STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2010AP387-CR

In the matter of Sanctions Imposed in
State v. Gregory K. Nielsen,

STATE OF WISCONSIN,

Plaintiff-Respondent,

STATE OF WISCONSIN COURT
OF APPEALS,

Respondent,

v.

GREGORY K. NIELSEN,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

ROBERT R. HENAK
State Bar No. 1016803
REBECCA R. LAWNICKI
State Bar No. 1052416
HENAK LAW OFFICE, S.C.
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Wisconsin Association
of Criminal Defense Lawyers

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ARGUMENT

THE COURT OF APPEALS' PRACTICE OF SUMMARILY IMPOSING SANCTIONS OR DECLARING COUNSEL IN VIOLATION OF PROFESSIONAL ETHICAL RULES VIOLATES DUE PROCESS AND THAT COURT'S OWN OBLIGATION TO ACT FAIRLY

The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), submits this non-party brief in support of the State Public Defender's challenge to the Court of Appeals practice of summarily imposing sanctions in its written decisions for what it deems to be violations of court and ethics rules. In addition to the reasons set forth in the Public Defender's briefs, the Court of

Appeals' current application of Wis. Stat. (Rule) 809.83(2) and imposition of public reprimands for perceived violations of ethics rules, without prior notice and an opportunity to be heard, exceeds its authority, violates due process, and conflicts with SCR 60:04(1)(g).[1]

A. The Court of Appeals' Current Practice Violates Both Due Process and SCR 60:04(1)(g)

The Court of Appeals' current practice of using the decision on the merits of an appeal to impose sanctions or the equivalent of a public reprimand on an appellate attorney for what it subjectively perceives as violations of either a court or ethics rule deprives the attorney of his or her rights to notice and to be heard. That right is based not merely on constitutional guarantees of due process, as addressed in the State Public Defender's briefs, but on judicial ethical rules as well.

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

A harmonious existence of due process, SCR 60:04(1)(g) and Wis. Stat. (Rule) 809.83(2) is possible, indeed mandatory. Rule 809.83(2) merely authorizes imposition of sanctions; it does not define the procedure required for imposition of those sanctions. By analogy, the Criminal Code, Wis. Stat. chs. 939-961, defines crimes

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

and potential penalties but does not outline the procedures required for implementation of those punishments. Rather, those procedures are found in the Criminal Procedure Code, Wis. Stat. chs. 967-979, the Wisconsin and United States Constitutions, and published appellate authority.

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

The Court of Appeals' current practice of summarily sanctioning attorneys for perceived violations does not provide such harmony. Under that practice, wrongly sanctioned attorneys are limited to seeking reconsideration under Wis. Stat. (Rule) 809.24 or, as here, a petition for review to this Court. However, unlike the Queen of Hearts' preference for "sentence first – verdict afterwards," Carroll, Lewis, *Alice in Wonderland*, Chapter 12, the right to be heard under due process and SCR 60:04(1)(g) contemplates a right to be heard *before* the decision is made, not merely a post-decision request that the Court of Appeals exercise its discretion to undo what it just did, or a request that this Court exercise its discretion to hear the case.

B. Notice and an Opportunity to Be Heard Before Imposition of Sanctions or Reprimand are Critically Important

The right to notice and an opportunity to be heard *before* the imposition of sanctions is critical for a number of reasons in addition to those noted by the Public Defender. First, contrary to the Court of

Appeals' assertions, COA Brief at 12-14, there is a substantial risk of erroneous deprivation absent such process. For example, on several occasions the Court of Appeals has either sanctioned appellate counsel or admonished them in a decision on the merits or both, claiming that counsel filed a "false" appendix certification in violation of SCR. 20:3.3(a). *E.g.*, ***In re Estate of Greenblatt***, 2009 WI App 141, ¶1 fn.1, 321 Wis.2d 476, 774 N.W.2d 475 (unpublished); ***Cutler v. Cutler***, 2009 WI App 110, ¶11, 320 Wis.2d 703, 771 N.W.2d 929 (unpublished); ***State v. Brown***, 2007 WI App 19, ¶¶20-21, 298 Wis.2d 548, 727 N.W.2d 373 (unpublished); ***In re Termination of Parental Rights to Dimitri P.***, 2004 WI App 244, ¶¶11-12, 297 Wis.2d 586, 724 N.W.2d 704 (unpublished).[2]

