

“INTERLOCUTORY APPEALS”:
APPEALS BY PERMISSION UNDER
WIS. STATS. (RULES) 808.03(2) AND 809.50.

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“INTERLOCUTORY APPEALS”

I. Should an interlocutory appeal be attempted?

With the partial exceptions described in subsection C, *infra*, interlocutory appeal petitions—seeking interference by an appellate court with proceedings in a trial court—are disfavored and will probably not be granted. The petitioner's overarching challenge is to demonstrate, **in the initial petition and memorandum**, that the statutory criteria are met **and** that an appeal would be successful on the merits.

Interlocutory appeals should not be commenced solely for delay. It is unethical to file any motion or institute any proceeding solely to cause delay. Moreover, filing a petition for interlocutory relief solely for delay is not even effective in most cases: a frivolous petition can be disposed of in less than a month. On the other hand, if an issue arises that meets the criteria for interlocutory relief, counsel may find that the delay involved is either tolerable or actually helpful to the client.

The criteria to be met are addressed in subsection B, *infra*. A preliminary consideration is whether the client can endure (or would in fact benefit from) the delay. A few strategic considerations: Parties generally cannot enforce trial court level timelines while creating the delays inherent in interlocutory appeal proceedings. *See, Section II. D., infra*.

The procedures governing stays (and the legal effects of a stay) are discussed in sections II.D. and III.D, *infra*. The effects of stays, the need for tolling of deadlines, and all strategic consequences of pursuing an interlocutory appeal must be evaluated before a petition is filed.

A. An interlocutory appeal versus a petition for a supervisory writ.

The term "interlocutory appeal" is not statutory. Rather, Wis. Stat. Sec. 808.03(2) and Wis. Stat. Sec. (Rule) 809.50 (1) refer to “appeals by permission,” and appeals from "a judgment or order not appealable as of right."

Interlocutory appeals differ from “regular” appeals because they involve orders not appealable of right. Interlocutory appeals differ from supervisory writ petitions because writ petitions are not “appeals.”

As of right vs. permissive. An appeal as of right (the “regular” appeal) lies from a final order. Interlocutory appeals are not "as of right," but "by permission." They concern nonfinal orders. One petitions for permission to appeal; if granted, an appeal may ensue, or the court may summarily dispose of the appeal under Rule 809.21.

Appeal vs. writ. Writ proceedings in the appellate court are an alternative to an interlocutory appeal. The purpose of a petition for a writ is to obtain intervention to prevent a

trial judge's flouting of "plain legal duty." Writ proceedings are not "appeals" at all. They are requests that the appellate court act, not under its appellate jurisdiction, but in its supervisory capacity or in its exercise of original jurisdiction to issue a prerogative writ in order to enforce the law. A petition for a writ must show that an appeal (including an interlocutory appeal) would be inadequate and that the court must use its supervisory (or, in the case of the supreme court, superintending) authority.

At common law, courts had prerogative power to issue the writs in aid of their jurisdiction. The types of writs were distinctly labeled, such as *mandamus* ("We command"...the performance of a particular act), *quo warranto*, *certiorari* ("to be informed of"), prohibition, *coram nobis* ("in our presence").

The writs of prohibition and mandamus have been merged into the "supervisory writ" discussed in Rule 809.51, which governs writ procedure. There are instances where the relief sought could appropriately be granted either in the context of a supervisory writ or an appeal by permission. In such cases, **it may be advisable to plead in the alternative, allowing the appellate court to use the procedures it deems most appropriate.** See, *State ex rel. Oman v. Hunkins*, 120 Wis.2d 86 352 N.W.2d 220 (Ct. App. 1984) (discussing criteria for supervisory writ and differences between supervisory writ proceedings and appeal).

Another reason to file alternative petitions for leave to appeal and for a supervisory writ is that more than one ground for relief might exist. For example, if petitioner seeks removal of the trial judge because the request for substitution was timely but also because the trial judge should be disqualified for bias, the petitioner should seek a supervisory writ on the substitution issue and interlocutory relief on the bias issue. Note that the standards for granting relief differ between the two types of proceedings.

