pending.

To address the possibility that a client might be entitled to the appointment of counsel when retained counsel in an appeal in which postconviction, postcommitment, or postdisposition relief under WIS. STAT. RULES 809.107 or 809.30 is sought, WIS. STAT. RULE 809.85(5)(d) sets up a process for referral to the State Public Defender. The referral process mirrors that established in WIS. STAT. RULE 809.30(4) for the withdrawal of appointed counsel. It gives notice to the State Public Defender of the motion to withdraw and gives time for a determination of the client's indigency and right to appointed counsel. The State Public Defender will then notify the appellate court if counsel will be appointed. This provision protects an indigent person's right to appointed counsel in a first appeal as of right from cases to which RULES 809.107 and 809.30 apply.

Circumstances in which counsel is allowed to withdraw are set forth in SCR 20:1.16(b). Because the appellate courts are not finders of fact, the motion to withdraw must provide sufficient detail establishing those circumstances. If the details are not disputed, the appellate court may proceed on the circumstances set forth in the motion. Thus, the committee focused on the content of a motion to withdraw in proposing WIS. STAT. RULE 809.85(5)(e). Notable in that provision is the requirement that withdrawing

counsel indicate that counsel has given sufficient notice—at least fourteen days notice—to the client of counsel’s intent to withdraw. The provision also requires counsel to explain what good faith efforts were made to satisfy the notice requirement if counsel is unable to confirm actual notice to the client. The motion shall also set forth the grounds under SCR 20:1.16 that permit withdrawal, unless disclosure of those reasons would violate a standard of professional responsibility.

The appellate court, like the circuit court, has discretion to deny a motion to withdraw. In proposed WIS. STAT. RULE 809.85(5)(f), a number of factors to be considered in exercising discretion are set forth. These factors are derived from Wisconsin case law and are not exhaustive. The delineation of the factors to be applied aides practitioners and litigants.

Proposed WIS. STAT. RULE 809.85(5)(g), clarifies that the filing of counsel’s motion to withdraw tolls appellate deadlines, except the time to file a petition for review. This clarification is necessary because WIS. STAT. RULE 809.14(3)(a) provides that only a motion that affects the disposition of an appeal or the content of a brief automatically tolls an appellate deadline. Arguably the withdrawal of counsel, if occurring before briefing, may affect the content of the brief but it is not sufficiently clear. The time for filing a petition for review is not affected by a motion to withdraw because it is a jurisdictional deadline.

Finally, proposed WIS. STAT. RULE 809.85(5)(h), sets forth that a motion to withdraw is not necessary after the Court of Appeals issues a decision and a petition for review will be filed by new counsel or a self-represented person. This conforms to what is

current practice in clerk's office. The filing of a petition for review has a thirty day deadline. Because of the jurisdiction deadline, the clerk docket a petition for review even if not filed by counsel of record. The filer becomes the new counsel of record, or if filed by a self-represented person, counsel of record is removed. Requiring a motion to withdraw by counsel of record increases the risk that the jurisdiction deadline will be missed.

Client's File.

Court personnel reported that one of the most problematic areas in the withdrawal of counsel is the turning over of materials to successor counsel or a self-represented person. Although SCR 20:1.16(d) imposes an ethical obligation on withdrawing counsel to release the materials to which the client is entitled, the appellate court is often asked to address counsel's failure to timely do so. The appellate court lacks authority to enforce ethical obligations. Thus, the appellate court asked for a provision that it could cite to compel the release of materials when appropriate. Fourteen days was deemed to be a sufficient amount of time for withdrawing counsel to respond to a request for materials.

The timing of release of materials when new counsel is likely to be appointed was of concern. Both court personnel and state public defenders acknowledged the problem of returning materials to an incarcerated person and then having to retrieve them if counsel is subsequently appointed for that person. The committee attempted to draft a version in which the time to release materials was tolled while a person was awaiting the possible appointment of counsel. Unable to settle on an acceptable tolling mechanism, the rule

allows the court, when allowing the withdrawal of counsel, to provide for delay in the release of materials when the appointment of successor counsel is anticipated.

Judicial Council Note.

The Judicial Council Note proposed in section eight of the Petition first provides a cross-reference to the attorney withdrawal rule exclusively governing withdrawal when counsel is appointed by the State Public Defender in cases for postconviction, postcommitment, or postdisposition proceedings under s. 809.107 and 809.30. The note also clarifies the import of the new provision setting a time limit for turning over materials after the attorney withdraws and the appellate court's authority to alter the time. The Judicial Council respectively requests that the note be adopted and published with the new provisions.