In doing so, that Court overlooks the fact that there is a critical difference between a certification that is unintentionally inaccurate and one that is intentionally false, and only the latter violates SCR 20:3.3(a) ("A lawyer shall not *knowingly* . . . make a false statement of fact or law to a tribunal . . .." (emphasis added)). Prior notice and an opportunity to be heard allows the attorney to address whether any inaccuracies in the certification resulted from "inexperience, inadvertence or misunderstanding," ***Anderson v. Circuit Court for Milwaukee County***, 219 Wis.2d 1, 9-10, 578 N.W.2d 633 (1998), rather than knowing falsehood, and to do so before the Court solidifies its views on the matter.

Second, prior notice and an opportunity to be heard is necessary to minimize the risk that the Court will erroneously construe the relevant rule itself. Here, for instance, the Court of Appeals and the Public Defender dispute the meaning of the appendix content requirements of Wis. Stat. (Rule) 809.19(2)(a). It is better for all to resolve that matter *before* choosing to impose sanctions or to declare publicly that the attorney filed a "false" certification and violated ethical rules.

As another example, the Court of Appeals has, on multiple

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[2] These cases are not cited as precedent or authority, Wis. Stat. (Rule) 809.23(3)(a), but as evidence of the Court of Appeals' practice.

occasions, asserted that "misleading statements in briefs" violate SCR 20:3.3's requirement of candor toward tribunals. *E.g.*, ***State v. Jones***, 2010 WI App 133, ¶25 n.5, 329 Wis.2d 498, 791 N.W.2d 390 (quoting ***Wisconsin Natural Gas Co. v. Gabe's Constr. Co., Inc.***, 220 Wis.2d 14, 19 n.3, 582 N.W.2d 118 (Ct. App. 1998)). That is inaccurate, however. While neither attorneys nor the courts should resort to misleading arguments, the ethics rules only prohibit statements that the attorney knows to be "false." SCR 20:3.3(a). As demonstrated in the recent judicial ethics proceedings regarding a member of this Court, "misleading" is not the same as "false." *See* SCR 60:06(3)(c) (distinguishing knowing misrepresentations from allegations that, although true, are misleading).

Third, the Court of Appeals' argument also overlooks the fact that the due process right to be heard is not limited to issues of guilt or innocence. Similar to the contemptor's right to allocution in mitigation after a finding of contempt, ***In Matter of Contempt in State v. Paul Kruse***, 194 Wis.2d 418, 533 N.W.2d 819 (1995), the due process right to be heard also encompasses whether and what sanction is appropriate under the circumstances. *See* ***Morrissey v. Brewer***, 408 U.S. 471, 488 (1972) (a person facing loss of protected interest, in that case parole revocation, "must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation").

Fourth, the Court of Appeals' suggestion that adequate protection is provided by a motion for reconsideration under Wis. Stat. (Rule) 809.24(1), COA Brief at 12-13, fails for at least three reasons in addition to those cited by the Public Defender. First, it overlooks the fact that, once decided, "[m]inds, of course, are hard to change." Howard Gardner, *Changing Minds: The Art and Science of Changing our Own and Other People's Minds* 1 (2004); *see* David Ropeik, *Why Changing Somebody's Mind, or Yours, is Hard to Do*, http://www.psychologytoday.com/blog/how-risky-is-it-really/201007/why-changing-somebody-s-mind-or-yours-is-hard-do. The due process right to be heard and to persuade the Court *before* it makes

the decision to sanction or reprimand is not satisfied by later attempts to convince the Court that its original conclusion was wrong.