After determining the ground for relief, it is advisable to research the manner in which appellate courts have granted it other cases. Did the courts follow interlocutory appeal procedures or did they grant a supervisory writ?

A petition for leave to appeal a nonfinal order must be responded to within fourteen days. In contrast, the appellate court decides whether the respondent must answer the petition for a supervisory writ. If the court determines that the petition is insufficient, it may deny the petition *ex parte*.

The remainder of this outline addresses permissive (interlocutory) appeals.

B. The statutory criteria and the ultimate criterion.

Statutory Criteria:

Section 808.03(2) lists the criteria the court of appeals must consider when deciding whether to grant a petition for appeal by permission:

1. Whether an appeal would materially advance the termination of the litigation or materially clarify further proceedings in the litigation.
2. Whether an appeal would protect the petitioner from substantial or irreparable injury.
3. Whether an appeal would clarify an issue of general importance in the administration of justice.

Overarching the explicit statutory criteria is the **ultimate criterion: whether the petitioner would succeed on the merits**. As pointed out in Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin, State Bar of Wisconsin, 2002:

The most important criterion for determining whether an appeal should be granted is not expressly included among the statutory criteria listed in sec. 808.03(2), although it is implicit in those criteria. This consideration is whether the petition for leave to appeal shows a substantial likelihood of success on the merits. Only in this context can the general criteria listed in sec. 808.03(2) be given much significance. Likelihood of success on the merits is the first question the court will consider when responding to a petition for leave to appeal because the court will want to ensure that an appeal will not simply serve to delay and defeat the ends of justice, rather than expedite and clarify the proceedings. A petition for leave to appeal that does not show likely trial court error will generally be denied.

Id. at §9.4, Ch. 9, p. 3.

C. Types of cases where interlocutory appeals are necessary or favored.

Interlocutory appeals are **necessary** to effectively litigate any claim of a **defective bind over** and a defective **preliminary examination**. Conviction following a "fair and errorless" trial has been held to cure any arguable defect in the preliminary hearing. *State v. Webb*, 160 Wis.2d 622, 467 N.W.2d 108 (1991). Such defects, according to *Webb*, might include:

1. claims of errors of law likely to recur in the ensuing trial;
2. allegations that the proceeding should be terminated because of preemption by federal law;
3. challenges to the subject matter jurisdiction of the court;
4. challenges to the personal jurisdiction of the court; and

5. challenges to the constitutionality of the laws under which a petitioner is being prosecuted.

NOTE: Challenges raised in a petition for leave to appeal are preserved for a later appeal as of right, even if the court of appeals denies the petition for leave to appeal, *State v. Wolverton*, 193 Wis.2d 234, 533 N.W.2d 167 (1995) (noting that claim of defective bind over based on undue restriction of right to cross examine witnesses must be raised in an interlocutory appeal).

The court of appeals has strongly suggested that **judicial substitution** issues are deemed waived unless the defendant challenges them by either seeking administrative review by the Chief Judge of the district, or asking the court of appeals to exercise its supervisory authority. *State v. Damaske*, 212 Wis.2d 169, 185-86, 567 N.W.2d 905 (1997). The issue would also have been preserved if an objection had been made to the trial court, and if the defendant had proceeded to trial, rather than entering a no contest plea. *Id.* at 186-87.

To be on the safe side, **always seek review by the chief judge of the denial of a substitution request before approaching the court of appeals**. This is required in any civil case, such as a juvenile case: *Barbara R.K. v. James G.*, 2002 WI App 47, 250 Wis.2d 667, 641 N.W.2d 175. While *Barbara R.K.* may not be applicable to criminal cases, seeking administrative review from the chief judge is a relatively fast and easy way to preserve the issue. It sometimes holds potential for relief.

Interlocutory appeals are encouraged for claims that a prosecution violates the petitioner's rights to be free from **Double Jeopardy**. In *State v. Jenich*, 94 Wis.2d 74, 288 N.W.2d 114 (1980), the supreme court recommended that the court of appeals grant petitions for leave to appeal nonfinal orders which denied motions to dismiss for Double Jeopardy.

