# APPELLATE PRACTICE AND PROCEDURE

## *for SPD-Appointed Counsel*

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**Wisconsin State Public Defender – Appellate Division**

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To the Appellate Practitioner:

Thank you for signing on to take case appointments from the State Public Defender's Appellate Division.

Wisconsin's rules of appellate procedure for criminal cases and other cases where there is a statutory or constitutional right to counsel provide unique litigation opportunities. In other jurisdictions, criminal appellate attorneys are limited to reviewing a static record and writing appellate briefs that raise preserved issues and/or errors so clear that they fall within "plain error" or "structural error" doctrines.

In contrast, under Wisconsin rules, the right to a direct appeal includes a right, and in some cases an obligation, to first move for postconviction or postdisposition relief in the circuit court. Postconviction litigation may involve a contested hearing or even an evidentiary hearing. Common postconviction motion issues include, for example, whether a guilty plea was involuntarily entered, whether trial counsel was ineffective, or whether a sentence should be reduced based on information rebutting the judge's understanding of the defendant's prior history or circumstances of the crime. Appellate attorneys in Wisconsin thus have the opportunity, and the duty, to enhance or develop the record, and to resolve all of a client's claims in a single appeal.

This system makes Wisconsin appellate practice dynamic and interesting. Attorneys have more creative control over a case and get to employ a broader range of skills, but it also makes appellate practice in Wisconsin more challenging. In addition to reviewing the trial record, Wisconsin appellate attorneys must consider and evaluate issues that were not raised and evaluate or reevaluate witnesses who may or may not have been part of the underlying case. Consequently, in addition to traditional appellate skills, attorneys taking Wisconsin public defender appeal cases must also develop skills more typically associated with trial practice.

This handbook is intended as a general guide to this process. Of course, no guide is 100 percent comprehensive; this handbook is not intended to provide specific legal direction or advice. It is a starting point. In using this handbook, you should always verify citations, use your legal training and good judgment, and seek the advice of more experienced attorneys when needed. And no guide can substitute for intellectual curiosity and empathy, which we hope will inform every aspect of your practice.

Again, thank you! We hope you find this work—as we do—interesting and rewarding.

Very truly yours,

The Appellate Division Management Team

# PLEASE NOTE

This handbook is distributed or posted as a general information guide for appellate practice in Wisconsin public defender cases. It is not 100% comprehensive and is not intended to constitute specific authoritative legal direction or advice. Attorneys should know, reference, and follow all relevant statutes, court rules, and case law when analyzing a matter or taking action in any given case. This publication was finalized in August 2024. Subsequent changes to the law are not included. If you find any errors or omissions, please let a manager in the SPD Appellate Division know.

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# CHAPTER ONE:

## INTRODUCTION TO APPELLATE PRACTICE

### I. Overview of the appellate process

#### a. A snapshot of our cases

The State Public Defender (SPD) Appellate Division appoints attorneys to handle appeals in cases in which there is a constitutional or statutory right to counsel.[1] In addition, the SPD has limited authority to appoint counsel in some cases where there is no absolute right to counsel if it determines that the case should be pursued as a discretionary matter.[2] Discretionary appointments are rare.[3]

The vast majority of SPD appeals are governed by Wis. Stat. (Rule) § 809.30, which sets forth the procedure applicable to direct appeals in criminal, youth delinquency, civil commitment,[4] and CHIPS[5] cases. In addition, Rule 809.30 governs some, but not all, contempt cases. Specifically, it governs appeals of remedial and punitive contempt proceedings that were prosecuted by the government.[6]

The Appellate Division also appoints attorneys in termination-of-parental-rights (TPR) cases, which are governed by the appellate rules set forth in Wis. Stat. (Rule) § 809.107.

In addition, the Appellate Division appoints counsel to defend against appeals filed by the state and sometimes appoints counsel to represent clients involved in permissive (interlocutory) appeals.[7]

A small number of SPD-appointed appeal cases are governed by civil appeal rules.[8] Examples include appeal of a summary contempt order, appeal from denial of a sentence modification motion filed under Wis. Stat. § 973.19, appeal from denial of a writ of certiorari, appeal from denial of a collateral (not direct appeal) postconviction motion under Wis. Stat. § 974.06, and appeal from denial of common law writs of habeas corpus or error Coram Nobis.

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1 *See* Wis. Stat. § 977.05(4) (2019-20).

2 Wis. Stat. § 977.05(4)(j).

3 As a matter of policy, the SPD Appellate Division generally makes discretionary appointments only where there is a reasonable chance of success and the issue presented is of statewide importance, is important to the development of the criminal law, and is so complex that representation by an attorney is necessary.

4 This statute handles direct appeals from all kinds of civil commitments, whether they arise out of Chapter 51, Chapter 55, Chapter 980, or Wis. Stat. § 971.17. Wis. Stat. (Rule) § 809.30(1)(a).

5 CHIPS refers to Child in Need of Protection or Services, as defined in Chapter 48. The SPD appoints counsel for children in CHIPS proceedings at both the trial and appellate level. Wis. Stat. § 977.05(4)(i)5. & 48.23(1m). The SPD appoints counsel for parents in CHIPS proceedings when the proceedings are governed by the Indian Child Welfare Act. See Wis. Stat. §§ 977.05(4)(i)5. & 48.23(2g). The legislature also created a five-county pilot program until June 30, 2025, where the SPD represents parents in CHIPS cases in Brown, Winnebago, Outagamie, Racine, and Kenosha counties. Wis. Stat. § 48.233.

6 Wis. Stat. § 785.03(3).

7 *See* Wis. Stat. (Rule) § 809.50 (setting forth the procedure applicable to permissive appeals) & § 974.05 (setting forth the procedure applicable to State's appeals). In some cases, a trial attorney appointed by the SPD Trial Division handles the interlocutory appeal.

8 *See* Wis. Stat. § 808.04(1).

### b. Focus on Rule 809.30 and TPR Appeals

This handbook focuses on Rule 809.30 and TPR appeals.[9] These involve similar, though not identical, procedures. In both kinds of appeals:

- The appeal is initiated when the trial attorney files a Notice of Intent to Pursue Postconviction or Postdisposition Relief in the circuit court.[10]

- After the filing of the Notice of Intent, the clerk of the circuit court sends various case materials to the SPD, after which, if the SPD determines the person to be eligible, the SPD appoints counsel and requests the transcripts from the court reporters and the court record from the clerk.[11]

- After the court reporters and clerk provide the transcripts and court record to the appointed attorney, there are mechanisms for filing a postconviction or postdisposition ("postjudgment") motion in the circuit court to raise issues not preserved for appeal, though the procedures are different.[12] Alternatively, for some issues, the appellant can bring the case straight to the Wisconsin Court of Appeals.[13]

- If the circuit court denies the relief requested in the postjudgment motion, an appeal from the denial of that motion (along with the underlying judgment, if the case is on direct appeal) can be taken to the court of appeals.[14]

- If the court of appeals does not grant relief, a petition for review can be filed with the Wisconsin Supreme Court.[15]

- If appointed counsel concludes that there are no issues of arguable merit that can be raised on appeal, either before or after litigating a motion in the circuit court, there is a procedure for filing a no-merit report in the court of appeals.[16]

- If, after litigating an ordinary appeal in the court of appeals, counsel concludes that there is no non-frivolous basis for filing a petition for review, there is a procedure for filing a no-merit petition for review in the state supreme court.[17]

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[9] Appendix 1.c. is a time table for civil appeals and this book occasionally refers to provisions regarding civil appeals. But there is no need to be worried that you will get a case that is categorized as a civil appeal and not know what to do. Generally, we appoint procedurally unusual cases to experienced staff attorneys. When we appoint a case to a private bar attorney, we tell the attorney what sort of case it is before they agree to take it.

[10] Wis. Stat. (Rule) § 809.107(2)(bm) & 809.30(2)(b).

[11] Wis. Stat. (Rule) § 809.107(3)-(4) & 809.30(2)(c)-(e).

[12] Wis. Stat. (Rule) § 809.107(6)(am) & 809.30(2)(h).

[13] Wis. Stat. (Rule) § 809.107(6) & 809.30(2)(h).

[14] Wis. Stat. (Rule) § 809.107(6)(am) & 809.30(2)(j).

[15] Wis. Stat. (Rule) § 809.62; *see also* Wis. Stat. (Rule) 809.107(6)(f).

[16] Wis. Stat. (Rule) § 809.107(5m) & 809.32.

[17] Wis. Stat. (Rule) § 809.32(4).

Despite these similarities, Rule 809.30 appeals and TPR appeals also differ in significant ways. Among other things, TPR deadlines are shorter (as shown in the time tables found at Appendix 1.a., 1.b., and 1.c.) and the notice of appeal in a TPR case must be filed prior to filing any postjudgment motion in the circuit court. Additionally, in a TPR case, the notice of appeal and the petition for review must have the client's signature.[18] These and other differences are discussed later in this handbook. However, the procedures are similar enough that they can be presented together.

### c. The scope of an SPD appellate appointment

#### i. The proceedings that are part of the appeal

Representation in an SPD-appointed direct appeal case runs from the date of appointment through final resolution of the case in state court, which may involve review in the Wisconsin Supreme Court. Your appointment in a direct appeal case remains open and active until appellate review is exhausted by denial of relief or review in the Wisconsin Supreme Court, unless and until: (1) your client wins the relief requested; (2) your client explicitly directs you to close the case, with a full understanding of the ramifications of that decision; (3) a court orders that you may withdraw from the case, either via a motion to withdraw or a no-merit appeal; or (4) the SPD determines (before any motion or notice of appeal has been filed) that the case must be administratively reassigned.

Your representation covers every aspect of the appellate process in the case for which you were appointed, including:

- Litigating any postjudgment motion(s) in the circuit court.
- Pursuing any appeal or no-merit appeal in the court of appeals.
- Representing your client at any hearing held in the circuit court on remand from an appellate court so long as the appeal is not concluded.
- Filing a petition for review or a no-merit petition for review in the Wisconsin Supreme Court and litigating the case in that court if review is granted.

As discussed in Chapter 4, Section III.d.3, if you win relief vacating the judgment (e.g., resentencing, plea withdrawal, or a new trial), you should refer the case to the SPD Trial Division for appointment of trial counsel to handle the new sentencing hearing or trial litigation.

#### ii. The issues that may be appealed

Generally, any issue related to the judgment or order that was the subject of the "notice of intent" is considered part of your case. This plays out in criminal cases as follows:

[18] Wis. Stat. (Rule) §§ 809.107(5)(a) & 809.107(6)(f). Due to confidentiality requirements, the client's signature should be redacted, leaving only the first and last initial of the client's name on the copies filed with the Court. For example, if the client's name is John Smith, the signature should appear J[redacted] S[redacted]. However, keep the original unredacted signature pages in the file. Additionally, include a footnote stating: "The parent's signature has been redacted in order to comply with the confidentiality requirements applicable to cases involving children."

- For a notice of intent filed from an original judgment of conviction, your case includes the underlying conviction and sentence, as well as any matters (motions to suppress, other motions, etc.) related to the conviction or sentence.[19]

- For a notice of intent filed from a judgment of conviction following sentencing after revocation of probation (and filed more than twenty (20) days after the original sentencing hearing), your case does not include the underlying conviction or the underlying administrative revocation decision. It includes only the sentencing after revocation of probation and matters directly related to that.[20]

- For a notice of intent filed from an order denying sentence credit or deciding restitution (and filed more than twenty (20) days after the original sentencing hearing), your case includes only the credit or restitution decision and matters directly related to that.

- For a notice of intent filed from an amended judgment of conviction (and filed more than twenty (20) days after the original sentencing hearing), your case includes only the matters changed by the amendment and directly related to that.

Other kinds of cases work similarly. If the notice of intent is filed from an original dispositional order, it would encompass all underlying decisions. If it is filed from a revision, modification, or extension of a dispositional order, or from a sanction or contempt decision related to the original dispositional order, it would encompass only matters related to the new order, not the underlying judgment.

> ➢ Frequently asked question. *What if I notice a great issue for appeal in a matter outside of the scope of my representation?* If, for example, you are appointed on a judgment after revocation of probation and realize there is a very strong basis for challenging the underlying conviction, which your client would like to pursue, you should contact an Appellate Division attorney manager to discuss the possibility of a discretionary appointment.

If you are ever unclear about the scope of your representation in any particular situation, please contact an Appellate Division attorney manager.

### iii. Postjudgment matters left to trial counsel

In a criminal case, after the notice of intent to pursue postconviction relief is entered, the only issues that are generally left to trial counsel are filing a motion to stay the sentence or judgment pending appeal (if there is a basis for doing so) and/or representing the client at a restitution or sentence credit hearing. Once an appellate attorney is appointed, that attorney has concurrent authority to take care of these matters, but at least where the client had SPD-appointed trial counsel, they are trial

[19] This should not be read to imply that all motions and other matters related to the conviction or judgment have been preserved for appeal in any given case.

[20] *See State v. Scaccio*, 2000 WI App 265, ¶¶ 10-12, 240 Wis. 2d 95, 622 N.W.2d 449; State v. Drake, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994).

counsel's primary responsibility. In any kind of case, proceedings initiated after entry of the original judgment, such as those involving sanctions or contempt, are handled by trial counsel.

That said, never just assume that an upcoming hearing will be handled by trial counsel. If you ever have a question about who will (or should) handle a particular matter, you should communicate with trial counsel. You may also contact an Appellate Division attorney manager.

## II. Managing your appellate cases

If you are new to appellate practice, now is the best time to consider how you will maintain a manageable caseload and how you will manage that caseload.

With an appellate caseload, a single case may, at one point, demand all of your attention for weeks and, at another point, require no action for many months. One case may be resolved with a few hours of work, while another may be open for a year or more and require hundreds of hours of work. While full-time SPD appellate staff attorneys must manage full-time appellate workloads, private bar attorneys certified to take SPD-appointed cases should not receive enough appointments to generate a full-time workload. Private bar attorneys must take care to manage SPD-appointed appeal cases within the context of their other case work.

If you are new to appellate practice, or if you do not already have a functioning case-management system—a system of charting expected deadlines and calendaring your time—creating one should be a top priority. You should develop a system that is easy to amend or revise and that includes reminders when a deadline is approaching. For many, this involves a simple combination of a spreadsheet and a computerized or paper calendar. Others may prefer using more sophisticated case management software.

At a minimum, your spreadsheet (or other charting system) should have a place to track deadlines at every step of the case, from the court reporter's and clerk's deadlines for getting materials to you through your deadline for filing the petition for review. It should also have a place to make notes on tasks that you need to complete in each case.

In addition to a spreadsheet or other charting system, you need a calendaring system that can remind you of approaching deadlines. Most SPD staff attorneys copy each case deadline—or, minimally, the deadlines that they must personally meet—from their spreadsheets to electronic calendars with an automatic reminder function (e.g., Microsoft Outlook or Google calendar) or large wall calendars or both.[21] There are, obviously, endless calendaring options. What is critical is that you have one.

## III. Calculating deadlines

At every point of an appellate case, except when the case is fully briefed and awaiting decision in one of the appellate courts, there will be some outstanding deadline.[22] Unlike at the trial level, where the state in a criminal case generally is responsible for moving a case forward, on appeal that burden falls on the appellant.

[21] One benefit of a paper calendar is that you can display at least three months, at once, starting with the current month. Nearly all deadlines relevant to our practice occur within sixty (60) days of a triggering event, so this allows you to display all live deadlines at the same time.

[22] In TPR cases, there is an applicable deadline – for the court of appeals' decision – even when the case is fully briefed. Wis. Stat. (Rule) § 809.107(6)(e).

When bringing an appeal, you must be cognizant of all relevant deadlines and meet them—or, when necessary, timely seek extensions.

When calculating most deadlines, do not count the day that an action triggered the deadline, but do count the last day.[23] For example, if the opposing party files a response brief on May 5th and your reply brief is due fifteen (15) days later, (which in the court of appeals it usually is) you count May 6, 7, 8 . . . 20. Your reply brief is due on the 20th.

Note that mandatory e-filing in the court of appeals has made some changes to the calculation of deadlines. Prior to e-filing, the traditional service-by-mail rule added 3 days to the responding party's deadline if service was accomplished by mail. Now for e-filing users, service is accomplished through the e-filing system, and therefore, 3 days will not be added to the deadline to account for mailing. Thus, if you are filing a response brief, your deadline will be triggered by the later of the following three occurrences: (1) 30 days after "service" of the brief (keeping in mind that the notice of activity in your email now constitutes "service"); (2) 30 days after the brief is "filed" or (3) 30 days after the record is filed.[24] For a reply brief, the same rules apply except the reply brief is due the latter of 15 days from service or filing of the response brief.[25]

Practically speaking, the filing date and the service date will be the same unless the brief is filed after hours because it is the clerk's acceptance of a filed document that triggers the notice of activity to the electronic parties, thereby serving them. If the brief is filed after hours—for example, after 5:00 P.M. on a Friday—and the document is not accepted until the following Monday, then your deadline starts running once you receive the notice on Monday.

- ❖ Practical tip. You should carefully monitor your email for notices of activity. Print and save the notice in case there is ever a question about how your deadline is being calculated.

While the e-filing rule takes away the traditional "cushion" provided by the service-by-mail rule, note that the e-filing system must accept documents 24 hours a day.[26] A document will be considered "filed" so long as it is: (1) submitted prior to 11:59 P.M. on the day in question and (2) subsequently accepted by the clerk.[27] The e-filing rule therefore gives the appellate practitioner more flexibility in meeting the applicable deadline, as it allows a document to be "filed" even after the clerk's office is closed. However, while the e-filing system allows after hours filing, attorneys still need to be very careful in relying on this feature. If, for example, you file your brief after hours on the day the brief is due—and the brief is then rejected due to some technical irregularity like an erroneous caption, missing page numbers or the like—then you will need to file an extension motion to accommodate resubmission.

- ➢ Frequently asked question. *What if I try to upload my brief but run into an issue that causes me to miss a deadline?* If the failure is caused by the e-filing system, the user may move for

[23] Wis. Stat. § 801.15(1)(b).
[24] Wis. Stat. (Rule) § 809.19(3)(a)1.
[25] Wis. Stat. (Rule) § 809.19(4)(a)2.
[26] Wis. Stat. (Rule) § 809.801(4)(a).
[27] Wis. Stat. (Rule) § 809.801(4)(b).

> relief on the basis an attempt to timely file the document was made. The court may deem the document filed or served on the date and time the user first attempted to submit the document electronically or may grant other appropriate relief. If, however, the issue was not caused by the e-filing system, you may still seek "appropriate relief upon satisfactory proof of the cause."[28] Note, however, that "users are responsible for timely filing of electronic documents to the same extent as filing of paper documents."[29] In other words, we recommend making sure your computer, PDF software, internet access, etcetera are all e-filing ready in advance of your first e-filing deadline.

Note that if your brief is due on a weekend day, holiday, or some other day when the relevant clerk's office is closed, then your brief is due on the next day the clerk's office is open.[26]

There is one more important point regarding the calculation of deadlines. You generally count weekends and holidays unless your deadline lands on one of these days.[27] However, if you are calculating a deadline that is ten (10) days or less from the triggering event, as with the filing of a reply brief in a TPR case,[28] you do not count those days.[29]

> ❖ Practice tip. You don't have to manually count your deadlines. There are plenty of online tools that calculate deadlines just as § 801.15 requires. You can find a calculator here.

## IV. Extending deadlines

As with any other deadline, you will occasionally need to extend your appellate filing deadlines.