Second, and on a related point, the Court of Appeals overlooks the fact that the process of reviewing a decision is substantially different than that of reaching the decision in the first place. The initial decision whether to impose a particular sanction is vested in the sound exercise of the Court's discretion. ***Anderson***, ¶21. Reconsideration addresses a different question: whether "points of law or fact [were] erroneously decided in the decision." Wis. Stat. (Rule) 809.24(1).

> To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. A "manifest error" is not demonstrated by the disappointment of the losing party. It is the "wholesale disregard, misapplication, or failure to recognize controlling precedent."

Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd., 2004 WI App 129, ¶44, 275 Wis.2d 397, 685 N.W.2d 853 (citation omitted).

Reconsideration thus addresses whether the original decision was an erroneous exercise of discretion, ***Anderson***, ¶21, not whether, in the Court's sound exercise of discretion, it would have reached the same decision in the first instance in light of whatever response to the allegations the attorney may have provided. Rule 809.24(1) also provides no relief whatsoever in appeals regarding termination of parental rights or by a minor seeking an abortion, such as the attorney in ***Dimitri P.***, *supra*. Wis. Stat. (Rule) 809.24(4).

Finally, the Court of Appeals' suggestion of a *post hoc* procedure overlooks the fact that, in this age of instantaneous Internet transmission of released decisions, much of the damage inflicted by a decision inaccurately or unfairly sanctioning or admonishing an appellate attorney is irreversible at the time the original decision is released. Just as an e-mailed message or

photograph cannot be recalled, and may be duplicated and forwarded, neither can such a decision be recalled effectively, even if the Court should later reconsider the assertion of unethical or unprofessional misconduct. The allegation remains, whether in a web-search cache or some other archive, such that the damage to the attorney's reputation may be mitigated but not cured by subsequent court action.

The damage, moreover, is not minimal. "A reprimand is a public denunciation which permanently scars the [accused's] record. It is not a minor matter and should not be lightly imposed." ***In re Voorhees***, 739 S.W.2d 178, 180 (Mo. 1987) (citing ***Zauderer v. Office of Disciplinary Counsel***, 471 U.S. 626, 636-37 (1985)). It is "beyond peradventure that one's professional reputation is a lawyer's most important and valuable asset." ***Walker v. City of Mesquite***, 129 F.3d 831, 832 (5th Cir. 1997) (citing ***Cooter & Gell v. Hartmarx Corp.***, 496 U.S. 384, 412 (1990) (Stevens, J., concurring)). *See also* ***United States v. Talao***, 222 F.3d 1133, 1138 (9th Cir. 2000), noting that a finding of misconduct is "likely to stigmatize [the attorney] among her colleagues and potentially could have a serious detrimental effect on her career."

Such a reprimand, admonishment, or finding of professional misconduct carries all the more weight coming from a court. The public has every right to believe that a court will reach its conclusions only after fair proceedings and careful deliberation. *See* SCR 60:Preamble; 60:02; 60:03(a). Yet, the public viewing a decision imposing sanctions or a reprimand will not know that the Court of Appeals' current practice fails to provide those fundamental protections. *Cf.* ***Berger v. United States***, 295 U.S. 78, 88-89 (1935) (given prosecutor's obligation to do justice, improper allegations "are apt to carry much weight . . . when they should properly carry none").

C. The Rights to Notice and an Opportunity to Be Heard Before Imposition of Sanctions or Reprimand Do Not Prevent Appropriate Judicial Response to Misconduct

Just as compliance with the requirements of due process does not prevent the prosecution and punishment of those charged with crimes, compliance with those requirements does not prevent the courts from imposing sanctions where appropriate. It merely means that the courts must follow proper procedures in doing so, without resort to shortcuts or arbitrary action.