Interlocutory appeals should be granted routinely where the petitioner is challenging an order **waiving the jurisdiction of the juvenile court** in favor of adult court prosecution. *State ex rel A.E. v. Green Lake County Circuit Court*, 94 Wis.2d 98, 288 N.W.2d 125 (1980). For extensive practical assistance in these cases, consult Virginia A. Pomeroy, Gina M. Pruski and Susan E. Alesia, **Wisconsin Juvenile Law Handbook**, Chapter 13, State Bar of Wisconsin, May, 2002.

Generally, interlocutory appeals will succeed most often in cases where the **standards of review** increase the likelihood of a reversal (success on the merits for petitioner). The standard of review is a critical determinant of the outcome of any appeal. An appellate court is unlikely to accept an appeal to review a purely factual determination. Factual determinations are upheld unless clearly erroneous. Discretionary determinations (including waiver determinations) are similarly difficult to overturn on appeal. However, in the waiver context, the supreme court recognized in *A.E.*, *supra*, that interlocutory review is likely the only appellate review that is available to juveniles as a practical matter.

D. Types of cases where interlocutory appeals are especially disfavored.

Interlocutory appeals, in practice, are disfavored in all types of cases (even those in which they are ostensibly encouraged). It would seem, though, that a petitioner would have an especially onerous burden when appealing **denial of a suppression motion**. Under Section 971.31(10), the denial of the motion can be appealed as of right following conviction even when a guilty plea is entered. Note: Suppression issues are not preserved under sec. 971.31(10) unless they are raised in the suppression motion *and* ruled on by the trial court.

II. What must be done in the trial court before an interlocutory appeal may be commenced?

A. Give the trial court an opportunity to address all issues before attempting an appeal.

Litigate all issues in the trial court first. Raise more than nominal objections that might be sufficient to preserve an issue for an appeal as of right. The appellate court will demand proof that the petitioner made every effort to resolve the case in the trial court before resorting to a petition for appeal. Waiver is commonly found by appellate courts in appeals as of right, and waiver is an especially inviting rationale for refusing to hear a petitioner seeking a permissive appeal.

B. Have the trial court sign and enter an Order reflecting the ruling.

Rule 809.50 (1) requires entry of a written order prior to petitioning for leave to appeal under sec. 808.03(2). Make sure you have raised all issues and made all arguments before a written order is entered, as **the entry of the order triggers a 14 day deadline for filing the petition**. (The deadline is extendable under Rule 809.82(2), but such an extension request would not be looked upon at all favorably, inasmuch as the petition itself is not encouraged.)

C. Request preparation of, and make arrangements to pay for, all needed transcripts for the court and all parties. See Rule 809.11(4).

If time is not of the essence, you might be able to order the transcript and obtain it prior to drafting the trial court's order, so that the petition can cite to the transcript and so that the transcript is available to the court of appeals immediately. In many cases, the chances of prevailing are increased if the court of appeals is able to grant leave to appeal the nonfinal order and summarily reverse the order at the same time. The court of appeals can do this under Rule 809.21, which allows for summary disposition.

If the petitioner desires summary disposition (*e.g.*, concerning a simple matter, like a trial court's refusal to grant bail), it is well to advise the court of appeals of that desire in the petition so that the opposing party has the opportunity to address it. It is also best, regardless

of whether summary disposition is being sought, to provide the court of appeals with as much material as possible demonstrating the compelling need and entitlement to relief.

D. Apply for any needed stay in trial court proceedings.

Trial court proceedings are **not** automatically stayed upon filing a petition for leave to appeal. The petitioner must move separately for an order staying the proceedings.

The court of appeals will not grant a stay unless the petitioner has moved for one in the trial court or unless the petitioner can show that it was impracticable to seek a stay from the trial court. Rule 809.12 requires a trial court motion for a stay prior to moving for one in the court of appeals. *See generally*, Sec. 808.07(2) and Rule 809.52, in addition to Rule 809.12. NOTE: Rule 809.14 describes general requirements for motion practice in the court of appeals.