Feedback from Interested Persons

The committee's draft of proposed provisions were twice circulated to Department of Justice, Wisconsin State Bar Litigation & Appellate Practice Sections, Court of Appeals, Wisconsin Association for Justice, Wisconsin Defense Counsel, Marquette Law School, University of Wisconsin Law School, and State Public Defender's Office. See Appendix 2. The draft was circulated in the July 2017. The only comments received were from Court of Appeals staff attorneys. Suggestions were made for cross-references to corresponding Supreme Court Rules and clarification of when counsel's duty to explain good faith efforts to reach the client would apply (the initial draft used a term "knowingly failed" in respect to giving notice of counsel's intent to withdraw). The committee was also asked to address

the meaning of SCR 11.02(3) with regard to an attorney's signature being needed to allow for substitution of counsel. The proposed WIS. STAT. RULE 809.85(4)(b) addresses the application of SCR 11.02(3) by specifically requiring the signature of both the outgoing and new attorney.

After revisions, the draft was circulated in July 2018 to the same interested persons. No groups or individual submitted any opposition to the proposed amendments. December, 2018.

A Court of Appeals staff attorney suggested a cross-reference to WIS. STAT. RULE 809.30(4) to make clear that an attorney appointed for postconviction, postcommitment, or postdisposition proceedings under RULES 809.107 and 809.30, seeking to withdraw need not comply with the content requirements of the new proposed RULE 809.85(5). The committee did not include the requested cross-reference because RULE 809.85(5) states that it is not applicable to counsel appointed for postconviction, postcommitment, or postdisposition proceedings under RULES 809.107 and 809.30. The committee proposes the Judicial Council Note that clarifies that RULE 809.85(5), does not supersede RULE 809.30(4).

The State Bar's Appellate Practice Section Board raised concern about the time limit for turning over materials when the attorney withdraws as applied to an incarcerated person from whom counsel may be appointed. Tolling type language was drafted.

The appellate practice board also questioned language in proposed WIS. STAT. RULE 809.85(5)(h), which originally provided: "A motion to withdraw is not necessary

after a decision issued by the court of appeals pursuant to s. 752.41(1), *when the client desires to petition for review as a self-represented person or by new counsel.*” (Emphasis added.) The board pointed out that there could be times when privately-retained criminal defense counsel would seek to withdraw for reasons contrary to the client’s desire (i.e. client has no more money or the attorney for whatever reason can’t do what the client wants him to do). The language was dropped from the proposed provision in response to the raised concern.

The Appellate Procedure Committee’s final draft proposal was forwarded to the full Judicial Council for consideration. The Judicial Council asked the Committee to improve language tolling the time for withdrawing counsel to turn over materials if the appointment of counsel was anticipated. The council indicated that tolling language was lengthy and potentially confusing. As explained previously, the committee was unable to craft workable tolling language. The committee addressed timing concern by allowing the court to make any order necessary regarding the release of materials when counsel withdraws. *See* Section 7 of petition. The committee also corrected an inconsistency in the use of the phrase “good cause” and an incorrect cross-reference noted by the council.

Final changes were made to the proposed rule and approved by the Judicial Council. The Judicial Council then direct the Committee to draft the petition and supporting memorandum, which also was approved by the Judicial Council for filing.

Conclusion

The provisions proposed in the petition are designed to clarify the issues related to attorney pro hac vice admission, substitution, and withdrawal of retained counsel in Wisconsin appellate courts. They will aid practitioners and litigants, and improve court efficiency. Therefore, the Wisconsin Judicial Council respectfully requests the court to adopt the proposed provisions in the accompanying petition.

Dated: _____, 2020

Respectfully Submitted,

Wisconsin Judicial Council

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Judge Thomas M. Hruz
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APPENDIX 1

Judicial Council -- Appellate Procedure Committee Members

Service time noted below each name

Hon. Gerald Ptacek
Racine County Circuit Court Judge
Former Chair (2015-12/2017)
2015-12/2017

Atty. Jennifer Andrews (ad hoc)
Chief Staff Attorney
Court of Appeals
Committee reporter
Temporary Chair (10/2019-present)
2015-present

Sarah Walkenhorst Barber
Senior Legislative Attorney
Legislative Reference Bureau
2015-present

Dennis Meyers
Governor appointee
Germantown, WI
2015-present

Hon. Robert Van De Hey
Grant County Circuit Court
Former Chair (2/2017-5/2018)
2/2017-5/2018

Diane Fremgen (ad hoc)
Clerk of Supreme Court and Court of
Appeals
2015-4/2018

Karla Keckhaver (ad hoc)
Assistant Attorney General
Department of Justice
2015-present

Jeremy Perri (ad hoc)
Appellate Division Director
State Public Defender's Office
2015-9/2019

Professor Steven Wright
University of Wisconsin Law School
Chair (6/2018 to 8/2019)
6/2018-8/2019

Sheila Reiff (ad hoc)
Clerk of Supreme Court and Court of
Appeals
5/2018-present

Katie York (ad hoc)
Appellate Division Director
State Public Defender's Office
11/2019-present

Colleen Ball (ad hoc)
State Public Defender's Office
11/2019-present

Winn Collins
Department of Justice
11/2109-present

APPENDIX 2

Judicial Council Appellate Procedure Committee
Proposed Rule for Attorney Pro Hac Vice Admission, Substitution, Withdrawal
Request for Comments—Potentially Interested Persons
July, 2017
July, 2018

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