Before discussing how to extend a deadline you must know that there are a few absolutely, positively, no-exceptions, non-extendable deadlines:

- The deadline for filing a notice of appeal under WIS. STAT. § 808.04(1) (in cases where civil appeal rules apply).[30]
- The deadline for filing a motion for reconsideration in the Wisconsin Court of Appeals in any case.[31]
- The deadline for filing a petition for review in the Wisconsin Supreme Court in any case.[32]

*If you miss one of these deadlines in an SPD-appointed case, you must immediately notify an Appellate Division attorney manager. In some cases, we may be able to help your client, but only if you promptly contact us.*

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[28] Note that the e-filing rule instructs the court to apply the subsection governing technical failures "liberally." Wis. Stat. (Rule) § 809.801(16)(c). This suggests that, so long as a sufficient explanation is given, a motion to accept a late filing or to extend the deadline to accommodate the late filing should be granted in most circumstances.
[29] Wis. Stat. (Rule) § 809. 801(16).
[30] Wis. Stat. (Rule) § 809.82(2)(b).
[31] Wis. Stat. (Rule) § 809.82(2)(e).
[32] *First Wis. Nat'l Bank v. Nicholaou*, 87 Wis. 2d 360, 364-66, 274 N.W.2d 704 (1979).

Most other appeal deadlines are extendable by means of a motion to the court of appeals, an example can be found at Appendix 1.d.[33] A blank document can be found here.

While some attorneys are concerned that filing a motion for enlargement of a time limit will reflect negatively on them, it is important to remember that your client only gets one direct appeal and it is your duty to ensure that it is as strong as possible. If you need extra time to adequately investigate or research an issue or produce a high-quality motion or brief, you should ask for the time. However, if you are asking for multiple extensions in most cases, you may need to develop new case-management practices, reduce your caseload, or take other actions to remedy the situation, before it gets worse. Also, be realistic about the time you will need. It is usually preferable to file a single motion requesting a longer period of time than to file multiple motions seeking short extensions.

Traditionally, motion practice in the court of appeals required the filing of numerous copies and service on both the circuit court and the other parties. The e-filing rules have made several changes. First, you are no longer required to serve both courts when filing a motion for extension of time (or any other motion discussed in this handbook). For example, if you electronically file a motion for extension of time in the court of appeals, the clerk of the court of appeals will transmit a copy to the circuit court.[34] Second, the rule requiring attorneys to print and file multiple copies has been repealed. And, because the e-filing system automatically notifies other electronic parties that a motion has been filed, and this notice constitutes service, you also no longer need to send copies to those parties. If, however, there is a "paper party" on your case, you must continue to serve them via traditional methods.[35]

- ❖ Practical tip. With SPD appeals, it will be rare, if ever, that there will be a "paper party" as opposing counsel because attorneys are required to register and "opt in" to their cases.[36] However, some attorneys may not promptly opt in. You can check whether someone is considered a "paper party" by clicking on "View parties" in the e-filing system under the appropriate case number. Notice for the parties will be designated as "e-notice" for parties that have opted in and "Paper" for paper parties. Note that in TPR cases, the GAL may not be opted in, thus requiring service by traditional methods.

What about the Attorney General's office? The e-filing rules require the clerk's office to opt the AG's office into electronically filed cases, meaning you no longer need to mail that office your electronically filed documents.[37]

As a technical note, you should be aware that e-filed motions must be in text-searchable PDF format.[38] It is also essential that e-filed motions comply with the signature requirements under Wis. Stat. (Rule) § 809.801(12)(a). E-filed motions must also leave room for a file stamp.

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[33] Wis. Stat. (Rule) §§ 809.80(1) & 809.82(2)(a). Note that all motions to extend deadlines set by Wis. Stat. (Rule) §§ 809.30 & 809.10 are directed to the court of appeals, even if they are filed before a notice of appeal is filed.
[34] Wis. Stat. (Rule) § 809.14(3)(c).
[35] Wis. Stat. (Rule) § 809.801(6)(c).
[36] Wis. Stat. (Rule) § 809.801(3).
[37] Wis. Stat. (Rule) § 809.802.
[38] Wis. Stat. (Rule) § 809.801(8)(e).

- ❖ Practice tip #1. Note that the act of filing a motion "which may affect the disposition of an appeal or the content of a brief, or a motion seeking consolidation of appeals, a motion for extension of time to file a statement on transcript, or a motion relating to production of transcripts automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order."[39]

- ❖ Practice tip #2. You should *always* file a motion for enlargement of the time limit before the applicable deadline lapses. In the past the court of appeals routinely granted retroactive extension motions, but now it occasionally converts such motions to habeas petitions (alleging ineffective assistance of appellate counsel for allowing the deadline to lapse). This complicates and delays the process, and often leads to client discontent.

- ❖ Practice tip #3 If your case is in the "pre-appeal" stage—meaning you have not yet filed a notice of appeal or other initiating document—the court has issued an online guide to assist you in filing your first extension motion on a new case here.

## V. Maintaining a record of your work

Please be aware that you must maintain a dated, legible, and understandable record of all of the work that you do for each case.

Minimum SPD performance standards for attorneys representing appellate clients, which are found at Appendix 1.e., require that a complete, up-to-date file be kept for every case. The file shall contain, at a minimum, proof of service for all transcripts, court records, or other papers that trigger a time limit; notations in summary form as to all action taken, advice given, and phone or in-person communications; notes taken while reviewing the transcripts and record; notes about potential issues considered, research conducted, and factual issues investigated; copies of all correspondence relating to the case; copies of all documents received or filed; a record of all documents provided to the client; a case activity log that accurately documents all time spent working on the case; and a case closing letter or memo.[40]

Maintaining a complete, well-organized file is critical for handling an appeal case efficiently and effectively. There often are long periods of time between litigation events on appeal, and having a complete, well-organized file is the only reliable way to get back up to speed when it is time to take another step. A complete file is also invaluable if a case must for some reason be re-assigned to another attorney. It may also be useful to successor counsel if you win the appeal and send the case back to a trial attorney. And, it may be useful to you if the client calls you at some point and asks you about a particular conversation or issue.

And, yes, having a complete, well-organized file will also protect you if your client contacts the Appellate Division (or the Office of Lawyer Regulation) to complain about your representation or, for private bar attorneys, if the Assigned Counsel Division is

[39] Wis. Stat. (Rule) § 809.14(3)(a).

[40] The importance of sending a case closing letter (or writing a case closing memo if the client can't be found) cannot be overstated, as some clients later question or dispute how their case ended.

reviewing or questioning a voucher you submitted.

## VI. Ethical note

You have an ethical duty to competently and diligently represent your client.[41] This includes zealously advocating for the client's strongest non-frivolous legal positions within the bounds of the ethical rules.[42] The SPD's performance standards for appellate attorneys are informed by this ethical obligation, which should guide every step of your representation.

With the sort of practice that we do, representing unpopular clients who have already been convicted of crimes or adjudicated delinquent, unfit, or dangerous and with the odds seemingly stacked against you, it is easy to become pessimistic about the possibility of obtaining relief. But a defeatist view is a self-fulfilling prophecy. The Appellate Division consistently finds, not surprisingly, that attorneys who litigate more win more. And attorneys who litigate more, and work to find new and novel issues, are often happier in their practice.

Approach each case with an open and curious mind and an enthusiastic willingness to investigate and pursue the case wherever it may take you. Be creative! Litigate!

41 Wis. SCR 20:1.1 & 1.3.
42 Wis. SCR 20 (Preamble).

# CHAPTER TWO:

## REVIEWING THE CASE

### I. Introduction

The most critical period for any appeal occurs long before the filing of a notice of appeal. It takes place in the first few months of your appointment, as you review the record, talk to your client and the trial attorney about the case, investigate factual allegations, and research potential legal issues.

On the basis of what you find in these early months, you will decide whether you have a "merit" case or a "no-merit" case—in other words, whether the case presents any non-frivolous issue(s) for appeal.

If it is a merit case, you will determine what the non-frivolous issues are, what remedies you can seek based on those issues, and what risks the claims you've identified might present to your client. After you counsel your client about the risks and potential rewards of any available claim(s), the client will decide whether to seek appellate relief or to forever waive their right to a direct appeal.

If it is a no-merit case, you will advise your client of the three no-merit options and the client will decide whether to seek no-merit review or, again, forever waive their right to a direct appeal.

Thus, at this early stage, each case is placed on one of several possible appellate tracks: merit appeal, no-merit report, close without court action, or withdrawal so the client can proceed without appointed counsel. If you miss a meritorious issue and place the case on a no-merit or waiver track or raise a weaker issue, or if you initiate a risky appeal without your client's full understanding, it may be difficult or impossible to set the case right later. By giving each case your full and careful attention from the start, you can get them on the right track and give your clients the best chance for a good outcome.

### II. Actions from appointment to receipt of the case materials

#### a. Applicable deadlines

In a Rule 809.30 appeal, from the date they receive the SPD's request for transcripts and the court record, both the clerk of circuit court and court reporters have sixty (60) days to get you the requested materials.[43]

In a TPR appeal, the clerk of circuit court and court reporters have 30 days to get you the requested materials.[44]

#### b. Getting the appointment

If you are a staff attorney, your cases will be assigned. If you are a private bar attorney, the Appellate Division Intake Unit will contact you (on a rotating basis with other attorneys certified to receive SPD appellate appointments) and offer case(s), which you will choose whether to accept.

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[43] Wis. Stat. (Rule) § 809.30(2)(g).
[44] Wis. Stat. (Rule) § 809.107(4m).

As noted in Chapter One, Section I.c.i., above, once you are appointed, your appointment continues through review by the Wisconsin Supreme Court, or denial of a petition for review in that court, unless your client asks you to close the case before that point—with a full understanding of the ramifications of that decision—or the appropriate court permits you to withdraw from the case.

Soon after making an appointment, the Appellate Division will provide you with confirmation of the appointment along with:

- The order appointing counsel.
- The notice of intent to pursue postconviction or postdisposition relief filed by the trial attorney.
- The judgment of conviction or dispositional order.
- Copies of e-filed requests—already made by the Appellate Division—to the court reporters and clerk of circuit court for the court record and transcripts.
- Any other correspondence or documents provided to the Appellate Division related to the appointment.

At this early stage of the case, the applicable deadline is the court reporters' and the clerk's deadline.

### c. First steps

There are several things that we strongly advise you to do immediately after your appointment:

- Opt into the case via the Wisconsin Circuit Court e-filing website.[45] This allows you to view the court record and electronically file additional documents. The SPD has created an e-filing guide to help attorneys navigate the e-filing system. The guide is accessible to private bar attorneys here. If you have questions related to the e-filing system, please contact your local clerk or the CCAP help desk.
- When you opt in as an electronic party, you will be required to answer a few questions. Click "yes" to the following question(s): "Are you appointed by a government agency?" or "Are you appointed by the State Public Defender Office or the court?"
  - ✓ Note that the Assigned Counsel Division will not reimburse the e-filing fee if you accidentally opt in to the case without taking this step!
- Set up the case by securing the case materials in a file folder (or scanning these materials to create an electronic file) and creating a time log so you can track your work on the case.

[45] If there has already been a pre-appeal motion filed in the case, you will also need to opt into the Court of Appeals e-filing website, which is separate from the circuit court e-filing website.

- Calculate the first deadline and enter the case and deadline information into your case-management system.

- Send your client a letter (a form letter, such as Appendix 5.a. is fine) introducing yourself, explaining the case posture, and estimating when you will be ready to talk about the case. Remind your client that they must notify you of any change of address or phone number, and invite the client to contact you with questions or concerns. Set reasonable expectations for your client about when and how communication between you will occur.

- Compare the requests for the record and transcripts against CCAP to make sure that nothing was overlooked by our intake staff.[46]

- Skim the notice of intent and the judgment of conviction or dispositional order to ensure nothing requires your immediate attention.

- Ask the trial attorney for their case file, including all discovery.

  - Frequently asked question. What if I find that there is a transcript that was not requested, and I request it well into my appointment; does that affect my deadlines? The SPD has a deadline to meet even before the clerk and court reporter do – a deadline for requesting the record and transcripts. If you (or we) order a transcript late, you should file a motion to extend that deadline in the court of appeals.[47] If you do not file such a motion there could be uncertainty regarding your deadline for filing the postconviction or postdisposition motion of notice of appeal. If you do file such a motion and it is granted, there will be no question that your deadline will run from service of the late-requested transcript.

The final two suggestions require some explanation. At this early stage of the case, no one would expect you to jump-start the appeal. However, occasionally you will find something that requires prompt attention. For example, a notice of intent may have mistakenly omitted a circuit court case number that was intended to be appealed with those properly listed. As for the judgment, if your client was given a four-month jail sentence (not stayed pending appeal) with no sentence credit, it would be worthwhile to see if your client may have credit that was not accounted for and applied at sentencing. If you find such an issue at this early stage, at a minimum, you could contact the trial attorney for more information and/or see if they plan to ask for the credit or for a stay of the sentence. If you do nothing, the issue may become moot.

In addition, at this very early stage, you may find an error that you would not notice later. For example, you may notice that your client's sentence exceeds the maximum. There may be no need to act on it now, but by noting the error right away,

[46] CCAP (Consolidated Court Automation Programs) is found here. If you have not already bookmarked that website, do so now. The state courts also maintain a lesser known database of appellate cases, which you should consider bookmarking as well, found here.

[47] This would amount to a motion under Wis. Stat. (Rule) § 809.82(2) to extend the time for ordering transcripts under Wis. Stat. (Rule) §§ 809.30(2)(e) or 809.107(4)(a).

you avoid missing it once you become wrapped up in the interesting issues the transcripts reveal.

As for the trial attorney's materials, there is some disagreement among appellate attorneys as to whether it is truly necessary to obtain the trial attorney's entire file in every single case. The best practice is to obtain the entire file. Certain categories of cases, such as trial cases and TPR cases, can almost never be fully assessed without reviewing the trial attorney's file. With other cases, you may not be able to determine whether you need to review the file until after you have read the transcripts and talked to the client—when there is a deadline looming. Thus, to simplify your practice and avoid needless delay, it makes sense to request the file immediately after appointment in every case.

If the trial attorney resists your attempts to obtain the file, and if that attorney was appointed by SPD, then—as noted in Chapter Two, Section III.b.ii.3., below—you may contact an Appellate Division attorney manager, who will work with you to get you what you need. Sometimes trial attorneys are more responsive when a manager calls. Additionally, the manager may be able to communicate the problem to the appropriate person in SPD's Assigned Counsel Division or Trial Division, who can motivate the trial attorney to work with you. If the trial attorney was not appointed by the SPD, you may ultimately have to turn to the courts or to the Office of Lawyer Regulation.

### d. Further steps

As case materials come in, there are several additional things that we strongly advise you do:

- As each transcript or the court record arrives, note that you have received it in your case management system, so you can be sure to know when the final document arrives, which triggers your filing deadline.

- Soon after receiving the court record, skim through it. In the past, clerks' offices have erroneously thought that our request for the "entire court record" did not encompass such potentially important items as trial exhibits, juror information, and correspondence.[48] If it appears that something may be missing, call the clerk's office to determine whether anything was omitted, and if the answer is yes, ask for the materials you're missing.

- When the later of the final transcript or court record arrives, print the notification email so that you can show how you calculated the deadline if a court or party ever questions your timeliness.

- When access to the later of the final transcript or court record arrives, promptly calculate your deadline for filing the postjudgment motion or notice of appeal and record it in your case management system.

  - Frequently asked question #1. If a transcript arrives late, does my deadline for filing a postjudgment motion or notice of appeal run from the date I should have received it or the date I

[48] In addition, a warrant will rarely, if ever, be considered part of the court record in an appointed case unless it was entered into the record in a pre-trial proceeding like a suppression hearing, because the warrant generally pre-dates the initiation of the criminal case. You should be able to obtain any warrant(s) from the trial attorney's file, a warrant file maintained by the clerk's office, or (if necessary) from the district attorney or appropriate law enforcement office.

actually received it? The deadline runs from the date you actually received it. See Chapter One, Section III.

- Frequently asked question #2. The court reporter filed the transcript electronically but did not give me "access," so while I see the transcript in the e-filing system, there is no link I can click on to pull up the document. When I asked the court reporter about this issue, they sent me a physical copy of the transcript, but still did not give me access. When does my deadline start running? Court reporters are required to provide electronic access of the transcripts[49] and that access constitutes service.[50] Therefore, ordinarily it is electronic access to the transcript that triggers your deadline. However, if the court reporter will not provide electronic access, the best approach is to calculate your deadline from receipt of the paper copy while still following up with the court reporter regarding electronic access. Even though it can be argued service was not accomplished until you received electronic access, the court may disagree or you may lose credibility with the court since you were still able to review the transcript, albeit in paper form.

- Frequently asked question #3. I requested the transcript, I have not received it, and the court reporter will not respond to my inquiries (e.g. because retired, on leave, or just does not respond). What should I do now? Obtaining transcripts from a non-responsive court reporter can be difficult and very frustrating. First, try to contact the court reporter and/or the district court administrator. If that doesn't work, you can file a motion to compel and/or for sanctions.[51] The chief judge or district court administrator may order another court reporter to prepare the transcript (if the notes/recording can be obtained). See SCR 71.04(10)(a). The notes, voice recordings, digital audio recording or other verbatim record "are not the property of the court reporter." SCR 71.01(1). If it proves impossible to obtain the transcript, and the transcript is necessary for postjudgment proceedings, you may need to try to recreate the record or request relief based on the lack of record (e.g. new sentencing hearing, new trial).[52] Please contact the SPD if you need assistance with these tricky issues.

It is not uncommon for a court reporter to miss the deadline for serving transcripts. When this happens, it is the reporter's responsibility to file a motion for an extension of time,[53] however, often they do not. While you may think this is good news for you because it delays the triggering of your own deadline, it is bad news for your

[49] Wis. Stat. (Rule) § 801.18(15)(a)&(b).
[50] Wis. Stat. (Rule) § 801.18(6)(a).
[51] See Wis. Stat. (Rule) §§ 809.11(7)(d), 809.83(2). Generally, you can give the court reporter a week or even two to respond to you. However, if you have not received any response within a reasonable time (a week or two), you should file a motion to compel.
[52] See *State v. DeLeon*, 127 Wis. 2d 74, 377 N.W.2d 635 (Ct. App. 1985); *State v. Perry*, 136 Wis. 2d 92, 401 N.W.2d 748 (1987); *State v. Pope*, 2019 WI 106, 389 Wis. 2d 390, 936 N.W.2d 606.
[53] Wis. Stat. (Rule) § 809.11(7)(c).

client. So, you must act to remedy the situation.

Ultimately, the legal solution to this problem is a motion with the court of appeals for sanctions against the court reporter.[54] The sanction that the court of appeals may impose against a court reporter is a prohibition against "performing any private reporting work until the overdue transcript is filed."[55] But because we rely on court reporters' cooperation to get what we need for our appeal cases, moving for sanctions is best used as a last resort rather than an opening salvo.

Before filing a motion for sanctions, most appellate attorneys call or write to the court reporter (sometimes more than once) to remind the reporter of their pending obligation, in case the reporter forgot, or to learn of any impediment to producing the transcript (like a serious illness) requiring you to work out an alternative arrangement. You may also turn to the appropriate district court administrator, who oversees the court reporters, for help. Sometimes, contacting SPD for assistance may also help to resolve the issue. However, if a transcript becomes unacceptably late and the court of appeals has not granted the court reporter an extension, you should file a motion for sanctions to protect your client's interest in a speedy appeal. If too much time goes by without the reporter having filed an extension or you filing a motion for sanctions, the court may later fault you for not properly monitoring the progress of the appeal.