Nor does the right to notice and a meaningful opportunity to be heard *before* a finding of an ethical violation to suggest that the Court of Appeals is prevented from commenting, even disparagingly, on counsel's performance, *e.g.*, ***Butler v. Biocore Medical Technologies, Inc.***, 348 F.3d 1163, 1168 (10th Cir. 2003), or from referring perceived misconduct to the Office of Lawyer Regulation. SCR 60:04(3)(b).

Rather, what the Court of Appeals cannot legitimately do is make findings that the attorney violated the Code of Professional Conduct, in effect if not in name arrogating to itself the disciplinary power to impose a public reprimand and circumventing the protections provided by SCR ch. 22.[3] ***Foley-Ciccantelli v. Bishop's***

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[3] Examples of such public reprimands in all but name abound. *See, e.g.*, ***Jones***, 2010 WI App 133, ¶29 ("We caution Jones's appellate lawyer that this unsupported assertion violates not only SCR 20:3.3 referenced in footnote 4, but also SCR 20:3.1(a)(2), which directs that '[i]n representing a client, a lawyer shall not: ... knowingly advance a factual position unless there is a basis for doing so that is not frivolous.' See also SCR 62:02 (Standards of courtesy)."); ***State v. Marks***, 2010 WI App 172, ¶25 n.12, 330 Wis.2d 693, 794 N.W.2d 547 ("We caution Dekoria Marks's appellate lawyer, Joel A. Mogren, Esq., that SCR 20:3.3 'requires candor toward tribunals.'"); ***Gabe's Constr. Co., Inc.***, 220 Wis.2d at 19 n.3 ("We admonish National Union's appellate counsel, Ross A. Anderson, Esq., who signed National Union's main brief on this appeal, and Marci K. Winga, Esq., who appears with Mr. Anderson on that brief, that false and misleading statements in briefs filed in court contravene not only Rule 802.05(1)(a) but also SCR 20:3.3, which requires candor toward tribunals.").

Condo Ass'n, 2011 WI 36, ¶2, ___ Wis.2d ___, 797 N.W.2d 789 ("Violations of the Code of Professional Conduct are determined only by means of disciplinary action"). Even if the Court of Appeals were authorized to enforce the Code of Professional Conduct, it cannot legally impose such a reprimand without providing the accused attorney notice and an opportunity to be heard *before* imposing it.[4] Its current practice provides neither notice nor such an opportunity.

CONCLUSION

For these reasons, therefore, WACDL joins the State Public Defender in asking that the Court reject the Court of Appeals' current practice of imposing sanctions for perceived violations of ethics or appellate rules without prior notice or an opportunity to be heard, and ban outright that court's practice of imposing what are, in effect, public reprimands for perceived violations of the Code of Professional Conduct.

Dated at Milwaukee, Wisconsin, July 8, 2011.

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[4] The type of public admonishment of an attorney for perceived ethical violations in prosecuting the appeal before the Court is readily distinguishable from cases cited by the Court of Appeals, COA Brief at 26-28, where the Code of Professional Conduct is relevant to the merits of the appeal, as where attorney misconduct, *e.g.*, ***State v. Jackson***, 2007 WI App 145, ¶22, 302 Wis.2d 766, 735 N.W.2d 178 (allegation that prosecutor violated SCR 20:3.4(e) (2009-10) by giving personal opinion in closing), ineffectiveness, ***Strickland v. Washington***, 466 U.S. 668, 689 (1984), or disqualification of counsel, ***Foley–Ciccantelli***, *supra*, is at issue.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amicus Curiae

HENAK LAW OFFICE, S.C.

Robert R. Henak
State Bar No. 1016803
Rebecca R. Lawnicki
State Bar No. 1052416

P.O. ADDRESS:

316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300
henaklaw@sbcglobal.net

RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,743 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

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

_____
Robert R. Henak

Nielsen Amicus Brief.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 8th day of July, 2011, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Robert R. Henak