The motion for a stay in the court of appeals must demonstrate that the petitioner would be unduly harmed unless a stay is granted. Often, this can be accomplished by stating simply, "Failure to stay the proceedings would moot the appeal." The motion should also demonstrate the likelihood of success on the merits. It is permissible to refer to the petition (if that has been filed or if it accompanies the motion), but the motion should be a reasonably "self-contained" document that makes this showing. (If the petition itself is quite short, there is nothing wrong with putting the motion for a stay in the same document. Just be sure that that motion is broken out separately in the caption on the cover page, so that the court is aware of it immediately.)

If time is of the essence, *e.g.*, to prevent destruction of evidence or to ensure tolling of trial court deadlines, consider requesting that the court of appeals hear the stay motion *ex parte* under Rule 809.14 (2). The court may either do so, or convene a telephone hearing between the presiding judge and counsel in order to expedite consideration of the stay request.

In *State ex rel. Rabe v. Ferris*, 97 Wis.2d 63, 68-69, 293 N.W.2d 151 (1980), the defendant's statutory right to a speedy trial was subordinated to the state's ability to enforce a stay of trial court proceedings pending the state's interlocutory appeal of a trial court order. (*Rabe* declined to decide whether constitutional rights to a speedy trial would be similarly infringed.)

Rabe does not definitively decide whether filing a petition for leave to appeal automatically tolls trial level time limits. Its reasoning strongly suggests, however, that tolling is **not** automatic upon the filing of a petition, but that it can be accomplished by either the trial court or the appellate court if they grant a stay of proceedings in the sound exercise of discretion. Thus, for example, if one appealed a judge's refusal to self-disqualify under Sec. 757.19 *et seq.* (or to recuse himself or herself based on case law requirements) one might wish to litigate that refusal through an interlocutory appeal while reserving the ability to file a substitution request (which is available only once) under Sec. 971.20. Tolling the time limits of Sec. 971.20 should be possible by obtaining the proper stay order from the trial court or appellate court. (This is especially true given case law holding that a defendant has the right to

intelligently exercise the substitution right, and that time limits can be relaxed to assist that process. *See, Tinti v. Waukesha County Circuit Court*, 159 Wis.2d 783, 464 N.W.2d 853 (Ct. App. 1990)).

An order staying proceedings, directed to the circuit court, tolls the running of any time period within which an act is to be done in that court. *In the Interest of W.P.*, 153 Wis.2d 50, 449 N.W.2d 615 (1990) (temporary 30 day extension of juvenile dispositional order was tolled by stay).

NOTE: In *W.P.*, the supreme court "conclude[d] that [the court of appeals'] order was sufficient to toll the temporary 30 day extension order entered pursuant to sec. 48.365(6)." *Id.* at 57. The supreme court was not called upon to address whether a stay order issued by the circuit court would have stayed the time limits. Therefore, even when the circuit court has granted a stay, it might be prudent to ask the court of appeals to continue it.

E. Determine whether opposing counsel in the court of appeals is the district attorney or the attorney general.

Generally, the district attorney represents the state in misdemeanor and juvenile matters, and the attorney general represents the state in felony matters. *See* Rule 809.80(2)(b) (District attorneys generally represent state in cases that are decided by one judge panels of the court of appeals under s. 752.31(3).) and sec. 978.05(5) (District attorneys may represent the state in other criminal appeals "[u]pon the request and under the supervision and direction of the attorney general)."

Even when the opponent is normally the district attorney, "[i]f a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding (sic) and be entitled to be heard." Sec. 806.04(11). So it may be necessary to serve both the district attorney and the attorney general.

NOTE: A document is not deemed filed with the court until the court actually receives it, but it is deemed served on opposing counsel when it is deposited in regular mail, properly addressed and with adequate postage. An affidavit of mailing is a good idea. *See* Rules 801.14(1), (2) and (4), and 809.80(2)(a). If the petition is granted, and the court orders briefing, the briefs may be filed upon mailing if the requirements of Rule 809.80(4) are met.