## III. Actions from service of the case materials to your filing date

### a. Applicable deadlines

In a Rule 809.30 appeal, from the service of the record or the last transcript, whichever is later, you have sixty (60) days to file a postjudgment motion or notice of appeal. In most cases, the complete record will be immediately available through the e-filing system, so your deadline will typically run from the date the last transcript is made available.[56]

In a TPR appeal, from the service of the record or the last transcript, whichever is later, you have thirty (30) days to file a notice of appeal.[57]

- ❖ Practice tip. While e-filing has made it easier to review the circuit court record, you should always carefully scrutinize it to make sure that it is complete. A common problem is that trial court exhibits—such as photographs used at a trial—may not always be scanned into the record. If this happens, you will need to contact the clerk of the relevant court to remedy the omission. Moreover, physical items and electronic exhibits will not appear in the electronic record. For example, if the DVD containing a squad car video was played at trial, that DVD is "in the record" but will not be accessible to you electronically. The clerk will often send you a copy of the DVD upon your request for the record—but not always. In those cases, even if you received a copy of the footage from trial counsel, the best practice is to contact the clerk of court to obtain a copy of the electronic exhibit. That way you can be sure you are

[54] Wis. Stat. (Rule) § 809.11(7)(d). Some attorneys title such a motion as a "Motion to Compel Production of Transcripts" as opposed to a "Motion for Sanctions."
[55] Wis. Stat. (Rule) § 809.11(7)(d).
[56] Wis. Stat. (Rule) § 809.30(2)(h).
[57] Wis. Stat. (Rule) § 809.107(5)(a).

viewing what the jury viewed. Note that in some counties, like Milwaukee, you will need to e-file a motion and a proposed order granting access.

### b. Finding appellate issues

Spotting issues is a skill that improves with experience. With each appeal litigated you become an expert on a different legal issue. Over years of practice your understanding of the applicable law will broaden and deepen, and you will get better at quickly identifying potential appellate issues.

That said, regardless of experience, attorneys should be able to spot all potential issues in a case if they are careful and thorough in their case review and take the time necessary to conduct research, listen carefully to the client and other potential witnesses, and consult with more experienced attorneys when necessary.

New attorneys should also take heart in the fact that their fresh eyes and viewpoints may enable them to find and formulate novel issues that more experienced attorneys might not have considered.

The following section provides tips for improving your ability to spot arguable issues as a general matter and for improving the likelihood that you will spot every arguable issue in any particular case.

#### i. Cultivating competence generally

##### 1. Internet resources

If you don't already subscribe to SPD's blog, "On Point," do so. Visit On Point and "subscribe" so that you receive regular updates via email or RSS. The blog describes and briefly analyzes each new appellate case that is potentially relevant to SPD practice.

Other blogs can be useful, particularly for introducing you to novel issues that have succeeded in other jurisdictions and may be worth raising in your own. Some potentially useful blogs include (but are not limited to):

- SCOTUSblog
- Confrontation Blog
- Evidence Prof Blog
- Crim Prof Blog

If you are an SPD-certified private bar attorney, you should already be signed up for the "defendernet" email listserv, which gives you access to a community of other defense attorneys doing this work. If you are not signed up for that listserv, contact the ACD to join the discussion. Please also note that as of 2021, a new listserv exclusively for private bar attorneys taking SPD appellate appointments has also been created. If you take SPD appellate appointments, you should already have access. If you do not, please contact SPD to get on the list.

Many professional organizations also maintain helpful listservs for advocates, including the Wisconsin Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, the Gault Center, and the National Juvenile Defense Center.

### 2. Treatises and other secondary sources

You should be aware of, if not intimately familiar with, the most commonly used and cited secondary sources. If you are brand new to criminal law, or to appellate law, you may want to skim the tables of contents of these books, just to get a sense of what's out there. As you work on cases you will want to reference them regarding specific issues. Because they take a bird's eye view of complicated issues, treatises are often the best place to start when you are researching a claim you have never litigated before.

Treatises and other similar secondary sources that our staff attorneys generally find helpful include (but are not limited to):

- Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence (4th ed. 2017, with annual updates).
- Kenneth S. Broun et al., McCormick on Evidence (8th ed. 2020, with 2022 update)
- Ralph Adam Fine, Fine's Wisconsin Evidence (2d ed. 2008).
- Michael Heffernan, Appellate Practice and Procedure in Wisconsin (9th ed. 2022, with supplements in 2023 and 2024).
- Wayne R. LaFave et al., Criminal Procedure (4th ed. 2015, with annual supplements).
- Wayne R. LaFave, Search and Seizure (6th ed. 2020, with 2022-2023 and 2023-2024 supplements).
- Wayne R. LaFave, Substantive Criminal Law (3d ed. 2017, with annual supplements).
- Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence (Jack B. McLaughlin ed.) (2d ed. 1997 with annual updates).
- Katie York et al., Wisconsin Juvenile Law Handbook (5th ed. 2022-2023).
- Kathleen Pakes, Wisconsin Criminal Defense Manual (7th ed. 2020, with 2022-2023 and 2024-2025 supplements).
- Wisconsin Judicial Benchbooks.[58]
- Christine M. Wiseman & L. Michael Tobin, Wisconsin Practice Series: Criminal Practice and Procedure (2d ed. 2008).

### 3. Training and networking events

The SPD hosts many training events, including a two-day conference each fall and a three-day appellate skills academy every few years. The Wisconsin Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, and

[58] There are a number of relevant Benchbooks, all published by the State Bar of Wisconsin.

the National Juvenile Defender Center also host annual conferences. The National Legal Aid and Defenders Association hosts a training program each year dedicated to appellate practice. All of these training opportunities will help you develop practical skills, learn more about substantive and procedural law, network with other attorneys who may have good ideas for appellate litigation, and get CLE credits.

In addition, the SPD's Training Division has a number of on-demand training videos that can provide you with valuable information about areas of law that may be new to you.

### ii. Finding issues in each individual case

#### 1. Reviewing case materials

Reviewing all of the transcripts and court documents is the most basic duty appellate attorneys must fulfill. We assume that every attorney does this in every case, yet attorneys still miss good issues.

We recommend a few ways to improve your review of the record in every case:

- *Take detailed notes that you can read, understand, and use as a reference.* If you do not take detailed notes, you may miss issues and will not be able to efficiently or effectively brief your case. It is a good idea to highlight or star notes about objections, contested motions, and other events that could prove to be an issue, and jot down each potential issue (with page references) on a separate list. Don't be stingy – add any potential issue to the list, even if you think it will probably amount to nothing. You can consider or reconsider all the issues later, rather than interrupting your review to evaluate the strength of each issue as it arises.

- *Use checklists.* Use checklists in every case, and use them even if you've been practicing law for years. Checklists may not help you find new and novel issues, but they can guide your reading and ensure that you do not miss common issues. Appendices 2.a.-2.e. are checklists that SPD appellate staff attorneys have developed over the years. Be mindful to update your checklists as laws or rules change.

- *Review the trial attorney's entire file, including the discovery, in every case.* The need to request these materials is addressed in Chapter Two, Section II.c., above. If you do not know the investigative facts that led to the case against your client, it is much, much more difficult to recognize unpreserved issues and evaluate risks. With the trial attorney's entire file, you can also note unpreserved but arguable issues related to plea bargaining, trial preparation, misadvice to your client, and more. Or, you may learn that something that seemed like an issue is not an issue at all.

#### 2. Meeting with your client

Clients are a critical source for potential issues. A client often has the best grasp of the facts of the case and the facts relevant to sentencing and has a good idea of the history of the court proceedings. This is not to say that every client observation or complaint is accurate or legally significant; it *is* to say that every client observation is

worth your consideration.

See Chapter Three, below, for a detailed discussion of communicating with clients and working with them to find issues.

#### 3. Speaking with the trial attorney

Trial attorneys are another invaluable resource for finding appellate issues (not just as the target of ineffective-assistance claims), and you should attempt to speak with the trial attorney in every case.

Unfortunately, because claims of ineffective assistance of counsel are so common in Wisconsin, communication between appellate and trial attorneys can sometimes be strained. For that reason, it is often helpful to contact the trial attorney soon after your appointment (when you aren't investigating an ineffective-assistance claim) in order to ask for the attorney's thoughts on the case and establish a friendly, professional relationship.

At minimum, an early issue-spotting conversation with the attorney should address any issues that they think might be raised on appeal, any concerns that they had about the client or the case in general, and their thoughts on whether the ultimate disposition was comparable to similarly-situated cases in that county and with that judge. If you haven't already requested or received the trial case file, this conversation is a good time to ask for it.

If you have this type of neutral initial contact, and you later need to have an investigative conversation, inquiring why the attorney did or did not take a particular action in the case, the investigative conversation likely will be more pleasant and productive.

- Frequently asked question. *What if my client's trial attorney won't talk to me?* If the attorney was appointed by the SPD, you may contact an Appellate Division attorney manager who will work with you to get you what you need. Sometimes trial attorneys are more responsive when a manager calls. The manager may also be able to communicate the problem to the appropriate person in SPD's ACD or Trial Division, which can motivate the trial attorney to work with you.

### c. Developing potential issues

#### i. Investigating factual questions

#### 1. Generally

Many factual issues that require investigation can be investigated by the appellate attorney. The most common factual issues in need of investigation are resolved by a conversation with the client or trial counsel. For example, if the judge neglected to explain the elements of the offense at your client's plea hearing, you will need to determine whether the client nevertheless understood the elements of the offense.[59] Another example would be if the client claims that trial counsel did not

[59] *See State v. Brown*, 2006 WI 100, ¶ 39, 293 Wis. 2d 594, 716 N.W.2d 906 (noting that a defendant seeking to withdraw his plea under *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), must demonstrate that there

present an exculpatory video at trial. You would need to find a copy of the relevant video, and if you determine it might have been exculpatory, ask trial counsel whether they knew about it, and if so, why they did not present it at trial.

In addition, an appellate attorney can (and should) personally obtain factual information from friendly or supportive potential witnesses (sometimes, but not always, a client's parent or spouse). The attorney may want to conduct at least an initial interview of these witnesses but be mindful that if the potential witness tells you one thing at an initial interview and then changes their story, you will be in a bind because you cannot be a witness in the case.

You should use a private investigator or other trained assistant to talk to (or be present when you talk to) any witness whose testimony may be critical to a postjudgment claim and/or to view any place or thing that may be critical to a postjudgment claim. Investigators can also be helpful in a range of other circumstances, including when the attorney cannot find a potential witness.

As for experts, the appellate attorney must secure an expert any time the factual predicate for a claim can only be established by an expert opinion.[60]

#### 2. Hiring an investigator or expert

SPD staff attorneys have access to SPD investigators. Private bar attorneys must find their own investigators and get SPD approval to hire them. Both staff attorneys and private bar attorneys must find experts and get approval to hire them.

In order to get approval for hiring an expert, a staff attorney must submit a completed expert request form, which can be found on the SPD intranet, to the Regional Attorney Manager in their office.

Private bar attorneys handling SPD cases must get approval for investigators and experts through the ACD. Information and forms for private bar attorneys regarding experts are found on the SPD's website here.

Funds available for experts in SPD cases are extremely limited. For both staff and private bar, whether a request is approved will depend on whether—and the degree to which–the investigator or expert can help the client (i.e., make it more likely they will win their motion for postjudgment relief); whether your claim has a reasonable chance of succeeding; and whether the investigator or expert is willing to work for an amount of money that is affordable for the SPD.

### ii. Researching legal questions

#### 1. Legal research 101

In order to do appellate work at a minimally competent level, you will need access to a searchable database of cases, statutes, and regulations; a reputable citator (generally Shepard's or Key Cite); and jury instructions. (Jury instructions are now available for free through the State Law Library) Ideally, you should also have some

was a defect in the plea colloquy and allege that the client did not know or understand the information that was not given).

[60] Some postconviction claims that may require experts include claims for sentence modification or resentencing based on new information about a defendant's mental or physical condition or about the defendant's risk as measured by a standardized risk assessment instrument.

access to helpful secondary sources, such as those discussed in Chapter Two, Section III.b.i.2., above.

In assessing any appellate case, you will likely be confronted with legal questions with which you are already familiar. While you need not linger on these questions, it behooves you to do some minimal research on each potential issue in every case, including such mundane questions as the applicable maximum penalties. Run familiar cases through a citator and verify that familiar statutes remain unchanged. Although it may seem tedious, laws and rules change frequently, and errors are common even on straightforward issues.

In most (or at least many) cases, you will also need to research unfamiliar, and potentially complicated, legal questions. In addressing such questions, the advice that your legal research teacher gave you in law school remains sound: start with secondary sources. If you are so unfamiliar with an issue that you do not even understand its terms, it can be helpful to take an additional step back and start with an Internet search, then move on to more specialized secondary sources. Along with the websites and treatises listed in Chapter Two, Section III.b.i., above, there are many other great secondary sources that you can find in a good library or legal database.

Once you have a solid grasp of the basic law governing an issue, you can turn to a database like Lexis, Westlaw, or Fastcase to gather legal authority and figure out how it applies to your case. Attorneys taking our cases must be reasonably adept at doing this sort of research. If you are not, or if you simply want a refresher, the State Law Library regularly offers trainings on the use of these basic research tools.

### 2. Specialized research

There are some legal sources you may not know well but can be very helpful in litigating SPD appeals. This section discusses three: state legislative history, appellate briefs, and municipal ordinances.

#### a. State legislative history

If you are presented with a case involving interpreting a statutory section, particularly where the state's courts have never previously interpreted the section or relevant subsection, it is a good idea to conduct a thorough search of legislative history. If you have never previously searched state legislative history, an excellent primer is found in Chief Justice Shirley Abrahamson's concurring opinion in *State ex rel. Kalal v. Circ. Ct. for Dane County*.[61] Chief Justice Abrahamson's opinion identifies each source of Wisconsin legislative history and describes where one would find it and how it is used by the courts.

Legislative history research almost always begins with the Wisconsin Statutes Annotated, in which each statutory section is followed by a list of every act that has ever altered the section, including the act that first created it.[56] The Statutes Annotated also includes, if applicable, any official legislative comment or any official Judicial Council notes.[57] These materials, which show changes over time and official statements of intent, are the easiest bits of legislative history to find and often the most valuable.

[61] 2004 WI 58, ¶69, 271 Wis. 2d 633, 681 N.W.2d 110 (Abrahamson, C.J., concurring). The majority opinion in the same case thoroughly discusses how the supreme court interprets statutes, and how it uses legislative history, as a general matter, and may also be useful in determining whether and how to address any history that you find. *Id.*, ¶¶38-52.

Once you know the act or acts that created the language at issue in your case, you can look at the act itself. You can currently find statutes going back to the early 1940s and acts going back to 1848 on the legislature's website. Among other things, looking at the act will tell you which bill became enacted law. You can find recent bills (from 1995 to date) on the legislature's home page (access the drop-down menus), and you can find many additional bills on a commercial database like Lexis or Westlaw. Finally, older bills can be found at the State Law Library, the Legislative Reference Bureau (LRB), or one of the law school libraries.

Once you review the bill itself, you can identify the council or committee, if any, that created the bill and find materials related to its creation through the State Law Library or the LRB. Of particular interest, many Judicial Council materials are found in the State Law Library. If you are looking at a bill that was created by the Joint Legislative Council, you may also find historical materials here.

Finally, you may want to look at the drafting file for the bill, which will give you information about the process through which it became law. Recent drafting files can be found online here. To see older drafting files, you may need to visit the LRB. Regardless of whether the legislative history you are researching is available online, the LRB's reference librarians can help you navigate the available materials. They are available at (608) 266-0341.

**Note:** Sections 806.04(11) and 893.825 require that if you file a postconviction motion or appellate brief alleging that a statute is unconstitutional or challenging its construction or validity, you must serve it on: (1) the attorney general; (2) the speaker of the assembly; (3) the president of the senate; and (4) the senate majority leader.

### b. Appellate briefs

If you find a case that is directly or nearly on point, it is often helpful to find the briefs filed in the case. You may want to use the briefs as a template for your own, see how the opposing party argued the issue, or look for avenues to distinguish your case.

Briefs filed in criminal cases after June 2009 may be found on the Wisconsin Supreme Court and Court of Appeals Case Access website (as long as you know the party names or appeal number). Briefs filed in criminal cases between November 1992 and June 2009 can be found on the UW Law School Library's webpage. Hard copies of all briefs, whenever filed, may be found at the State Law Library.

Because the record in some cases is confidential—namely TPR, juvenile, and Chapter 51, 54, and 55 cases—the briefs filed in those cases are not publicly accessible.

### c. Municipal codes

Occasionally, an SPD case will be impacted by a municipal (city or county) code.[62] Most municipal codes are not found on commercial legal databases. Wisconsin municipal codes.

[62] For instance, whether a circuit court judge may order a youth to serve time in a secure detention facility as a disposition depends, in part, on whether the county board has passed a resolution authorizing such a disposition. WIS. STAT. § 938.34(3)(f)3. Also, determining the legality of a search or seizure occasionally involves an assessment of a suspected municipal violation. *Cf.* Wis. Stat. § 800.02(6).

### 3. Talking with other legal professionals

Don't forget two of the most important research tools: other lawyers and law librarians. Confer with colleagues. Use practitioner listservs, described in Chapter Two, Section III.b.i.1., above. If you are a private bar attorney, feel free to contact either Appellate Division office (at one of the phone numbers on the front cover of this handbook) and ask to speak with a manager or other experienced appellate attorney.

Reference librarians are also incredibly knowledgeable and can help you find sources of information and come up with research plans for tough legal problems. Here is contact information for the state's largest law libraries:

*Wisconsin State Law Library – Reference Desk*
Phone (800) 322-9755

*UW Law School Library – Reference Desk*
Phone (608) 262-3394

*Marquette Law School Library – Reference Desk*
Phone (414) 288-3837

Any time you confer with another attorney or legal professional, be cognizant of your ethical duty to keep information related to your representation confidential. Be particularly cautious when using email discussion groups, since you cannot know the identity of all recipients.

## IV. Understanding your client's appellate issues

### a. Determining whether an issue is arguable

The threshold question for any issue that you are considering is: is it arguable? "Arguable," here, is a synonym for "potentially meritorious"; both, for our purposes, are synonyms for "non-frivolous." This is a very low standard. That an issue is unlikely to succeed, or even *extremely* unlikely to succeed, does not make it frivolous. At the same time, an issue is only arguable if it has some factual and legal basis.

When you are faced with a marginal issue, there is no magic formula for determining whether it is arguable or frivolous. Some claims are truly borderline, and you must use your judgment, guided by your ethical obligation to zealously advocate for your client. Still, there are some guidelines to keep in mind:

- *If you can allege a version of the facts that would support a meritorious appeal, you have an arguable issue.*

Sometimes a client or other potential witness will tell you something that, if true, would support a meritorious appeal—but you do not think any judge would believe them. For example, a client may tell you that they did not know when they pled guilty to felony bail jumping that the maximum sentence was six years. You know, however, that the client was convicted of that same crime three times within the past five years and the trial attorney has told you, and would testify, that the trial attorney explained the correct maximum penalty.