III. What must be filed in the court of appeals?

A. Petition.

The petition and supporting memorandum **must be filed within 14 days of entry of the order** described in section II.B, *supra*. A copy of the order appealed from, with the trial court clerk's date stamp, must be attached to the petition.

The petition and supporting memorandum, collectively, must contain everything listed in section B, *infra*. **The combined total length may not exceed 35 pages (if a monospaced font is used) or 8,000 words (if a proportional serif font is used). Rule 809.50(1).** Rule 809.50(4) also requires that a statement be attached to the petition which indicates whether the petition is produced with a monospaced or a proportional serif font, and, if a proportional serif font is used, sets forth the word count.

Rule 809.81 sets forth all of the other form requirements (size, number of copies, type style, cover, captions, spacing, margins, pagination, etc.).

NOTE: After attempting to identify for oneself the current requirements concerning the number, form and length of documents to be filed in the appellate court, it is a good idea to consult the clerk with any questions before filing and serving the petition. Assuming that counsel has already made a good faith effort to identify the applicable rules, the staff in the clerk's office tries very hard to be helpful and seldom give inaccurate advice. The clerk's telephone number is (608) 266-1880.

The petitioner has some flexibility in deciding how detailed the petition should be and how much it should refer to and incorporate the supporting memorandum. In extremely simple cases, a petition alone can include everything. If a petition and supporting memorandum are both filed, they should clearly set out the procedural history, what steps have been taken to obtain needed transcripts, the facts and the argument.

NOTE: The petition itself--in addition to whatever is contained (perhaps more comprehensively) in the supporting memorandum, **must** contain the sections described in Rule 809.50(1), (a) through (d). For example, Rule 809.50(1)(b) requires a "statement of the facts necessary to an understanding of the issues." Such a statement--perhaps truncated--must be in the petition. The petition might then cite to a more comprehensive statement of facts in the supporting memorandum.

TIME LIMIT: The petition and any supporting memorandum must be filed within 14 days after entry of the order described in Section II.B, *supra*. Rule 809.50(1). A few important principles:

--The deadline for **filing** is **not** satisfied on the day of mailing. Filing is not timely unless the clerk receives the document within the time set for filing. Rule 809.80(3)(a).

--The deadline for **service** is satisfied upon mailing with proper address and postage; the opponent has up to three days added to their deadline if service was effectuated by mail. Rule 801.15(5).

--The 14 days starts on the day after the order is entered and ends on the 14th day thereafter, unless it is a day that the clerk of courts office is closed. Rules 801.15(1)(b) and 809.82.

TIME LIMIT ISSUE: May a party create a new deadline by simply moving the trial court to reconsider an order already entered, and then seeking to appeal the denial of reconsideration? Answer: Probably not, especially if the reconsideration motion was filed solely to create a "new" time limit. Even if the court of appeals did not formally rule that a petition from the denial of reconsideration was untimely, it could find that the petitioner's lack of diligence demonstrated that there was no urgent need for interlocutory relief. On the other hand, if the reconsideration is sought because the trial court truly was not given the opportunity to respond to all of the arguments, the appellate court would be unlikely to find a petition from denial of reconsideration to be untimely, for such a finding would discourage complete litigation of issues in the trial court. The ideal practice for the putative petitioner is not to have the trial court sign an order--thus triggering time limits--until the petitioner is certain that all issues have been litigated.

The best practice, if a motion for reconsideration is contemplated, is to avoid having the trial court enter a written order until the reconsideration motion has been filed and litigated. This avoids triggering a deadline in the first instance.

If a basis for reconsideration arises while the appeal is pending, consider filing a motion for remand in the court of appeals. *See, Metro Greyhound Mgt. Corp. v. Racing Bd.*, 157 Wis.2d 678, 698, 460 N.W.2d 802 (Ct. App. 1990). There the court held that such motions "serve an important function. First, a trial court's reconsideration may obviate the necessity for an appeal... Second, ... the trial court's [reconsideration] decision can hone its analysis, and thus assist appellate review."

B. Supporting Memorandum.

As in all appellate practice, but especially in this area, the petitioner must be brief enough so that the submissions will be read, yet thorough and persuasive in the initial petition, because there is no guarantee that a more comprehensive brief will be received later.

If at all possible, every factual assertion made in the memorandum should be supported by a citation to the transcript or other court document upon which the assertion is made. Every legal assertion should be supported with a citation to authority.

1. Issues Presented.

Put the issue(s) in the form of a question that shows concisely but precisely how the trial court ruled and why the ruling is both erroneous and in need of immediate rectification.

The court of appeals may specify the issue or issues it will review if it grants the petition for leave to appeal. Rule 809.50(3).

2. Statement of Facts and Procedural History.

Even if only one discrete issue is being litigated, the appellate court is aided by a few short paragraphs that specifically detail the dates in the procedural history (when charged, bound over, etc., when the motion in question was filed, and when and how it was heard and disposed of). The statement of facts, focused on the issue presented, should be brief but sufficient to show the significance of the issue to the broader controversy. Cite to transcripts and other sources whenever possible.

3. Statement demonstrating need for immediate review.

The argument section should amplify the bases for the petition. This "statement" section, however, should specifically state how each criterion relied upon is met. In keeping with section I.A, *supra*, this section might usefully include a brief statement as to why success on the merits is likely (*e.g.*, citing to the primary authority relied upon and contrasting that authority with the trial court ruling).

4. Argument.

Remember, again, that there is no guarantee that the court will grant the petition and then allow a subsequent brief. So the petition and memorandum should, in effect, *be* the brief.

5. The Relief Sought.

If the injustice of the petitioner's plight can be summarized, it may be appropriate to do so at the conclusion of the petition or memorandum. However, the most important purpose of the conclusion (which is not specifically required in the rules) is to provide a succinct statement of the relief the petitioner hopes to obtain.

C. Appendix.

The rules do not require an appendix, except that **Rule 809.50(1)(d) requires that a "copy of the judgment or order sought to be reviewed" be attached to the petition.** For the reasons discussed in section II.C, *supra*, the ideal situation is one in which the court can be provided with as much of "the record" as possible at the petition stage. (Technically, the "record" will be transmitted by the clerk only after a petition for leave to appeal is granted,

unless the court of appeals both grants the petition and summarily disposes of the appeal, in which cases the trial court clerk would not transmit the record. The point is that the court of appeals will have greater confidence in overturning the trial court, or even agreeing to review its decision, if it has copies of as much **relevant** material as possible.)

D. Motion for any needed stay not provided by trial court.

See, Section II.D, supra.

E. Consider a motion for a three judge panel.

An appeal in a felony case will be heard by a three judge panel and its decision (if leave to appeal is granted) is subject to being published. The petitioner will have the opportunity to argue for publication in the brief that follows the grant of leave to appeal.

If the petitioner anticipates summary disposition under Rule 809.21, an argument for publication should be made in the petition. The argument should address the publication criteria in Rule 809.23.

If the case is not a felony, it will probably be heard by a one judge panel. Consult Sec. 752.31 to find out. One judge decisions cannot be published, so they have no precedential effect. Rule 809.23(1)(b) 4.

A one judge decision may well be in the best interests of your client. Statistically, it is easier to persuade one judge than three. In addition, the court of appeals incurs less political pressure by granting relief in a non-published decision. (This should be considered when deciding whether to seek publication in a felony case.)

On the other hand, the client may be well served by an effort to obtain publication. If the court of appeals can be convinced that the issue is sufficiently important to warrant publication, that might reinforce the argument for granting leave to appeal.

If publication is desired in a case normally decided by one judge, a party may move for a three judge panel. In a regular appeal, that motion must accompany the notice of appeal, Rule 809.41. In interlocutory appeals, the order granting leave to appeal constitutes the notice of appeal, Rule 809.50(3). Therefore, the motion should be filed, if possible, with the petition seeking leave to appeal. If a basis for publication arises after the deadline, remember that the Chief Judge of the Court of Appeals has the authority to convert the case to a three-judge case. Rule 809.41(3). A party may write to the chief judge and request such an order.