Even if you do not find your client's story or version of events to be credible, and believe the court would not either, this likely presents an arguable issue. It is the postconviction court's job, not yours, to make credibility determinations and resolve factual disputes. This is not to say that you shouldn't explain the long odds, offer your opinion about what the court will likely do, and perhaps even discuss the possibility of perjury charges if the client does not tell the truth under oath. But if the client sticks to their story, you have an arguable issue.

- *If you find yourself debating with colleagues and coworkers about whether an issue is arguable, it probably is.*

This is a truism: if attorneys are arguing about whether an issue is arguable, they have answered the question and the answer is yes. There are, of course, exceptions. An issue may provoke debate, but if, upon further investigation, you find case law or facts that foreclose it, your lively discussions will not be able to revive it.

- *If the court made a legal error and an objection was timely made, you may have an arguable issue, even if the error may have been harmless.*

With a preserved issue, harmlessness is generally a defense against reversal that the opposing party bears the burden of proving beyond a reasonable doubt—it is not your issue to deal with.[63] So, if the court, over trial defense counsel's objection, made a significant error, this may present an arguable issue even if you know that the state will respond with a harmless-error argument, and you suspect the court will agree.

That said, there can be errors so minor, and plainly harmless, as to make any claim arising from them frivolous.

- *In contrast, if you are considering a claim of ineffective assistance of counsel but you think that counsel's error was harmless, you may not have an arguable issue.*

Ineffective assistance of counsel is different than a claim of court error because, as discussed in Chapter Four, Section III.b.ii.2., below, your client bears the burden of proving prejudice. That means that harmlessness is *your* problem, not the state's.[64] Thus, even if you find that the trial attorney did something monumentally deficient, if you cannot in good faith allege prejudice, the trial attorney's action cannot form the basis for an arguable issue.[65]

- *Related to that, if you cannot make any particular factual allegation that is necessary for a legal claim, you don't have an arguable issue.*

One common manifestation of this arises in criminal cases involving guilty pleas. You may come across a plea colloquy so inadequate that the postconviction motion is half-written in your head before you even meet your client. But a defective plea colloquy

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[63] *State v. Harvey*, 2002 WI 93, ¶¶41-49, 254 Wis. 2d 442, 647 N.W.2d 189.

[64] *State v. Thiel*, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305. Certain other kinds of claims also require the claimant to prove prejudice; this discussion would be relevant to any such claim. *See, e.g.* Wis. Stat. § 904.03 (exclusion of evidence based on undue prejudice).

[65] However, in some circumstances prejudice is presumed. *See State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997) (when there is a breach of the plea agreement, and counsel does not object or confer with client, prejudice is presumed).

only produces a claim when your client did not know and understand the information omitted from the colloquy.[66] Thus, if upon meeting with your client you learn that they knew and understood all the information that they needed to at the time of the plea—despite the court's failure to provide the necessary advisements–you cannot make a necessary factual allegation and thus do not have an arguable issue.

### b. Considering the potential risks and benefits of each issue

In every appeal, you must tease out every potential risk and benefit to the client related to each arguable issue, and attempt to assess the likelihood that any given risk or benefit will occur. Note that this subsection's discussion of risks is primarily applicable to criminal and juvenile delinquency cases. In an appeal of an involuntary TPR, mental commitment, or sexually violent offender commitment, there are few, if any, significant legal risks. In such cases, the client has probably already lost all they can lose in a legal sense.

#### i. Risks and benefits related to the remedy

In determining all of the potential risks and benefits of raising any potential issue, the threshold question is: what is the applicable remedy? With the vast majority of claims, the remedy, assuming you win, is clear. Some of the most common remedies, depending on the issue, include:

- Vacatur of the judgment of conviction or dispositional order for a new trial.
- New sentencing or dispositional hearing.
- Sentence modification or modification or revision of dispositional order.
- Commutation of sentence, probation term, or juvenile disposition.
- Sentence credit or juvenile detention credit.

Each of these possible outcomes is addressed in turn.

##### 1. Outcomes creating no risk.

While rare, occasionally you will identify an issue that, if litigated, creates no risk for your client. For example, a motion or appellate brief alleging insufficient evidence to sustain the conviction or adjudication, if successful, will result in vacatur of the underlying conviction. In this circumstance, the defendant's protection against double jeopardy prohibits retrial.[67] Likewise, an appeal alleging insufficient evidence to sustain an involuntary mental commitment order should result in vacatur of the underlying commitment order; while the county can file a *new* commitment action, it has probably lost the ability to act in the previously-existing action on remand.

Other issues can sometimes appear to create "no risk," although, in practice, they may not be truly "risk-free." For example, while an appeal of a preserved restitution order may seek vacatur of the underlying order, the court of appeals may instead

[66] *See State v. Brown*, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906.

[67] *State v. Ivy*, 119 Wis. 2d 591, 608, 350 N.W.2d 622 (1984). Similarly, a successful appeal focusing on a double-jeopardy violation will also result in the state losing the ability to retry the defendant upon remand. *See Arizona v. Washington,* 434 U.S. 497, 503-06 (1978).

remand for a new hearing, which may result in an order that is less favorable to your client. Likewise, litigation of a preserved suppression motion that is dispositive (a motion that would result in suppression of all evidence supporting the charge) may still create risk depending on all of the circumstances in the case (e.g. a plea is undone and the suppression decision does not resolve all charges).

### 2. New trial

The first remedy listed above, vacatur of the applicable judgment for a new trial, almost always has significant, complex risks and benefits that must be determined on a case-by-case basis. For a criminal defendant convicted upon entry of a negotiated plea, the risks are usually at their apex because the defendant will lose the benefit of a negotiated plea bargain.

In every case presenting an issue that could result in a vacated judgment, whether the case was resolved by a plea or by a trial, the true value of potential risks and benefits can only be determined by fully assessing the strength of the underlying case against the client, any uncharged crimes or matters that could be raised against the client, the attitudes of the opposing party and judge toward the client and the case, and the client's history and/or personal characteristics, which could make the client more or less vulnerable to bad outcomes.

### 3. New sentencing or dispositional hearing

When resentencing is denied by the postconviction court but granted by an appellate court, and when the same judge presides over the resentencing as the initial sentencing, the defendant generally may not be sentenced more harshly unless the judge can point to new facts that justify the harsher sentence.[68] Presumably, the same rule applies to a new juvenile delinquency dispositional hearing. This somewhat limits the risks of an appeal (but not necessarily a postconviction motion) that could result in a new sentencing or dispositional hearing.

However, there are two significant qualifications embedded in the above rule. First, if a different judge resentences your client after a successful appeal, that judge is free to sentence the client up to the applicable maximum.[69]

Second, even if your client is resentenced by the same judge, if that judge can point to "new" facts, the judge is free to impose a higher sentence.[70] New facts may include old facts that the judge simply did not know about at the time of the original sentencing and/or post-sentencing conduct, including conduct that has resulted in new charges or prison disciplinary proceedings. Thus, it is important to talk with your client about facts (or allegations) that that could become a factor at a new sentencing hearing prior to filing any motion for resentencing. And if your client decides to move forward with the motion, it is important to remind them that ongoing good behavior will be important to a favorable resentencing outcome.

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[68] *State v. Naydihor*, 2004 WI 43, ¶¶33-34, 270 Wis. 2d 585, 678 N.W.2d 220. This is based on the notion that a court may not impose a higher sentence out of vindictiveness related to the defendant's exercise of his right to appeal. *Id.*

[69] *Naydihor*, 2004 WI 43, ¶ 48.

[70] *Naydihor*, 2004 WI 43, ¶¶ 35-48.

#### 4. Modification of sentence or dispositional order

A request for a sentence modification or for modification or revision of a dispositional order is distinct from a request for resentencing. With a sentence modification, you are simply asking the court to improve your client's circumstances without further hearings. There is usually no risk inherent to this sort of claim. The court cannot use a motion for a sentence modification as an excuse to *increase* the sentence.[71]

#### 5. Commutation and credit

The final two forms of relief commonly requested are commutation of an illegal sentence, detention order, or probation term, and sentence or detention credit. These sorts of claims are not risky unless some aspect of credit that was already given was improper, and pressing for additional credit may reveal that error. (See Chapter Two, Section IV.b.ii.2., below.) Unlike other kinds of postconviction claims, a motion for commutation or credit does not generally waive future postconviction motions.[72]

### ii. Additional risk/benefit considerations

#### 1. Overview

In addition to the risk-benefit analysis that is related to the request for relief, you should consider whether an appeal could affect collateral matters. Some matters are truly case-specific and will only become apparent through the client. For instance, a former spouse may agree to drop a civil lawsuit for child support arrears if the defendant agrees not to appeal their child abuse conviction and the restitution related to that conviction.

There are a few common collateral matters that can be affected by the appeal; your client may want, or need, to know about these.

#### 2. Sentence credit

##### a. Errors in credit

If the sentencing court granted your client more sentence credit than they were due, any appeal presents some risk that someone will notice the mistake.

- Practice tip. There is nothing unethical about noticing a sentence credit calculation error and not bringing it to a court's attention. In fact, it would almost certainly be unethical for you to bring it to the court's attention.[73] However, you cannot make any "false statement of fact or law" to the court.[74] Thus, if you file some sort of motion and the court asks you directly about sentence credit, you may be required to reveal an error that benefited your client.

The extent of the risk will depend on how obvious the error is and the sort of motion or appeal that you propose to file. If the error is obvious, such as a classic "double credit" situation (in which the court grants a defendant the same credit in two cases

[71] *See State v. Wood*, 2007 WI App 190, ¶17, 305 Wis. 2d 133, 738 N.W.2d 81 (the postconviction court may not convert a motion for sentence modification to a motion for resentencing "in the absence of a clear, unequivocal and knowing stipulation by the defendant").
[72] *See State v. Hanson*, 2001 WI 70, ¶¶ 19-22, 244 Wis. 2d 405, 628 N.W.2d 759, 763 (commutation).
[73] *See* Wis. SCR 20:1.6 Confidentiality (prohibiting an attorney from revealing "information relating to the representation of the client" under most circumstances).
[74] Wis. SCR 20:3.3 Candor toward the tribunal.

although the sentences are consecutive), the Department of Corrections (DOC) is likely to spot the error regardless of whether your client takes any action. On the other end of the spectrum, if the error is so complicated that it took you several hours and some graph paper to figure it out, it may be that no one will notice it regardless of your client's actions.

Regardless of the type of error, the risk of losing erroneous sentence credit is particularly high if you seek, and win, relief in the form of a new trial or a new sentencing or dispositional hearing. In such cases, assuming your client is reconvicted, the court will determine sentence credit anew.

#### b. Credit after vacatur of a conviction

A separate credit-related risk that is less common but can arise, is the loss of credit for time spent under a later-vacated sentence.

Under Wis. Stat. § 973.04, "[w]hen a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement previously served." However, a problem can arise after a defendant wins an appeal, succeeds in vacating the conviction, and then, on re-trial, is convicted of a different crime. The client might not get credit for the time spent under the earlier sentence in such a case. These situations are fact-intense and can be complicated. Be sure to cross-reference § 973.04 and § 973.155. Just because credit might not be due under § 973.04 doesn't mean it wouldn't be due under § 973.155.

An additional problem can arise if the defendant originally gets multiple concurrent sentences and then succeeds in getting one, but not all, of those sentences vacated. If at a new sentencing hearing the court orders the sentence to run consecutive, the client will not get credit for time previously served concurrently with the other sentences.[75]

### 3. DOC programming

The DOC has, at various times and at various institutions, informed clients that they cannot participate in special programs like the Earned Release Program (ERP) (also known as the Substance Abuse Program (SAP)) or the Challenge Incarceration Program (CIP), if they are actively appealing their cases.[76] This is incorrect under current DOC policy, if the case is at a stage that can have no impact on programming (e.g., a case is being briefed or is awaiting decision in the court of appeals). However, a client's in-person appearance at a postconviction hearing would affect programming and could result in the client having to choose between continuing SAP or pursuing an appeal. In such circumstances, it may be possible to obtain an extension of appeal deadlines until after programming is completed.

A similar problem arises for clients appealing sex offense convictions. DOC agents often tell such clients that they cannot attend sex offender treatment, and thereby graduate to a lower level of supervision, if they are actively appealing their cases.[77]

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[75] *State v. Lamar*, 2011 WI 50, ¶4, 334 Wis. 2d 536; 799 N.W.2d 758.

[76] *See* Wis. Stat. §§ 302.05(3) (ERP) (referenced as SAP) 302.045 (CIP), 973.01(3g) (ERP) (referenced as ERP), 973.01(3m) (CIP).

[77] This is not necessarily a bad thing, given that, under certain circumstances, the state may be able to use statements made during treatment against the client in a later proceeding.

While DOC policy changes from time to time, you should be aware that an appeal can potentially affect a client's programming.[78] Sometimes a friendly call to a prison social worker or other appropriate person will clarify that the client will not be kept out of a particular program. If this does not work, however, a client may reasonably decide to focus on a treatment program that could result in early release from prison and forego any appeal.

### 4. Pending cases

Occasionally, an appeal may have some impact on a pending case. It may have a beneficial effect, such as a prosecutor agreeing to drop a pending charge against your client if the client agrees to drop his appeal. Alternatively, it may have a negative effect, as when your client wins a new sentencing hearing and the court learns about new charges that it did not take into account at the original sentencing, leading to a harsher sentence.

It is always important to be aware of any pending court matters involving your client and it is usually a good idea to talk with the attorney(s) representing your client in other matters, to discuss how the cases may affect each other.

[78] As for ERP and CIP, as of the time of publication, the DOC has informed the Appellate Division that it will not exclude clients from these programs simply for filing an appeal, but may exclude a particular client if the appeal were to interfere with programming.

# CHAPTER THREE:

## COMMUNICATING WITH YOUR CLIENT

### I. Introduction

This handbook presumes that you will set up at least one in-person meeting with your appellate client. This is consistent with the Appellate Division's performance standards and is the best practice.

The appellate attorney-client relationship is often fraught. By the time you are appointed, your client has already lost something. Your client may be critical of their trial attorney and wary of all attorneys, especially public defenders and SPD-appointed private bar attorneys. Many clients begin the appellate process with the (usually) mistaken belief that an appeal can make their case go away, so even when there are strong issues for appeal a client may be frustrated by the notion that the best-case scenario might be a new trial or plea withdrawal.

A personal visit with your client, in combination with regular and timely written and/or telephone communication, goes a long way toward overcoming these initial obstacles building a trusting relationship. It will encourage your client to provide you with all of the information you need to understand the case. It will make your client more comfortable if they are required to testify at a hearing. And it will make it more likely that your client will trust your recommendation on the advisability of any arguable appeal or your opinion that there is no issue for appeal.

We understand that not every appellate attorney meets personally with every client on every case. Circumstances may make it impossible or very difficult to visit your client and, in some cases, conversations over the telephone may have to suffice. But this should be the exception, not the rule. You should accept every case with the expectation that you will meet with the client in person at least once.

### II. Arranging a meeting

#### a. Finding your client

Your case appointment materials will always include your client's last known address as of the time of your appointment. The materials will usually *not* include a phone number. Unfortunately, by the time you get the case materials, your client may have moved. Although your client has a responsibility to notify you of any change in address, if the only address you have is not current, you should take reasonable steps to locate them rather than simply closing the file. You should also document what steps you took in a note or memo to the file.

If your client is incarcerated, finding the client is simple. You may contact them at the relevant county jail. If you are unsure where, or if, your client is in jail you can check VINElink.[79] Note that some county jails, including the Milwaukee County Jail, also have an inmate search tool available online. If your client received a Wisconsin state prison sentence you can determine their location by searching for their name on the Department of Corrections' Offender Locator portal.

[79] Note that not all jails will allow confidential phone calls with clients, instead requiring recorded collect calls or in-person visits. Remember you should ensure your communication with your client remains confidential, meaning, to ensure confidential communication you may need to visit your client in-person while they are in jail.

If your client is not incarcerated, the best way of finding your client is generally through the trial attorney or through a probation agent or social worker. You can also look at recent cases on CCAP to see if any alternative address is listed there, or you can contact the jail where they were previously held to ask for the address that was reported upon release. In some cases, you may decide to request assistance from an investigator.

- Frequently asked question. *What if I have taken reasonable steps to locate my client and still can't find them?* If you have not identified any arguable issue for appeal, the only thing you can do is document what you did to try to locate the client and then close the case. Because under Wisconsin rules an appeal can involve matters outside the trial record, in the absence of a conversation with your client, you cannot know whether there are arguable issues that occurred off the record. Moreover, rules governing no-merit procedure in Wisconsin require you to certify to the court of appeals that you consulted with your client about the no-merit options, which you cannot do if you were unable to locate your client.[80]

- If you have identified an arguable issue and there is risk to pursuing it, then you again need to close the case. You cannot pursue a risky appeal without first consulting with your client. If you find the rare appellate issue that comes with no risk, such as commutation of an illegally long sentence or probation term, it may be possible for you to appeal that issue, relying on your client's last known directive: the notice of intent to pursue postconviction or postdisposition relief. If you are unsure how to proceed, you can contact a manager in the Appellate Division.

  If, shortly after you close the case, your client materializes, you can move to reopen the time for appeal or advise the client to contact the Appellate Division. You may also contact the Appellate Division Intake Unit about the possibility of reappointment.

### b. Setting up a meeting

#### i. Meeting in the prison system

Setting up a meeting with your client in the state prison system is easy. Appendix 3.a. is a document with contact information for each of the state's prisons (as well as jails, juvenile detention facilities, and state mental health facilities). At most prisons either the records department or the social services department sets up the meeting. Contact the facility and let the operator know that you would like to set up an attorney meeting with an inmate; the operator will connect you to the correct department.

Most prisons require you to set up a meeting at least 48 hours in advance. It is good to set up visits well ahead of time so that you can get your preferred meeting time and let your client know that you are coming.

[80] *See* Wis. Stat. (Rule) § 809.32(1)(b) & (c).

When you go to your visit, give yourself an extra 15 minutes to park and go through security. All attorneys will have to run their briefcase and/or other belongings through an x-ray machine.[81]

Be sure to take a photo ID, your bar card, and any materials you need for the meeting, including any release forms that you may need your client to sign.[82] Leave everything else at home or in your car. There are also lockers in institution lobbies that you can leave your belongings in while you go back to see your client. Prison staff will not let you through security with (among other things) your cell phones, money, cigarettes, or anything that could be considered contraband (e.g., a pocketknife).

The prison should provide you with a place to meet with your client where confidentiality will not be compromised. If there is any question as to whether a guard or someone else can listen to your conversation, raise it with prison staff. If prison staff does not resolve the problem, report it to the Appellate Division so that we can act to ensure that the prison understands its obligation to facilitate confidential attorney-client meetings.

### ii. Meeting in a county jail or in the community

Procedures for meeting with your client in a county jail differ from county to county. In most counties you can visit most any time (except mealtimes or late at night) and see your client so long as you have a photo ID and your bar card. However, it is advisable to call ahead if you are visiting your client, both to confirm the procedure and check whether your client will be available at the relevant time (and not, for instance, working or performing community service).

With clients who are not incarcerated, many appellate attorneys ask the client to travel to the attorney's office or meet with the client in a conference room at a circuit court or an SPD trial office that is reasonably convenient to the attorney. Remember, though, that your client is indigent and may struggle to find transportation. Therefore, you may need to travel to a location near your client rather than vice versa, or your meetings may need to occur telephonically.