IV. What happens after the petition is filed?

A. A response is due within 14 days.

The respondent's 14 day deadline is computed the same way as the petitioner's. Rule 809.50(2).

B. If the petition is denied, the denial will not be reviewed by the supreme court.

In *In the Interest of J.S.R.*, 111 Wis. 2d 261, 330 N.W.2d 217 (1983), the juvenile first petitioned the court of appeals for leave to appeal a nonfinal order concerning discovery. Before the court of appeals decided that petition, the juvenile petitioned the supreme court to allow for bypassing the court of appeals. The supreme court denied the bypass petition, reiterating its holdings that the decision whether to grant leave to appeal is subject to the discretion of the court of appeals, not to be reviewed by the supreme court, *Id.* at 262, citing *Aparacor, Inc. v. DILHR*, 97 Wis.2d 399, 293 N.W.2d 545 (1980); *State v. Whitty*, 86 Wis.2d 380, 272 N.W.2d 842 (1978); and *State v. Jenich*, 94 Wis.2d 74, 97a, 292 N.W.2d 348, 349 (1980).

The supreme court has never agreed to review a court of appeals' denial of a petition for leave to appeal a nonfinal order. Such review is unlikely. However, *J.S.R.*, *supra*, 111 Wis.2d at 263, admits that the rule against such review is a "matter of policy" that is "theoretically subject to certain exceptions." These could include certification of an issue by the court of appeals or the intervention in an action by the supreme court on its own motion. *Id.* "Neither procedure is likely to be invoked in the absence of unusual circumstances. In any event, the litigants themselves cannot initiate the process by means of a bypass petition." *Id.*

This author attempted to persuade the supreme court to review the denial of a petition for leave to appeal. The argument was that, even though the court of appeals denied the petition, it did so after conducting the equivalent of a full-blown appeal that should be subject to review. The court of appeals, after the petition and response had been filed, had remanded the case for an evidentiary hearing before a referee (the trial judge was a witness), had thereafter received the transcript along with findings by the referee, and had permitted the parties to supplement the petition and response. Relying on numerous cases holding, *e.g.*, that an appellate court is not bound by " ...labels... but will look beyond the form and label of the document to the substance and nature of the determination," (*In re Corporation of Town of Fitchburg*, 98 Wis.2d 635, 647-48, 299 N.W.2d 199 (1980)), the petitioner sought review based on the claim that the court of appeals had, in effect, heard an appeal despite denial of the petition for leave to appeal. Review was denied, with one dissent.

C. If the petition is granted and the appeal is not disposed of summarily under Rule 809.21, the appeal proceeds under rules governing appeals as of right.

Granting the petition has the effect of filing a notice of appeal. The petitioner's next responsibility is to file a docketing statement, *if required by Rule 809.10(1)(d)*, within 11 days after the order granting the petition for leave to appeal. Rule 809.50(3).

See generally Rules 809.10, .11, .15, .18, .19, .22, .23, .24 and .26 for the rules governing appeals as of right.

- D. A grant of leave to appeal from a non-final order or judgment does not authorize cross-appeals as of right by other parties from the same or from another non-final order or judgment.**

Cross appeals require a separate petition for leave to appeal a non-final order. Rule 809.50(3).

Other Sources of Information.

1. Wisconsin Statutes:

Chapter 808 (Appeals and Writs of Error).
Chapter 809 (Rules of Appellate Procedure).
Chapter 752 (Court of Appeals).

2. Michael S. Heffernan, **Appellate Practice and Procedure in Wisconsin**, Third Edition. Chapter 9. State Bar of Wisconsin, October 2002.

3. Internal Operating Procedures of Wisconsin Court of Appeals. (These are printed at the end of the Wisconsin Statutes, *e.g.*, Vol. V, p. 6252-57, softbound edition, 2001-03.)

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