### iii. Timing the meeting

There is no right or wrong time to set an initial meeting with your client, as long as it is set well in advance of your deadline for filing a notice of appeal or postjudgment motion. Many attorneys wait to meet with their client until after they have received and reviewed all of the case materials, talked to the trial attorney, and completed their initial research of all the legal issues revealed by these sources. A smaller number of attorneys visit their clients early in the process, when they have a general idea of the case, but have not yet completed their review of the case materials or initial research.

An attorney who waits until they have completed the initial assessment is able to speak more confidently about the case and the potential issues. On the other hand, the attorney may go to the meeting with a fixed idea about the issues at play and be less open to new information and new ideas. Furthermore, the client may think that the attorney prejudged them and the case from the start.

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[81] Even shoe insoles, small items of jewelry, and underwire bras generally set off the machines, so attorneys should dress carefully in order to avoid delay.

[82] DOC release forms are found at Appendix 3.b. and 3.c. A general release form can be found at Appendix 3.d. Reference the DOC Public Records Request website to obtain the most current release forms.

In the end, this is a matter of personal preference and (especially if you are driving a long distance) efficiency.

#### iv. Documents to bring to the meeting

In order to save time, remember to bring any documents to the meeting that you will need your client to sign. For example, sometimes it may be necessary to review a client's medical or mental health records. If you believe such review is necessary, it is most efficient to bring a release form to the meeting.

In a TPR appeal, you will need a signature from your client on the notice of appeal—*see* Appendix 4.g.[83] A blank signature page can be found here. Due to the short deadlines involved in TPR cases, you should bring a notice of appeal for the client to sign, and also a signature page for a potential petition for review–*see* Appendix 4.n.

## III. The initial meeting

### a. Establishing rapport and building trust

We hope that everyone reading this guide is at least minimally familiar with the concept of "client-centered" legal interviewing. In a client-centered interview, the attorney does not approach the client as a bully (immediately telling the client what they should do) or a bureaucrat (asking generic questions and recording the answers), but as an open-minded counselor and with respect and compassion.

An overarching guideline is that your meetings should feel like conversations. When first meeting a client, establish an initial connection before delving into the case: make eye contact, shake the client's hand, and introduce yourself. Give the client a business card, if you have one. Make sure that the client understands that you are the attorney and you are there to help. It is usually a good idea to explain that the client has not yet filed an appeal, but has indicated a desire to appeal, and explain your role as the appellate attorney.

Most experienced attorneys then start the interview process by asking the client why they decided to appeal. After asking this question, actively listen to your client's concerns without rushing to judgment. While listening, pay attention to non-verbal and verbal cues: body language and affect, vocabulary and fluency, and understanding (or lack thereof) of the criminal and appellate process.

Active listening does not mean sitting silently and observing. You should ask questions, interrupting your client if necessary, and respond to their concerns and stories just as you would in a conversation with a friend. If you notice unusual non-verbal cues, consider whether to ask or comment about them. It may be that your client has medical issues or may be on medication that affects behavior or ability to understand or process what is going on or went on with the case. That type of information could be relevant both to a potential appellate claim and to your approach to counseling the client.

While you should let the conversation develop naturally, you will sometimes need to steer it toward areas relevant to potential appellate issues. And while you may want to keep the legal pad down for the first few minutes of your conversation in order to encourage careful listening, at some point, you need to start taking notes for your file.

[83] In a TPR appeal, you will also need to have the client sign the petition for review –*see* Appendix 4.n. A blank signature page can be found here.

However, prior to picking up the legal pad and pen, it is a good idea to tell the client that you will be taking notes and explain why you may find them useful later.

Throughout the meeting, listen carefully and show the client that you are listening and working to find issues that can be raised on appeal. If the client tells you something that might be relevant to a potential issue, ask for more information and explain your interest in the statement. If the client raises plainly meritless issues or irrelevant facts, nudge the discussion in a more productive direction, perhaps explaining that the subjects they are addressing are unlikely to affect any appeal, but try not to criticize or ignore their ideas as they make them. Your goal is to draw as much relevant information out of the client as possible—and to show them that you care. You don't want to shut them down.

### b. Discussing the case

The issues and events that you need to discuss with your client in order to assess potential claims will be different in every single case. Some may be clear from the case materials (like their reasons for not going to trial), while others may become apparent at your meeting (like whether a hearing-impaired client was wearing a hearing aid during the trial or whether it was functioning properly).

Clients often present topics that may not be relevant to appeal but are nevertheless worth discussing. These topics, too, will be different in every case. For instance, a client may seek information about how the Department of Corrections will interpret their sentence structure or how a criminal case may affect a family matter or vice versa. Or the client may need assurance that an SPD staff or appointed attorney, who is a state employee, is independent of "The State" and is ethically obligated to competently and zealously advocate for them.

This section addresses a few items for discussion that are relevant to just about every case, be it criminal, youth, civil commitment, CHIPS, Ch. 980, and TPR cases. It is not, however, intended to limit the many areas of discussion that may be relevant to an appeal or useful in developing a good attorney-client relationship.

#### v. Facts related to potential appellate issues

There are at least two categories of issues that should be discussed in every single case, because the client is usually the best source of information: (1) the client's understanding of decisions entrusted to them; and (2) the underlying facts relevant to sentencing or disposition. In addition, you should inquire with each client whether anything that happened at the trial level just seemed wrong.

##### 1. Client's understanding of personal decisions

With any decision entrusted to the defendant or respondent, not the attorney, you should talk to your client about their understanding of that decision, as well as the facts and legal concepts associated with that decision.

The likelihood that you will succeed in any claim in which your client made a decision without sufficient understanding will depend, at least in part, on the circuit court's colloquy that preceded that decision. But even where the colloquy was sufficient, you may find a potential lack-of-understanding of a claim or you may learn something about your client or the case that would be useful to a different sort of claim.

The decisions entrusted to clients include:

- Whether to waive the right to counsel.[84]
- Whether to waive the right to trial as to any element.[85]
- Whether to waive the right to trial by jury (where applicable).[86]
- Whether to testify.[87]

As to each of these decisions, case law dictates a number of matters that the client must understand prior to making the decision. For instance, before waiving the right to counsel, the client must be aware of their right to counsel, the difficulties and disadvantages of self-representation, the seriousness of the charges, and the range of possible penalties.[88] Before waiving the right to trial, the client must be aware of much more, including all of the rights associated with a trial.[89]

As to any decision relevant to your client's case, you must understand the case law addressing that decision before meeting with your client so that you can have a full discussion of the relevant matters.

### 2. Facts relevant to sentencing or disposition

Two potential issues that should be considered in nearly every case are:

(1) whether the judge relied on any inaccurate information at the sentencing or dispositional hearing (giving rise to a claim for a new sentencing or dispositional hearing, or perhaps for a sentence modification or revision of the dispositional order);

(2) whether there is new information that would affect the advisability of the sentence or disposition (giving rise to a claim for sentence modification or revision of the dispositional order).

Your client is an expert on their own life history and circumstances, so you should involve them in brainstorming these kinds of claims. You may want to send them a copy of the sentencing or dispositional hearing transcript prior to your meeting, or give them time to read it at or after the meeting. Ask your client about each item of historical fact that was discussed and that may be untrue. Also ask your client about the judge's assumptions about the operation of the sentence or disposition and ask them about their present circumstances.

Most clients appreciate the opportunity to play an active role in identifying meritorious issues and this is one place where they can be very helpful.

❖ Practice tip. In a criminal or youth delinquency case, don't forget to ask about sentence credit! Just like clients are experts on their own lives, they are often experts on their incarceration history. In each case, ask your client whether they agree with the court's

[84] *N.E. v. Wis. Dep't of Health and Soc. Servs.*, 122 Wis. 2d 198, 206, 361 N.W.2d 693 (1985).
[85] *State v. Smith*, 2012 WI 91, ¶53, 342 Wis. 2d 710, 817 N.W.2d 410.
[86] *State v. Livingston*, 159 Wis. 2d 561, 569, 464 N.W.2d 839 (1991).
[87] *State v. Denson*, 2011 WI 70, ¶¶49-67, 335 Wis. 2d 681, 799 N.W.2d 831.
[88] State v. Imani, 2010 WI 66, ¶23, 326 Wis. 2d 179, 786 N.W.2d 40.
[89] *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (citing *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986)).

determination of credit and, if not, ask for their theory of credit—the client just might know what they're talking about. It is also a good idea to ask your client what jails they have spent time in since the date of the offense in your case, so that you can request their booking records. Appellate attorneys frequently identify credit clients were entitled to, but did not get, by reviewing their booking records.

### 3. Things that seemed wrong

The rules of criminal and civil procedure are generally based on notions of fairness. Therefore, it is fruitful to ask each client what they thought was unfair about their case. Actions that would strike a layperson as "unfair" are also occasionally unlawful, and your client's gripes may trigger recognition of a cognizable issue. This is particularly true where the client's concerns involve matters outside of the record, which generally cannot be identified from the transcripts.

In having this discussion, you will want to direct your client's attention to each of the phases of the case: the circumstances underlying the filing of the case, the trial or plea hearing, the sentencing or dispositional hearing, and the attorney- client discussions and advice related to each of these phases.

If nothing else, this sort of conversation, involving careful and active listening on your part, will help build rapport with your client and allow you to understand their decision to appeal and their understanding of the law, all of which will enable you to better counsel your client through the appellate process.

## vi. Appellate procedure

It is easy to assume that our clients already know, at least generally, how appeals work. But most of our clients, even those with significant criminal records, have never previously appealed a case, and even if they have, they may not know how appeals work.

Thus, at some point during your first meeting, it is a good idea to explain to your client the basics of appellate procedure in Wisconsin. The "Information for Clients" document the Appellate Division sends to the client in every case can be a good template for this discussion. At a minimum, you will likely want to cover (in plain language) the following:

- You are looking for any non-frivolous issue to raise on appeal, whether first in the trial court or straight to the court of appeals, and whether related to the conviction/adjudication or sentencing/disposition.

- If you determine that there is any arguable issue, you will talk to the client about it and the client will decide whether they want to actually pursue the appeal.

- If you find no arguable issue, the case is not necessarily over but, if that happens, you and the client will have to have a discussion later about how to proceed.

- A non-TPR appeal can take anywhere from a few months (if it moves quickly and only goes as far as the trial court) to several years or more (if it goes through the appellate courts). A TPR appeal is usually resolved within a few months, unless it goes to the state supreme court.

If your client has filed a notice of intent in the past and then pursued an appeal, closed the case, or gone through a no-merit appeal, it can be useful to ask them about that experience. Sometimes, a single appellate experience will color a client's idea of how the process works and it is helpful for the attorney to know this early in the relationship and dispel any misunderstandings.

### vii. Expectations for the future

Your first client meeting should end with a discussion of expectations, both general and specific. As for general expectations, you should invite your client to contact you with questions, concerns, and new developments, and give them an idea of how quickly you expect to respond to any such communication. Tell your client that they must notify you of any change in contact information—especially if they are getting out of jail or prison soon—and that you will keep them informed of your actions, including by sending them a copy of any court document you file in relation to the case. Alert your client to any other practices and procedures you have that may be helpful for them to know.[90]

As for specific expectations, you should let your client know your thoughts about clear or potentially arguable issues, and your plan and timeline for resolving whether any potentially arguable issues are in fact arguable. Be careful to not oversell expectations when imparting your opinions on the relative strength of any arguable issue. It is very difficult to predict what the courts will do in any particular appellate case. You should also tell the client what each potential issue, if successful, would conceivably get the client. If the client would "win" a form of relief that they do not want, the client may not want you to examine it at all.

If your client has raised specific issues that you know or suspect do not have any arguable merit, explain that as well; do not simply brush them off. If you know that something would not be arguable, explain why, and describe the applicable law. If the client pushes the matter, you can end the discussion (while avoiding an argument) by telling the client that you will go back to your office, double-check the applicable law, and send them a letter with further explanation, with citations to controlling law (and perhaps copies of relevant statutes or cases). If you suspect, but do not know, that a client's issue would not have any arguable merit, note your uncertainty and tell the client that you will do some research and get back to them. Then do so.

At the end of your meeting, you should review your notes and set a post-meeting to-do list for the case, which you should explain to your client. For example, in a sexual assault case, you might have the following list:

- Request an expert to do a sex offender risk evaluation.
- File a motion for an extension of time so you can get the risk evaluation.
- Research the community caretaker doctrine in order to determine whether the trial attorney missed a possible suppression issue.
- Find a case to share with the client showing that a postsentencing change to the sentencing laws is not a basis for a sentence modification.

[90] Ideally, you will have already outlined your expectations in an opening letter to the client.

By making this sort of list, and sharing it with your client, you force yourself to organize the case and you show your client what you are doing. Don't forget to tell your client when they should reasonably expect to see a copy of the motion for an extension of time and the sentence-modification-related case.

Then, *follow through*. If you make any promise to a client, treat it just as you would a promise to a colleague or a judge. It is always a good idea to follow up a client meeting with a letter to the client confirming what happened and what was decided at the meeting.

#### viii. Final determinations

Occasionally, by the end of the first meeting after your review of the complete record, it is already clear that there are one or two arguable issues for appeal, and no more—or that there are no arguable issues for appeal. If the case involves arguably meritorious issues, you will need to discuss the risks and benefits that you see, as discussed in Chapter Two, Section IV.b., above, and Chapter Four, Section II, below. If the case presents no arguable issues, see Chapter Five, Section II., below, in regard to the "no merit" conversation you must have.

## IV. Follow-up conversations

Once you have had an initial in-person meeting and established rapport with your client, it is often appropriate and more efficient to have follow-up conversations over the telephone, and, if you have determined that the client is literate, via mail or email.[91]

What is important is that you promptly respond to your client's letters and phone calls, provide the client with any information or copies that you have promised, and provide them with updates on the case, even in the absence of contact from the client. An update may come in the form of mailing a copy of a motion for enlargement of time, expert request, or other case-related document, or it may come in the form of a letter describing the status of the case. Alternatively, you can set a different expectation at the initial meeting or contact. Whatever expectation you have set, meet it.

Once you have determined your client's options for appeal, you will need to have fairly extensive conversations about the options for appeal and the risks and benefits associated with those options, as discussed in this handbook's subsequent chapters.

## V. Communication barriers

### a. Non-native-English speakers

#### i. Determining whether an interpreter is needed

If your client speaks no English, or speaks little enough English that trial counsel and/or the circuit court previously found that an interpreter was necessary, it should be clear that you must hire an interpreter.

If your client is a non-native-English speaker, you should assess whether an interpreter is needed, even if the client speaks some English, and even if the client says that they do not need or want an interpreter. If your client speaks only elementary-level English and you believe that they would be more proficient in another language, you

[91] It sometimes makes sense to conduct *all* meetings in person, such as where your client has low intellectual functioning or is hearing impaired.

should hire an interpreter. You should compliment your client's English skills, but explain that some of the concepts you will need to discuss may be complicated and involve terminology that can be confusing even for native speakers. You can also mention that you may want to explore whether the trial court should have used an interpreter as an issue for appeal and, in order to do that, you will need to assess their understanding of the case in both English and their native language.

Of course, if you speak the client's non-English language, you may not need an interpreter. However, you should assess your own linguistic abilities carefully. If you have any doubts about your ability to explain complex or subtle legal concepts, you should consider getting an interpreter.

If you determine that an interpreter is necessary, you will only need the interpreter for meeting with your client and communicating with them in writing and over the telephone. If the appeal necessitates a hearing, the court is required to furnish an interpreter for the hearing.[92]

Note that you are not obligated to provide the client with translated copies of documents such as transcripts, motions, or briefs, and the SPD does not have the resources to pay for such translations. You are required to convey to the client in their own language the content of any document you file, and you still should provide the client with a copy of the document as filed in English. When filing a no-merit report, however, the client may need a translated copy of the report so that they may file a response to it. The SPD will pay for producing a translated copy in this instance, if the client needs it. If the client is not literate, you must also have an interpreter explain the content of the report, orally. If a non-English speaking client files a response to a no-merit report in the client's native language, it is the court's responsibility to pay for a translation of the response into English.

### ii. Hiring an interpreter

If you determine that an interpreter is necessary, whether you are an SPD staff attorney or a private bar attorney taking SPD appointments, you will need to find and arrange to hire the interpreter. You should find an interpreter who is close to the location where you will be meeting with your client, if possible, so that the SPD can avoid paying travel costs.[91] If your client is in prison, remember that you will need to notify prison officials that an interpreter will be joining you for the meeting.

If one is available, you should always hire a court-certified interpreter. Attorneys can find a database of certified court interpreters in a variety of language here. Certified interpreters have been tested on their abilities, should have a solid grasp of legal vocabulary, and understand client confidentiality.

If possible, you should attempt to find an interpreter who has experience interpreting for clients who are from the same country or region as your client. There can be major linguistic differences between interpreters from different countries where the same language is spoken, for example, a French speaker from France and one from Senegal.

As for logistics, if you are a staff attorney, you can find the interpreter hiring request form on the SPD internal network. If you are a private bar attorney, you can find information about how to submit an expense request on pages 17-21 of the Assigned Counsel Division (ACD) Manual, as well as the form here.

[92] It is your responsibility to alert court personnel to the need for an interpreter.

### iii. Working with the client

Establishing a strong working relationship with a non-English speaking client can prove difficult. In part, this is because you are attempting to build a relationship through an intermediary (the interpreter), which can be awkward. The following are some tips for improving communication through an interpreter:

- Early in your conversation, explain the interpreter's role and the fact that both you and the interpreter will maintain confidentiality.
- Determine if your client speaks any English, even if just a little, so that you can exchange some pleasantries and ask simple questions in English in order to establish a direct connection.
- Speak directly to your client and make eye contact with them; do not look to the interpreter as if playing a game of "telephone."
- Speak slowly and clearly, pause often, and ensure that your client understands your advice by asking them open-ended questions and/or asking them to paraphrase your advice.
- At the end of the meeting, discuss how future communications will work. Does your client prefer written or oral communications? Does your client understand the interpreter well?

Effective communication can also be inhibited by cultural differences between you and your client. There may be cultural differences that are directly related to the relationship. For example, your client may be uncomfortable working with someone of a different gender or uncomfortable shaking hands. There may also be cultural differences regarding the criminal legal system and roles of legal actors that make it difficult for your client to understand the case generally or understand specific legal concepts.

With any sort of cultural barrier to communication, you should learn as much as practical about the client's perspective, including potentially educating yourself about the client's native legal system, and discuss any concerns thoroughly with the client. In cases where these issues arise, schedule longer and/or more frequent meetings and conversations and listen carefully to your client. While you may want to skip ahead to the appellate options, it is only by addressing barriers to understanding those options that you can ensure your client is capable of making a rational and informed decision.

## b. Deaf and hard-of-hearing clients

It can be particularly challenging to communicate with deaf and hard-of- hearing clients. If a deaf client fluently speaks American Sign Language, you can obtain an interpreter, as discussed above. Alternatively, or additionally, if the client is literate, you may be able to arrange for use of a TTY telephone or other real-time translation device.

A more profound problem could arise with a deaf client who does not speak sign language and has minimal language skills, which may necessitate a relay interpreter or could suggest that the client is not competent to proceed on appeal and/or was not competent at the trial level.[93] If you are ever faced with such a client, please feel free to

[93] For a discussion of deaf individuals with minimal language skills, see Michele LaVigne & McCay Vernon, The Deaf Client: It Takes More Than a Sign – Part 1, CHAMPION, June 2005, at 26.

contact an Appellate Division attorney manager to discuss the matter.

### c. Clients with other communication problems

Additional communication problems arise with a client who is functionally or completely illiterate, has a very low IQ, has a communication disorder or serious mental illness, and/or is a youth client.[94] In adult cases, these problems arise much more frequently than one might expect. In youth cases, young clients, even those who function and communicate at a developmentally-appropriate level, almost always pose significant communication challenges. Unfortunately, no interpreter can resolve these problems.

The most important thing is to be aware of the possibility, or even likelihood, that each client will have significant educational or developmental deficits, or a significant mental illness. Do not assume that your client is literate, and do not convey any important information in writing that you do not plan to repeat orally, unless and until you have first assessed the client's literacy. It is okay—and important, especially when you haven't received a letter from them—to ask your client if they can read or write. Do not assume that your client understands your advice just because they nod their head or answer affirmatively. Ask meaningful, open-ended questions of your client that test their understanding and/or ask them to paraphrase or summarize your advice.

If your client does not seem to understand something, explain it again, as often as necessary, and in as many ways as it takes to establish understanding. Be careful not to simply repeat yourself; try to say things in different ways to see what "clicks." If your client seems incapable of understanding an important matter, see the discussion of competency below.

### d. The incompetent client

If you have a good faith reason to doubt whether your client is capable of understanding the risks and benefits of their appellate options, of rationally making the decision whether to appeal, or (if necessary) of assisting you with developing a factual record in the circuit court, you have an ethical duty to raise it.[95]

You may want to start by simply extending the appellate timelines and attempting to counsel the client to competence. If that does not work, you will need to file a motion for determination of in the circuit court. An example of a motion for a criminal case where the appellate attorney has determined that an examination of the client is needed, is found at Appendix 3.e. A blank document can be found here. A competency motion will prompt the circuit court to evaluate the client's competency, for example, by appointing an examiner, and if the client is deemed incompetent, to determine next steps. The options include: extending appellate deadlines while the person is given treatment; appointing a temporary guardian for the purpose of making appellate decisions on the client's behalf; or, creating a record so that the client may have collateral postconviction motions heard at a later date if they become competent.[96]

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[94] For a discussion of communication disorders, see Michele LaVigne, Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters, 15 UC DAVIS J. JUV. L. & POL'Y 37 (2011).

[95] See *State v. Debra A.E.,* 188 Wis. 2d 111, 523 N.W.2d 727 (1994). The suggested framework set forth in the body of this handbook is taken from this opinion; we recommend that any attorney dealing with a possibly incompetent client read the opinion carefully, in its entirety.

[96] *Debra A.E.*, 188 Wis. 2d at 119.

Note that if there is an appellate option that comes with *no* risk, you may be able to proceed with the appeal even if your client is incompetent.[97] Risk-free appeals are rare; examples include commutation of an illegal sentence or probation term, correction of a sentence credit error, or a challenge to a conviction based on insufficient evidence at trial.

### e. Dealing with a breakdown in communication

The best way to deal with a breakdown in communication with your client is to avoid it in the first place. If you meet with your client personally, actively listen, and promptly respond to questions and requests for information, then if and when you have to deliver bad news, the client is more likely to respond productively.

Sometimes, regardless of the attorney's actions, a client becomes hostile and communication becomes unproductive and/or nonexistent. When this happens, it is usually after the attorney has told the client that they believe there would be no arguable merit to any appellate issue, or after the attorney has told the client that there is an arguable issue but not the one the client wants.

In this unfortunate, and hopefully very rare, situation, it is important for both the attorney and the client to understand that the Appellate Division does not reappoint appellate counsel just because the attorney-client relationship has soured.[98] The client is not entitled to a new attorney to render a second opinion about the case. Furthermore, the client cannot force reappointment by filing an ethics complaint against you or making idle threats (or advances) toward you. Of course, if things get so contentious that you actually feel threatened, please contact an Appellate Division attorney manager.

Assuming that the appellate attorney has had whatever initial conversations with the client were necessary to determine the arguable issues, if any, for appeal, the only other critical communication that must occur pertains to the client's decision on how to proceed. Many attorneys deal with a client's refusal to speak with the attorney about this decision by putting together a basic form listing the appellate options, with a checkbox next to each option, and instructions to check one box and return the form by a date certain. It is usually a good idea to send a self-addressed, stamped envelope with this sort of form. You might instead try an in-person visit (understanding that the client may refuse to come meet with you).

If the case is in a no-merit posture, meaning that you have determined that there are no non-frivolous issues that can be raised on appeal, there is a statutory default option that is discussed in Chapter Five, Section II., below. In short, if you have counseled your client on the no-merit options and your client refuses to choose a no-merit option, you must file a no-merit report.

If there is an arguable issue for appeal, and your client will not authorize you to file the appeal, but also does not consent to have you close the file or discharge you so they can proceed pro se or with retained counsel, this is a more difficult dilemma. If you face this situation (which is, thankfully, rare), you should contact an Appellate Division attorney manager. We will help you come up with a plan for dealing with it.

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[97] *Debra A.E.*, 188 Wis. 2d at 130.

[98] The Wisconsin Supreme Court has noted "the Sixth Amendment does not guarantee 'a friendly and happy attorney-client relationship,' but rather effective assistance of counsel." *State v. Jones*, 2010 WI 72, ¶ 4, 326 Wis. 2d 380. Note also that disagreement over legal strategy generally is not a basis for appointed counsel to move to withdraw. *See State v. Suriano*, 2017 WI 42, ¶ 10, n. 5, 374 Wis. 2d 683.

## VI. Ethical note

The single most common client complaint to the Appellate Division, and the most commonly verified as true, is that the appellate attorney did not reasonably communicate with the client.

Remember, throughout your representation, you have an ethical duty to:

- Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required.
- Reasonably consult with the client about the means by which the client's objectives are to be accomplished.
- Keep the client reasonably informed about the status of the matter.
- Promptly comply with reasonable requests by the client for information.
- Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.[99]

You also have a duty to explain issues and options to the extent reasonably necessary to permit the client to make informed decisions regarding your representation.[100] In our practice, this ethical rule requires, at a minimum, that you: respond to all client attempts at communication and requests for information quickly (generally within a week or two); consult fully with your client about their appellate options and provide them with the information and advice they need to make an informed decision regarding those options; and send your client a copy of all court filings and most correspondence related to their appellate case.

[99] Wis. SCR 20:1.4(a).
[100] Wis. SCR 20:1.4(b).

# CHAPTER FOUR:

## LITIGATING A MERITORIOUS APPEAL

### I. Where to initiate the appeal

#### a. Rule 809.30 appeals

In a Rule 809.30 appeal, there are two categories of issues you can take straight to the court of appeals: (1) "sufficiency of the evidence" presented at trial and (2) "issues previously raised."[101] See Appendix 4.a. for a general checklist.

Other than claims falling in one of these two categories, everything must be litigated in the circuit court via a postjudgment motion prior to filing a notice of appeal.[102] This can be counterintuitive, like when you are claiming that the circuit court (the same court hearing the motion) erroneously exercised its discretion at sentencing. Even then you must bring your claim to the circuit court before proceeding to the court of appeals—or risk forfeiture.

One potential gray area arises when an attorney is unsure as to whether an issue was "previously raised." For example, say the trial attorney objected to testimony based on hearsay grounds, but not the confrontation clause. Has the confrontation issue been preserved? If not, you would have to first raise it in the circuit court (likely in the form of an ineffective assistance of counsel claim). For this particular example, the answer is fairly clear: the confrontation issue was not preserved.[103] The question would be tougher if the trial attorney objected on both hearsay and confrontation grounds, but neglected to mention a supportive case or inaccurately argued the matter.[104]

On very rare occasions, an appellate attorney will recognize that an issue was not preserved, but decide, for strategic reasons, to go straight to the court of appeals. After all, forfeiture is a rule of judicial administration, which the appellate courts may choose to ignore.[105] This is an extremely risky maneuver that generally should not be taken when challenging a sentence or raising an ineffective-assistance-of-counsel claim. At a minimum, before making this sort of strategic decision, you should consider the likelihood of prevailing in the various courts; the likelihood that the opposing party will raise waiver or forfeiture (the attorney general's office almost always does); whether you have a good argument against application of the forfeiture doctrine in the event the opposing party raises it; and your client's preference. If you are planning to risk forfeiture by going directly to the court of appeals with an unpreserved issue, we urge you to first consult with an Appellate Division attorney manager.

On the other hand, an attorney may, for strategic reasons, decide to file a postjudgment motion even when the claim being raised could go straight to the court of appeals, as with a preserved error or sufficiency claim. For example, an attorney may realize upon reading the transcripts that the circuit court misstated an important fact in deciding a motion to suppress. In this circumstance, the attorney may decide that the circuit court might reverse its own decision if the error were pointed out, which would

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[101] Wis. Stat. (Rule) § 809.30(2)(h).
[102] *State v. Walker*, 2006 WI 82, ¶24, 292 Wis. 2d 326, 716 N.W.2d 498.
[103] *See State v. Marshall*, 113 Wis. 2d 643, 653, 335 N.W.2d 612, 616-17 (1983).
[104] Whether the appellate attorney should consider this issue sufficiently preserved would depend on all of the surrounding facts of the case, including the details of the circuit court's ruling at trial. The question may ultimately be strategic: would the circuit court possibly overrule itself if told about the case or the corrected information?
[105] *See State v. Moran*, 2005 WI 115, ¶ 31, 284 Wis. 2d 24, 700 N.W.2d 884.

accomplish the client's goals much faster than taking the case to the court of appeals. Note, however, that there can be risks associated with this approach, such as giving the circuit court an opportunity to supplement the record with additional reasoning that could make it harder to prevail in the appellate courts.

### b. TPR appeals

In a TPR case, as noted in Chapter Four, Section III.a., below, every appeal starts in the court of appeals.[106] If the case "require[s] postjudgment fact-finding," the appellant files a motion to remand the case to the circuit court after the court of appeals has taken jurisdiction over it.[107] This rule means that, in TPR appeals, the circumstances in which the case goes back to the circuit court are much more limited than in Rule 809.30 appeals. Some circumstances clearly require fact-finding and must be remanded to the circuit court, like an appeal based on ineffective assistance of trial counsel or on a plea that was not knowing and voluntary. Other circumstances, like an appeal based on the trial court's erroneous exercise of discretion at disposition, would not necessarily require fact-finding and therefore would not necessarily require remand.

A motion for remand needs to be accompanied by an affidavit.[108] The affidavit, which you will need to sign, must state with specificity the reasons that postjudgment fact-finding is necessary and include an affirmation that "under s. 802.05(2), to the best of my knowledge, information, and belief, remand is warranted and is not being sought to cause unnecessary delay."[109] Appendix 4.l. and 4.m. contains an example of a motion for remand with a supporting affidavit; a blank motion can be found here and a blank affidavit can be found here.

If the motion for remand is granted, the court of appeals will set time limits for the circuit court to hear and decide the issue, for you to request a transcript after a hearing, and for the court reporter to file and serve the transcript of the hearing.[110]

## II. Client consultation regarding meritorious appellate options

### a. The nature of the discussion

Once you have determined the issues that you can argue on your client's behalf, you will need to have a detailed discussion with them about the issues, covering, at a minimum, the following:

- The relief available for the particular issue, and the best- and worst-case scenarios.
- The risks and benefits of any appeal based on each arguable issue.
- The logistics of any postconviction hearing, including whether the client will need to attend the hearing and testify.
- The likely timeline for the appeal.

In addition, it is your job as counselor to actually give your client advice. That does not mean that you should bully your client into making the decision that you would make, were you in their shoes. But it *does* mean you should share with your client your

[106] Wis. Stat.(Rule) § 809.107(5).
[107] Wis. Stat. (Rule) § 809.107(6)(am).
[108] *Id.*
[109] *Id.*
[110] *Id.*

honest thoughts about how they should proceed, and why.

### b. Who decides how to proceed?

The quick and easy answer is that your client chooses whether to appeal, and determines the goals of the appeal, while you determine whether an issue is arguable and how the issue will be litigated.[111] What that means in practice is that your client, and not you, decides whether they want to seek specific relief (say, plea withdrawal but not resentencing), ask for every kind of relief potentially available, or drop the appeal altogether.

You decide which specific issues to raise in order to pursue the relief your client wants, how to raise and argue those issues, and in which court to argue them first. If you have thought of five different grounds for plea withdrawal, but only four of them are strong, you may decide to drop the fifth claim in order to focus on your stronger ones, even if your client wants you to raise all five. Or you may decide to raise them all to show, for example, that the plea colloquy was so riddled with errors as to be worthless. Whatever the case, it is your ultimate decision.[112]

That said, you are ethically obligated to consult with your client about strategic decisions, and it is usually a good idea to involve the client in those decisions.[115] Not only does this promote positive attorney-client relationships, but you may find that your client has good ideas. Remember, your client has already appeared in front of the judge who presumably will decide the postjudgment motion, and the client knows at least some of the prosecutors. Your client might also have an idea of how they, their trial attorney, and others would do as witnesses. Do not count your client out as a valuable resource in determining strategy.

### c. Your client's options

In any case where you have identified one or more arguable issues for appeal, your client ultimately has three options: (1) ask you to pursue an appeal based on one or more of the issues that you have identified; (2) ask you to withdraw from the case so they can appeal pro se or with the help of retained counsel; or (3) ask you to close the case without further action, waiving the right to direct appeal.

If you have identified any arguable issue, even if it is not one that the client is interested in raising, your client is not entitled to a "partial" no-merit report and you should not file such a report.[113] In other words, you should not file a no-merit report for the purpose of explaining that your client has opted not to pursue an arguable appeal and asking the court of appeals to determine whether the case presents any other issues.[114] A no-merit report should be reserved for cases in which the appointed attorney has not identified *any* arguable issues for appeal.

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[111] Wis. SCR 20:1.2(1).

[112] *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

[113] *See State ex rel. Ford v. Holm*, 2006 WI App 176, ¶¶ 12-13, 296 Wis. 2d 119, 722 N.W.2d 609 (holding that there is no right to a partial no-merit report and noting that there may be ethical reasons that an attorney would not file such a report).

[114] There are several reasons for the SPD's rule against partial no-merit reports. First, a client is not entitled to a partial no-merit report, and, as an administrative matter, having SPD-appointed attorneys take this unnecessary step would be burdensome and expensive. *See Holm*, 2006 WI App 176, ¶12. More importantly, it is our position that a partial no-merit report forces the attorney to argue against the client's interests, which, because it is not required by law, would be unethical. *See id.*, ¶ 13; *see also* WIS. SCR 20 (preamble) (discussing the attorney's duty to argue for the client's position and seek results that are advantageous to the client).

### d. Resolving disputes on how to proceed

Unfortunately, resolving disputes with a client where there are meritorious issues to litigate can sometimes be more difficult and frustrating than resolving disputes in a no-merit situation. In the no-merit context, there is a default. If your client cannot or will not make up their mind regarding how to proceed, you will have to file a no-merit report, as discussed in Chapter Five, Section II., below.

A typical dispute involving a meritorious appeal arises when the attorney has identified an arguable issue, but not one that furthers the client's goal. For instance, you may have identified an arguable basis for plea withdrawal, but your client does not want to withdraw the plea. The client only wants a sentence modification, but you have not identified any new factor that would arguably support a sentence modification.[115]

In this example, there is no default option. The client must choose one of the three options identified above: (1) ask you to file an appeal seeking plea withdrawal; (2) ask you to withdraw from the case so they can appeal pro se or with the help of retained counsel; or (3) ask you to close the case without further action, waiving the right to direct appeal.

If you get stuck in this situation and cannot obtain a decision from your client, after diligently attempting to obtain a decision, it is not always clear how you should proceed. Some attorneys in this situation file a motion to withdraw as counsel, which has the effect of forcing a decision from the client. The procedure for withdrawal is set forth in Chapter Five, Section IV., below. If you end up in this situation, please do not hesitate to call an Appellate Division attorney manager for help in setting a plan for moving forward.

## III. Litigating a postjudgment motion in the circuit court

### a. Applicable deadlines

In a Rule 809.30 appeal you have sixty (60) days to file the postjudgment motion or notice of appeal from the date that the last transcript is electronically accessible to you.[116] When a postjudgment motion is filed, from the date of filing, the circuit court has sixty (60) days to decide the motion or the motion is deemed denied.[117]

In a TPR appeal, you have thirty (30) days to file the notice of appeal from the date that the last transcript is electronically accessible to you.[118] Then, from the date the court record is filed with the court of appeals (which should be within 15 days of the filing of the notice of appeal),[119] you have fifteen (15) days to file the motion to remand the case for the filing of a postdisposition motion.[120] If the court of appeals grants your motion, its order will set deadlines for the postdisposition proceedings.

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[115] *See Holm*, 2006 WI App 176, ¶¶ 4-5 (describing just this situation).
[116] Wis. Stat. (Rule) § 809.30(2)(h).
[117] Wis. Stat. (Rule) § 809.30(2)(i). If it looks like the court is not going to decide the issue within the 60-day deadline, you should move for an extension in the court of appeals, as discussed in Chapter Four, Section III.c.ii.1.b., below.
[118] Wis. Stat. (Rule) § 809.107(5)(a). You will need to file a statement on transcript between the filing of the notice of appeal and the filing of the motion for remand. Wis. Stat. (Rule) § 809.107(5)(c)&(d). See Chapter Four,Section IV.a.ii., below, for information about the form and content of the notice of appeal and the statement on transcript.
[119] Wis. Stat. (Rule) § 809.107(5)(b).
[120] Wis. Stat. (Rule) § 809.107(6)(am). Click the links for a template form for filing the motion for remand with an accompanying affidavit is found at Appendix 4.m.

## b. The postjudgment motion

### i. Motion practice, generally

#### 1. Persuasive motion writing

If you think that the "real" appeal starts after you file the notice of appeal, think again. Most appeals start in the circuit court, and, while it is hard for some brief-loving appellate attorneys to accept, more of our clients win relief in the circuit court than in the appellate courts. That means that our motions must be compelling, and they must involve as much effort, preparation, and craft as our briefs. They should be thoroughly researched, factually accurate, persuasively written, and complete.

At worst, if you write a great postjudgment motion and lose anyway, your brilliant motion can be easily modified into an opening brief in the court of appeals.

The precise form each motion takes will vary. For example, in a *Bangert*[121] motion, which is discussed in Chapter Four, Section III.b.ii.1., below, the defendant or respondent has a limited burden of production. There is no need to write pages of powerful prose, but you must clearly and concisely point to the errors in the record, make the necessary factual allegations, and cite to the applicable law.

In contrast, in a motion seeking a sentence modification based on new information that sheds light on your client's brain damage, which the sentencing court did not previously hear about, you will need to tell a moving story and persuade the court that justice requires a sentence reduction. This sort of motion will generally win at the circuit court level or not at all.

We do not know of specific resources devoted to writing great motions, however, you can improve your persuasive motion writing by looking at resources focused on brief writing. See Chapter Four, Section IV.b.iii., below, for some helpful tips and references.

#### 2. Filing requirements

There is no uniform set of rules governing motions that prescribes any particular form, word count, etc. If you do not regularly practice in a particular circuit court, be sure to check out the local rules.[122] Many courts, including the Milwaukee Circuit Court, have rules governing motion practice, including postjudgment motions.

As far as we know, every circuit court will accept a postjudgment motion that lays out the entire argument within the motion and may read like a brief, and every court will also accept a minimal motion with a longer brief attached. The form you use to make your case is a matter of personal preference or style.

The postjudgment motion must be electronically filed by the 60-day deadline. If the clerk of court accepts the document for filing, the motion will be considered filed with the court at the date and time of the original submission, as recorded by the electronic filing system.[123] If the motion is rejected by the clerk of court, you will need to file a motion to extend the postjudgment motion deadline if you are e-filing the motion outside your deadline.

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[121] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).
[122] Most local court rules are available at https://rb.gy/m2nvia
[123] *See* Wis. Stat. (Rule) § 801.18(4)(c).

When the clerk of court accepts the document for filing, the electronic filing system shall issue a confirmation to serve as proof of filing.[124] The electronic filing system serves all other parties, with the obvious exception of any "paper parties,"[125] in the case.[126]

- ❖ Technical point. You can check whether someone is considered a "paper party" by clicking on "View parties" in the court of appeals e-filing system under the appropriate case number. Notice for the parties will be designated as "e-notice" for parties that have opted in and "Paper" for paper parties. Note that in TPR cases, the GAL may not be opted in, thus requiring service by traditional methods.

In addition, in any case, either criminal or civil, in which you file a motion alleging that a statute is unconstitutional or challenge the construction or validity of a statute, you must serve: (1) the attorney general; (2) the speaker of the assembly; (3) the president of the senate; and (4) the senate majority leader with the motion.[127]

### 3. Making factual allegations

Virtually every claim that must be raised in a postjudgment motion requires the defendant or respondent to make certain factual allegations. Attorneys often wonder whether such allegations must be made in the form of an affidavit or whether they can be made in some other manner.

In general, an allegation made by the defendant or respondent may be made in the body of the motion.128 You swear to any document that you file with the court, and you are an agent of your client and are authorized to speak for them.[129] So while you may attach an affidavit signed by your client, you are not required to do so.

If your motion involves allegations made by any other party, such as a trial spectator who witnessed a juror sleeping during the trial, or an alibi witness who was never called by trial counsel, that party's allegation should generally be made in an affidavit attached to the motion. If your motion requires an expert, it is generally acceptable to attach the expert's report to the motion, rather than an affidavit signed by the expert.

No matter what form the factual allegations take, your motion and attachments, if any, function only as an offer of proof or a prima facie case. If you bear the ultimate burden of proof, you will have to prove any factual matter necessary to your claim at a motion hearing, usually through testimony.

## ii. Common postjudgment motions

There are at least three categories of postjudgment motions that are so commonly filed that this section discusses them individually: the *Bangert* motion; the ineffective-assistance-of-counsel motion; and the motion for sentence modification. This section also identifies some other commonly-filed postjudgment motions.

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[124] *See* Wis. Stat. (Rule) 801.18(4)(c).
[125] *See* Wis. Stat. (Rule) 801.18(3)(a)-(c).
[126] *See* Wis. Stat. (Rule) 809.80(2)(b).
[127] *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979). For more information on the *Kurtz* rule, see Chapter Four, Section IV.b.ii.2.b., below; *see also* Wis. Stat. §§ 806.04(11), 893.825.
[128] *See State v. Brown*, 2006 WI 100, ¶ 62, 293 Wis. 2d 594, 716 N.W.2d 906.
[129] Restatement (Third) of the Law Governing Lawyers § 26 (2000).

### 1. The *Bangert* motion

In Wisconsin, the term "*Bangert* motion" is used as shorthand to refer to a motion that is governed by the burden-shifting scheme announced in *Bangert*.[130] This burden-shifting scheme is generally applicable to claims that a trial court failed to conduct a colloquy required by law regarding the defendant's or respondent's decision to waive a fundamental right, including:

- The decision to plead guilty or no contest, or to enter an *Alford* plea, in a criminal case.[131]
- The decision to admit or plead no contest in a youth delinquency case.[132]
- The decision to admit or not contest grounds for termination in a TPR case.[133]
- The decision to waive the right to testify, or the right not to testify, at a criminal trial.[134]
- The decision to waive the right to a jury trial in any case involving the right to a jury trial.[135]

Under the *Bangert* scheme, your client bears an initial burden of production. In order to meet this burden, your client must point to a defect in the relevant colloquy—that is, a failure of the trial court to explain something that it was required by law to explain—and must also allege that they did not understand the matter not explained to them.[136] Once your client meets this initial burden (also referred to as "making a prima facie case"), the court must hold an evidentiary hearing at which the opposing party bears the burden of proving by clear and convincing evidence that, despite the inadequacy of the colloquy, your client's waiver of the relevant right was "knowing, intelligent, and voluntary."[137]

Thus, if you are filing a *Bangert* motion, the motion *must* contain at a minimum: (1) allegations showing that the court's colloquy on the waiver in question was defective, with citation both to the record and the applicable law; and (2) allegations indicating that your client did not understand the information not provided by the court in the colloquy.[138]

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[130] *See State v. Bangert* 131 Wis. 2d 246, 251-52, 389 N.W.2d 12 (1986). This use of the term *Bangert* motion is often contrasted with the "*Nelson/Bentley* motion," in which a criminal defendant seeks to withdraw a plea based on some problem extrinsic to the plea colloquy, like ineffective assistance of counsel, and in which the defendant faces a greater burden. *See, e.g., State v. Howell*, 2007 WI 75, ¶¶ 73-75, 301 Wis. 2d 350, 734 N.W.2d 48.

[131] *State v. Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 716 N.W.2d 906 (citing *State v. Bangert* 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986)).

[132] *See State v. Kywanda F.*, 200 Wis. 2d 26, 38, 546 N.W.2d 440 (1996).

[133] *Oneida County Dep't of Soc. Servs. v. Therese S.*, 2008 WI App 159, ¶ 6, 314 Wis. 2d 493, 762 N.W.2d 122.

[134] *See State v. Denson*, 2011 WI 70, ¶ 70, 335 Wis. 2d 681, 799 N.W.2d 831 (right not to testify); *State v. Weed*, 2003 WI 85, ¶¶ 43-44, 263 Wis. 2d 434, 666 N.W.2d 485 (right to testify).

[135] *State v. Anderson*, 2002 WI 7, ¶¶ 25-26, 249 Wis. 2d 586, 638 N.W.2d 301.

[136] *See State v. Brown*, 2006 WI 100, ¶ 39, 293 Wis. 2d 594, 716 N.W.2d 906.

[137] *See id.*, ¶ 40. Usually, the state will attempt to meet this burden by calling the trial attorney and/or your client as witnesses. *See id.*

[138] It follows that if your client tells you they did fully understand the missing information, it would be frivolous to file a *Bangert* motion.

A *Bangert* motion is a very simple sort of postjudgment motion, but it can be unforgiving. If you fail to sufficiently allege that your client did not understand the relevant information, you risk losing the motion without a hearing. Ultimately, what could have been a meritorious *Bangert* motion may later form the basis for an ineffective assistance of counsel claim, against you.[139]

### 2. Motion based on ineffective assistance of counsel

Perhaps the most common way to raise an issue that was waived at the trial-court level is via a claim of ineffective assistance of counsel (IAC).[140] Under *Strickland v. Washington* and its progeny, counsel is ineffective if they performed deficiently (i.e., acted incompetently and not based on a reasonable strategy) and their deficient performance prejudiced the defendant (i.e., it undermines the reviewing court's confidence in the outcome of the proceeding).[141]

- ❖ Technical point. Although the law regarding IAC was developed in the criminal context (in which there is a constitutional right to counsel), Wisconsin courts have extended its application to cases involving the statutory right to counsel.[142] As a practical matter, that means your client has a right to effective assistance of counsel—and that right can be violated—in any SPD-appointed case that is not appointed under the SPD's discretionary authority.

When a defendant or respondent raises an IAC claim, they bear the full burden of proving both that trial counsel's performance was deficient and that the deficiency was prejudicial.[143] In drafting an IAC motion, your immediate goal is to get an evidentiary hearing, known as a "*Machner* hearing," without which your client cannot win the motion.[144]

In order to get a *Machner* hearing, you must allege facts that, if found to be true at the hearing, would prove deficient performance and prejudice.[145] *This cannot be done in conclusory fashion.* An IAC motion requires allegations of fact that are far more detailed than a *Bangert* motion.[146] As for deficient performance, the motion should not only describe trial counsel's improper actions or omissions, but also explain how and why these actions or omissions were improper and not based on a reasonable strategy.[147] If the motion alleges that counsel performed deficiently by not raising some sort of legal

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[139] *See State v. Giebel*, 198 Wis. 2d 207, 217, 541 N.W.2d 815 (Ct. App. 1995).

[140] An alternative method of raising the error may be as an assertion of "plain error," which is generally reserved for especially unique and egregious claims of error. See, e.g., *State v. Jorgensen*, 2008 WI 60, ¶¶ 1-19, 310 Wis. 2d 138, 754 N.W.2d 77. Even when plain error is raised, ineffective assistance of counsel is often raised in the alternative in order to avoid a finding of waiver/forfeiture. C.f. *State v. Miller*, 2012 WI App 68, ¶¶ 17-23, 341 Wis. 2d 737; 816 N.W.2d 331 (finding that the defendant forfeited a claim that the prosecutor's closing argument involved plain error).

[141] *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984).

[142] *A.S. v. State*, 168 Wis. 2d 995, 1004, 485 N.W.2d 52 (1992).

[143] *State v. Roberson*, 2006 WI 80, ¶ 24, 292 Wis. 2d 280, 717 N.W.2d 111.

[144] *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905. (Ct. App. 1979) (holding that "it is the duty and responsibility" of postconviction counsel to compel the trial attorney to testify at a hearing on an IAC motion so that the court can assess the attorney's actions and strategies).

[145] *State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). An IAC motion claiming that trial attorney's deficient performance caused the defendant to enter a guilty or no-contest plea unknowingly or involuntarily (notwithstanding a proper plea colloquy) is a variety of "Nelson/Bentley motion." *See, e.g.*, *State v. Hoppe*, 2009 WI 41, ¶¶ 59-61, 317 Wis. 2d 161, 765 N.W.2d 794.

[146] *See State v. Balliette*, 2011 WI 79, ¶ 56, 336 Wis. 2d 358, 805 N.W.2d 334.

[147] *Id.*, ¶¶ 60-69.

defense, argument, or objection, it should explain why the issue not raised was obvious and strong.[148]

As for prejudice, the motion must explain specifically how trial counsel's actions prejudiced your client. If the claim involves some sort of trial error, the motion will need to describe precisely how counsel's errors impacted the trial in the context of all of the evidence and defenses that were presented.[149] If the claim involves a client waiver, usually a claim that trial counsel's erroneous advice led the client to enter a plea unknowingly and waive his right to a trial, prejudice is established by proving that there is a reasonable probability the client would not have waived the right at issue if they had been given correct advice.[150] However, an IAC motion involving client waiver cannot rest its prejudice discussion on a conclusory allegation that the client "would not have waived the right to X if they had known Y."[151] It must allege facts that would support that claim.[152] For example, a client claiming that they would not have pleaded guilty to a reduced charge of third-degree sexual assault if their attorney had told them that they would have to register as a sex offender may need to explain why this issue was important to them or explain a plausible defense to the charged crime that supports the allegation that, if they had known about registration, they would have gone to trial.[153]

In other words, you cannot "hide the ball." Although your instinct may tell you to leave information out of a motion in order to avoid giving the opposing party an advantage at the hearing, this instinct is dangerous in the postjudgment context. In an IAC motion, as with any motion in which your client bears the burden of proof, you must make specific, detailed factual allegations regarding each element that you must prove and persuasive arguments explaining why they entitle your client to relief, or you risk losing the case without a hearing.

- ❖ Practice tip: If you allege ineffective assistance of counsel, you should always serve trial counsel with a copy of the motion. Attorneys sometimes disagree as to when service should be accomplished; at the very least you should provide trial counsel with a copy prior to the hearing. Keep in mind opposing counsel may reach out to trial counsel to discuss your allegations in the motion. Any attorney who is the subject of an ineffective assistance of counsel claim should be mindful of their continuing ethical duties to the client.[154] Consider providing a letter with your motion requesting that counsel refer any communications from opposing counsel to you and reiterate that your client has not yet formally waived attorney-client privilege.

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[148] *Id.*, ¶ 69.
[149] *Id.*, ¶¶ 70-78.
[150] *See, e.g., State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).
[151] *Id.*
[152] *Id.*
[153] *See id.* at 313-18. An IAC motion could not rest on an allegation that the client would have held out for a better deal if they had known the consequences of the plea. *See id.* at 312.
[154] *See In re Disciplinary Proceedings Against Thompson*, 2014 WI 25, ¶50, 353 Wis. 2d 556, 847 N.W.2d 793 ("We caution lawyers that a former client's pursuit of an ineffective assistance of counsel claim 'does not give the lawyer carte blanche to disclose all information contained in a former client's file' … Typically the better practice is to wait for a subpoena and the *Machner* hearing before disclosing confidential client information.") *See also* Wis. Stat. § 905.03; SCR 20:1.6(c)(4) (confidentiality) (an attorney may "reveal information related to the representation of a client to the extent the lawyer reasonably believes necessary… (4) … to respond to allegations *in any proceeding* concerning the lawyer's representation of the client" (emphasis added); and *State v. Flores*, 170 Wis. 2d 272, 278, 488 N.W.2d 116 (Ct. App. 1992) ("the defendant's lawyer-client privilege is waived to the extent that counsel must answer questions relevant to the charge of ineffective assistance of counsel").

### 3. Motion for sentence modification

Clients seek to modify or revise dispositional orders in nearly every kind of case, but this subsection addresses only motions for sentence modification filed in criminal cases. Often clients only want a sentence modification, given their minimal risk, and these motions are extremely common. However, because of their discretionary nature, motions for sentence modification usually only succeed at the trial court level. This means that appellate case law provides little guidance.

Where a defendant has filed a notice of intent to pursue postconviction relief, a motion for sentence modification can be filed under Rule 809.30(2)(h) either on its own or combined with additional or alternative postconviction claims.

> ❖ Technical point. You should generally file any motion for sentence modification under Rule 809.30(2)(h), *not* WIS. STAT. § 973.19(1)(a). Section 973.19(1)(a) is a provision permitting defendants who have not filed a notice of intent to ask for a sentence modification soon after sentencing. A defendant who files a motion under § 973.19(1)(a) waives the right to appeal the conviction and sentence, so the statute can act as a trap. Such a defendant can theoretically appeal the denial of the sentence modification, but not other errors, and only under the less forgiving procedure applicable to civil appeals.[155]

> ❖ Practice tip. When combined with a strong legal claim, such as a claim for plea withdrawal or resentencing, a motion for sentence modification can provide an avenue for negotiating with the prosecutor, as discussed in Chapter Four, Section III.c.ii.1.d., below. The prosecutor may be willing to agree to a sentence modification in exchange for your client's waiver of another legal claim.

The circuit court cannot modify (i.e., reduce) a sentence based solely on a change of heart, however, it has the inherent authority to modify a sentence when it identifies a "new factor" or determines that the sentence was "unduly harsh or unconscionable."[156] When considering a motion for sentence modification based on a "new factor," the court must engage in a two-part analysis: first, whether there is a new factor or information showing that the sentence was unduly harsh; and second, whether a reduction of the sentence is appropriate.[157] The first question, at least when the motion seeks sentence modification on the basis of a new factor, is legal in nature, while the second question is a matter for the circuit court's discretion.[158]

The vast majority of sentence modification motions are based on a "new factor." A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not

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[155] Wis. Stat. § 971.19(4)-(5). As noted in Chapter One, Section IV., above, the deadline for filing a notice of appeal cannot be extended in civil appeals. Wis. Stat. (Rule) § 809.82(2)(b).

[156] *State v. Stenklyft*, 2005 WI 71, ¶ 115, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, C.J., *concurring*). Chief Justice Abrahamson also noted that a court could modify a sentence upon determining that it was "legally erroneous" (e.g., unlawfully long). *Id.* This section will not discuss that possibility since it is both obvious and rare. *See id.*

[157] *State v. Harbor*, 2011 WI 28, ¶¶ 36-37, 333 Wis. 2d 53, 797 N.W.2d 828.

[158] *Id.* In recent history, there have only been two cases involving a modification for an unduly harsh sentence; it is not clear whether the courts considered the determination of harshness to be a legal or a discretionary question. *See McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971); *State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990).

then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."[159]

Wisconsin's appellate courts have rejected numerous issues as potential new factors, including a postsentencing change to the applicable maximum sentence,[160] postsentencing rehabilitation or good behavior,[161] and a victim's change of heart regarding his sentence recommendation.[162] The appellate courts have been slow to declare issues to be proper new factors. It is at least clear that the correction of erroneous information presented at sentencing can be a new factor,[163] as can postsentencing assistance to law enforcement.[164]

However, attorneys should not limit themselves to raising new factors that have been recognized by the appellate courts—or necessarily disregard potential new factors that the appellate courts have rejected in prior cases. Whether something is a new factor is a highly fact-specific, and case-specific, inquiry. An issue that is a proper new factor in one case may not be in another. For example, if the sentencing court stated that it was sentencing your client to three years in prison specifically so that your client could complete the Department of Corrections' new three-year sex offender treatment program, information showing that the client was placed in an older, six-month program may be a new factor. However, if the sentencing court said only that it hoped your client would get intensive treatment while in prison, this same information probably would not be a new factor.

As this example illustrates, the starting point in a search for new factors is the sentencing court's own comments. Once you note each of the issues that the court considered important for sentencing purposes, you can talk to your client about, and search records for, information that was not previously given to the court that is "highly relevant" to the issues the court identified.[165] There are myriad issues that may fit this standard. This is not to say that a "new factor" is found in every case; many cases do not present any new factors. In order to make this determination, however, you will need to minimally examine the court's sentencing remarks and have an open-ended conversation with your client.

Sentence modification motions based on the harshness of a sentence are much rarer than those based on a new factor, and the applicable law is less clear. In order to win sentence modification based on harshness, the circuit court must find that the sentence it previously imposed was "unduly harsh or unconscionable," which is a daunting task for any sentence within the applicable maximum.[166] While such claims are rarely granted, they are not necessarily frivolous. If you have a client who received the maximum or near-maximum sentence in a mitigated case, you should consider the issue.[167]

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[159] *State v. Harbor*, 2011 WI 28, ¶ 40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).
[160] *State v. Tucker*, 2005 WI 46, 279 Wis. 2d 697, 694 N.W.2d 926.
[161] *State v. Kluck*, 210 Wis. 2d 1, 7, 563 N.W.2d 468.
[162] *State v. Johnson*, 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990).
[163] *See State v. Norton*, 2001 WI App 245, ¶ 10, 248 Wis. 2d 162, 635 N.W.2d 656.
[164] *State v. Doe*, 2005 WI App 68, ¶ 10, 280 Wis. 2d 731, 697 N.W.2d 101.
[165] *See State v. Harbor*, 2011 WI 28, ¶ 40, 333 Wis. 2d 53, 797 N.W.2d 828.
[166] *See Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979).
[167] The appellate courts have affirmed modifications on this basis, though not for many years. *Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979); *State v. Wuensch*, 69 Wis. 2d 467, 480, 230 N.W.2d 665 (1975); *State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990). *But see State v. Grindemann*, 2002 WI App 106, ¶¶ 30-

- Frequently asked question. Can the disparity between my client's sentence and that of a similarly-situated co-defendant support a motion for sentence modification? The case law relating to this question is somewhat complicated. The Court of Appeals has held that a disparate sentence can be one way of proving that a sentence is unduly harsh, thereby entitling the defendant to modification.[168] With the advent of programs like Court Tracker, which enable an attorney to see how similar cases have resolved, some attorneys have used this kind of information as a basis for a sentence modification motion. The courts, however, have been skeptical of such claims and (dated) precedent appears to support that skepticism.[169] And, while the Court of Appeals has asserted that a sentencing disparity cannot support a "new factor" sentence modification motion, that authority is in question as a result of subsequent case law removing the "frustrates the purpose" requirement for sentence modification motions.[170] Finally, you should also keep in mind that a disparity may be sufficient to prove an erroneous exercise of discretion and therefore entitle you to ask for resentencing, as opposed to modification.[171] In any case, if you are filing a motion based on a disparity, it is good practice to include as much information as possible about the other sentences and the facts underlying them. Some jurisdictions, such as Milwaukee County, will not consider a disparate sentence motion unless you also provide the court with copies of the sentencing transcripts for the other defendants.

### 4. Other common motions

Other sorts of legal claims that require a postjudgment motion, which are very common in SPD practice include:

- Motion for a new trial in the interests of justice.[172]
- Motion for a new trial based on newly discovered evidence.[173]
- Motion for resentencing or a new dispositional hearing based on the court's reliance on inaccurate information at the original hearing.[174]

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31, 255 Wis. 2d 632, 648 N.W.2d 507 (finding that a circuit court could not modify a sentence unless it was "so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances"). Note that this sort of motion for sentence modification is related to, but distinct from, a claim that the sentencing court erroneously exercised its discretion based, in part, on the unreasonable harshness of the sentences. *See McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971); *State v. Hall*, 2002 WI App 108, ¶¶ 15-16, 255 Wis. 2d 662, 648 N.W.2d 41.

[168] *See State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990).

[169] *See State v. Macemon,* 113 Wis. 2d 662, 335 N.W.2d 402 (1983).

[170] *State v. Toliver*, 187 Wis. 2d 346, 523 N.W.2d 113 (Ct. App. 1994).

[171] *See McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971); *State v. Hall*, 2002 WI App 108, ¶¶ 15-16, 255 Wis. 2d 662, 648 N.W.2d 41.

[172] *See* Wis. Stat. § 805.15(1); *see also State v. Harp*, 150 Wis. 2d 861, 443 N.W.2d 38 (Ct. App. 1989) (discussing the standard).

[173] *See State v. Edmunds*, 2008 WI App 33, ¶ 13, 308 Wis. 2d 374, 746 N.W.2d 590; *State v. Armstrong*, 2005 WI 119, ¶ 161, 283 Wis. 2d 639, 700 N.W.2d 98.

[174] *See State v. Tiepelman*, 2005 WI App 179, ¶ 5, 286 Wis.2d 464, 703 N.W.2d 683.

- Motion for resentencing or a new dispositional hearing based on the court's erroneous exercise of discretion at the original hearing.[175]

- Motion for resentencing or plea withdrawal based on the prosecutor's breach of the plea agreement (often packaged as an ineffective assistance of counsel claim when trial counsel failed to object to the breach).[176]

- Motion to revise a dispositional order.[177]

- Motion for sentence or detention credit.[178]

- Motion for commutation of an illegal sentence or period of detention, probation, or other confinement.[179]

In each of these motions, the defendant or respondent bears the burden of persuasion and, if additional fact-finding is necessary, the burden of production and proof. Each kind of motion requires particular allegations and is governed by a distinct legal standard, which you should research before drafting.

While the above list represents some of the most common claims that SPD-appointed appellate attorneys raise in the circuit court, it is far from exhaustive. Postjudgment motions can be used to challenge the circuit court's competency or jurisdiction, restitution or costs, and just about any other error not previously raised.[180] Sometimes, postjudgment motions are filed regarding preserved issues for the purpose of supplementing or correcting the record in preparation for an appeal. Moreover, as noted in Chapter Four, Section I.a., above, an attorney may decide, for strategic reasons, to file a motion regarding an issue that could go straight to the court of appeals.

### c. The postjudgment motion hearing

#### i. Getting a hearing

Many circuit courts in Wisconsin grant hearings on postjudgment motions as a matter of course. A few courts do not (notably the Milwaukee County Circuit Court). It is best to presume that any motion that does not necessitate fact-finding or persuade the court to grant relief may be denied without a hearing.

Even in courts that grant a hearing for every motion, you must usually contact the court (generally the relevant judge's assistant) after filing the motion in order to get a hearing date. There are exceptions. For example, some courts simply issue a notice of

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[175] *See State v. Gallion*, 2004 WI 42, ¶ 38, 270 Wis. 2d 535, 678 N.W.2d 197.

[176] *See State v. Quarzenski*, 2007 WI App 212, ¶¶ 17-19, 305 Wis. 2d 525, 739 N.W.2d 844; *see also State v. Williams*, 2002 WI 1, ¶¶ 36-44, 249 Wis. 2d, 637 N.W.2d 733 (involving a prosecutor's "end run" around the plea agreement); and *State v. Smith*, 207 Wis. 2d 258, 271-81, 558 N.W.2d 379 (1997) (involving trial counsel's ineffective assistance for failing to object to a breach of the plea agreement).

[177] *See, e.g.*, Wis. Stat. § 938.363.

[178] *See* Wis. Stat. § 973.155; *see also State v. Johnson*, 2008 WI App 34, ¶¶ 26-70, 307 Wis. 2d 735, 746 N.W.2d. 581 (reviewing cases addressing various aspects of credit).

[179] *See* Wis. Stat. §§ 973.13 (commutation of sentence), 973.09(2m) (commutation of probation), 971.17(1) (providing the maximum duration of commitment for persons found not guilty by reason of mental disease or defect), 938.355 (providing the dispositional options in delinquency cases), *and* 51.20(13)(g) (providing the maximum duration of involuntary mental commitment under Chapter 51).

[180] Of course, any error that is not preserved and not raised under the rubric of ineffective assistance of counsel is likely to draw an accusation of waiver from the state.

hearing. Still, it is a good idea to call the court soon after filing the motion to ask for a hearing date, unless you already know that the particular judge has a different procedure.

If your motion necessitates an evidentiary hearing, it is advisable to call all of your witnesses to ask them for scheduling conflicts before calling the court for a date—including, if the motion alleges ineffective assistance of counsel, your client's trial attorney. This will keep you on good terms with your witnesses and the judge's assistant, and obviate the need for multiple scheduling orders (hopefully).

### ii. Preparing for the hearing

#### 1. Preparation common to all hearings

##### a. Arranging for your client's appearance

In most circumstances, you should arrange for your client to attend the hearing in person. The court should require your client to attend any evidentiary hearing in person, and may require them to attend even a non-evidentiary hearing in person. Moreover, regardless of the nature of the hearing, many clients want to be present.

- Frequently asked question. *What if my client doesn't want to or can't appear?* If the hearing is not evidentiary, let the judge's assistant know ahead of time. Usually, no one objects. For an evidentiary hearing, it can be difficult to convince the judge to excuse your client's nonappearance. Note that Wis. Stat. § 971.04(2) states: "A defendant charged with a misdemeanor may authorize his or her attorney in writing to act on his or her behalf in any manner, with leave of the court, and be excused from attendance at any or all proceedings." You can explain that you are your client's agent and that they have authorized you to represent them in their absence. You can seek a stipulation from the opposing party. You can submit an affidavit signed by your client waiving the right to appear. In the end, though, if the judge can point to a rational reason for requiring your client to appear, there is the possibility of a default decision against your client if they do not appear.

If your client is not in custody, you simply need to inform your client of the time and place and make sure that they want to, are able to, and plan to attend. You might help with travel arrangements, if necessary, and remind them of the hearing the day before the hearing.

If your client is in custody, you will usually have to prepare an "order to produce" for the court, for which there is a circuit court form.[181] When you talk to the judge's assistant about scheduling the hearing, you should verify that you are expected to prepare the order and submit it to the judge. Occasionally, the court prefers to have the prosecutor or judicial assistant prepare the order to produce.

[181] The form is available here and appears at Appendix 4.b. Historically, a client was produced with a writ of habeas corpus, but nearly all circuit courts now prefer the order to produce.

If it's your responsibility, promptly prepare the proposed order and submit it to the e-filing system for the judge's signature. Note that once the judge signs the order, this does not automatically effectuate transport. The Sheriff's Department is not an electronic party and thus will be unaware that an order has been filed and signed unless and until the order is forwarded to the relevant transport authority. In some counties, the clerk emails the form. In other counties, like Milwaukee, the attorney is responsible for emailing (or physically dropping off) the signed OTP to the transport deputy. The deputy will often be able to provide a stamped copy or other proof of service, which can help to avoid the judge blaming you should the sheriff fail to produce your client for the hearing.

Regardless of who prepared the order, about a week before the hearing, it is advisable that you contact the relevant sheriff's department to make sure that your client is on the transport list.

### b. Staying ahead of the circuit court's deadline for deciding the motion

As noted above, from the date that a postjudgment motion is filed (under RULE 809.30), the circuit court has 60 days to decide the motion.[182] Does that mean the court will get in trouble if it decides the motion late? No! It means your client will automatically lose the motion, and, depending on what happens afterwards, it could tie your case up in procedural knots.[183]

Therefore, if at any point after filing the motion, it becomes clear that the court will not decide it within the statutorily allotted timeframe (often because it has set the hearing for a date outside of that timeframe), you should file a motion to extend the circuit court's deadline for deciding the motion under Wis. Stat. (Rule) § 809.30(2)(i) & 809.82(2).

### c. Preparing for oral argument

While you need not necessarily prepare to argue to the circuit court as if it were the state supreme court, you should not just wing it. Remember that your goal is to win in the circuit court. If you do not meet that goal, you will need a complete record for your appeal, including a record of having preserved all of your arguments.

Before any hearing, jot down each element of your client's claim so that you can remember to address each of them. Determine your strongest points, so that you can emphasize them. Determine your weakest points and come up with some way to neutralize them. Brainstorm the opposing party's likely arguments and the judge's likely questions.

If you will be arguing at the end of an evidentiary hearing, you cannot fully prepare for the argument, as you do not know exactly how the evidence will come in. Usually, though, you have a pretty good idea of how it will come in (e.g., the lawyer will say that they did not object because they did not want to alienate the jury, or the client will say that they did not know something covered in the plea questionnaire because they are only minimally literate). Therefore, you should be prepared to tailor your argument as appropriate.

[182] Wis. Stat. (Rule) § 809.30(2)(i).
[183] *Id.*

### d. Considering negotiation with opposing counsel

In many cases, there is no point to negotiating with opposing counsel. If your client only wants a new trial, it is probably a good bet that opposing counsel will not agree to that. Opposing counsel is also not likely to concede in the face of a relatively weak claim. In certain categories of cases, such as TPRs and 980s, there is little or no middle ground and therefore negotiation may be futile.

However, in many cases, if you have a strong claim, opposing counsel may be willing to negotiate for a shorter sentence (or period of detention or commitment), or for different conditions. For example, if your client is willing to waive a meritorious claim for plea withdrawal or a new trial, opposing counsel may agree to a sentence modification or revision of the dispositional order. In many cases, this is the best possible outcome for your client: the client drops a claim that carries some measure of risk in exchange for a measurable improvement in their circumstances.

There are also claims that seek such minor relief, or that are so indisputable, that opposing counsel may be willing to stipulate. Sentence credit often falls into this category. Getting a stipulation—and submitting it with a proposed order in the hopes that the circuit court will sign it without even holding a hearing—is always a good idea if you can make it happen. Don't skip seeking a stipulation on the theory that you will win the motion at a hearing; circuit courts sometimes deny obviously correct legal claims, but they are much less likely to deny them if opposing counsel stipulates.

In sum, in every case involving a postjudgment motion, you should consider whether it makes sense to attempt to negotiate with opposing counsel or to send them a proposed stipulation. If it does make sense, and if your client is interested, go for it.

### e. Getting your paperwork in order

Other advisable preparation for a postjudgment motion hearing can include:

- Making copies of the motion and any exhibits for yourself, the court, and opposing counsel. If you do plan on using numerous exhibits, you might want to contact the clerk as to their preferences regarding numbering and submission in advance of the hearing.
- Making copies of any appellate case or statute that you are relying on heavily, particularly if the exact language of the case or statutory section is important to the issue.
- Making copies of any document (transcript excerpts, motions, discovery materials, etc.) that you may reference in your questioning of a witness—for yourself, the court, opposing counsel, and the witness.
- Organizing and labeling your case materials for easy reference.

### f. Preparing orders for the court

The deadline for the court's decision on the postjudgment motion, discussed in Chapter Four, Section III.c.ii.1.b., above, is met by the filing of a written decision on the motion. Therefore, it is best to promptly e-file the proposed order after the hearing. If

the court is not able to sign the order before its deadline, you should file a motion with the court of appeals to extend the circuit court's deadline. A sample form for a proposed order is found at Appendix 4.d., a blank order granting or denying a motion can be found here, and a plain order document can be found here.

### 2. Additional preparation specific to evidentiary hearings

#### a. Subpoenaing witnesses

You must subpoena your witnesses for any evidentiary hearing, just as you would for a trial.[184] If you neglect to do this, and your witness does not show up, your client could potentially lose the motion by default. Therefore, even if you already think your witness is planning to attend, as is often true with *Machner* hearings, you should take steps to compel attendance. Note that, with the advent of e-filing, you can now e-file your unsigned subpoena as a proposed order in order to obtain a signed (and therefore legally valid) subpoena. Use caution when relying on pre-signed subpoena forms that you obtain from other attorneys and from listservs; sometimes the form can be inaccurate, dated, or contain the signature of a now-retired court official. If a crucial witness fails to appear, a zealous prosecutor may seize on such technical irregularities to argue against your requests for a continuance.

When dealing with a cooperative witness (including an attorney), you may choose to mail or email their subpoena and an admission of service, and ask them to sign and return the admission, rather than formally subpoenaing them. A sample form for admission of service by mail or email is found at Appendix 4.c., a blank copy is here.

#### b. Preparing witnesses for testifying

You should prepare your own witnesses for testifying at a postjudgment hearing. That does not mean you should tell your witnesses how to testify. In fact, it is generally a good idea to tell every witness clearly that they should testify honestly. (No witness wants a perjury charge.) If, at the hearing, opposing counsel asks the witness whether defense counsel gave them any advice on how to testify, the witness can honestly say that you told them to testify honestly.

With certain witnesses, including your own client when they must be a witness, it is also a good idea to emphasize that you want the witness to answer only the question asked and should *not* try to tailor their testimony to what they think you want to hear. Giving too much information can inadvertently damage a claim, and most witnesses are bad at guessing the "right" answer.

As for the specifics of preparation, it is usually best to ask each witness every question that you might conceivably want to ask at the hearing and also ask him every question that you can imagine opposing counsel might ask. If a question elicits an unhelpful response, you may decide not to ask that question—at least not in those words—or brainstorm ways your argument can neutralize any negative impact the answer may have.

Finally, be sure to brainstorm about any witness that opposing counsel might call. If possible, talk to these witnesses as well.

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[184] *See* Wis. Stat. ch. 885.

#### c. Reviewing the rules of evidence

You are the appellate attorney; everyone will expect you to be an expert on the rules of evidence. So, before going into court and presenting evidence, work on becoming an expert on the rules of evidence. See Chapter Two, Section III.b.i.2., above, for suggestions of evidence treatises that may assist you in this endeavor.

If you expect a particular evidentiary conflict to arise—for example, if you plan to present hearsay testimony or expect the state to do so—decide how to respond to any objection, or whether and how to object. But be aware that most judges relax the rules of evidence at postjudgment hearings.

### iii. Conducting the hearing

Hopefully, given your conscientious preparation, each of your postjudgment motion hearings will go smoothly. For tips on questioning witnesses, presenting exhibits, and other technical matters that may come up at a hearing, you may wish to consult a guide intended for trial attorneys, such as Kathleen Pakes, *Wisconsin Criminal Defense Manual* (7th ed. 2020).

## 1. Final circuit court-level steps

### a. Obtaining an appealable order

Once the circuit court decides the postjudgment motion, you must ensure that it files a written order memorializing that decision. If the court denies the motion, you cannot appeal the case further, or file a no-merit appeal, until the court files a written order with the clerk's office.[185] If the court grants the motion, your client may not get the benefit of the win until the court files a written order with the clerk's office.

### iv. Final steps after a loss

After losing any postjudgment motion, you must determine whether the case presents any arguable issue(s) for the appellate courts, reassess the risks and benefits of further appeal, consult with your client about these matters, and determine how they want to proceed.

Deciding whether there is an arguable issue for the appellate courts follows the same standard discussed in Chapter Two, Section IV.a., above. You are assessing whether there is any non-frivolous issue for appeal. If the issue raised in the postjudgment motion was purely legal and you found it arguable there, the issue will almost certainly be arguable in the appellate courts. If it was factual or involved an exercise of the circuit court's discretion, whether the issue is arguable in the appellate courts will depend on whether you received a hearing and what occurred at any hearing.

As for risks and benefits, these usually remain the same at the circuit court and appellate court levels. If, however, your client is charged with new offenses or serious misconduct at an institution at any point during your representation, depending on the issue being litigated, the risk of pursuing an appeal may increase.

If, after you consult with your client, they want to proceed with an arguable appeal or a no-merit report, you should promptly request preparation of the postjudgment motion hearing transcript from the court reporter.[186]

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[185] *State v. Malone*, 136 Wis. 2d 250, 252, 401 N.W.2d 563 (1987).
[186] Wis. Stat. (Rule) § 809.30(2)(g)2. (setting 20-day deadline for the preparation of transcript).

### v. Final steps after a win

If you are reading this section because you won a postjudgment motion in the circuit court, congratulations! Any time you win a case you should determine whether there is still an issue that needs to be litigated and, if appropriate, proceed with that litigation. Regardless, you should hold the case open until the time for the opposing party to appeal has passed, and ensure that your client actually gets the relief granted.[187]

Whether there is still an issue for litigation will depend on the nature of the issue that you raised in the trial court and the relief obtained. For example, if you only sought, and won, sentence credit, the client still has the right to review of the underlying judgment. Therefore, if there is any arguable issue that could be raised in the appellate courts, your client has the option of going forward. If there is no arguable issue, your client has the right to any of the no-merit options discussed in Chapter Five, below.

If you won only a partial victory that does not result in the judgment being vacated, for example because you filed a motion for plea withdrawal and a motion for sentence modification, and the court denied the plea withdrawal but granted the sentence modification, then your client has the option of appealing the issue that lost in the circuit court, if it is still arguable.

If you won any relief that does not vacate the judgment, such as sentence modification, but there is yet an issue not raised in the circuit court that was preserved for the appellate courts (like a suppression issue), then your client still has the option of appealing the judgment based on the preserved issue.[188]

On the other hand, if you won any relief that resulted in the vacatur of judgment, which sets the case up for further proceedings in the circuit court, you will not be able to go forward with any further appellate litigation.

Regardless of whether there is the possibility of further litigation, after any win, you should ensure that your client receives the relief granted. This often means communicating with the clerk of court (to see if the clerk's office vacated or amended the judgment as ordered, for example) or with the Department of Corrections (to see if it has correctly recomputed your client's sentence and timely adjusted his release date). Depending on the circumstances, you may need to take different or additional action.

Finally, in any case in which the court vacated the judgment and ordered a new trial or new dispositional hearing, you should *not* handle the new sentencing, plea hearing, or new trial as part of your appellate appointment.[189] You *should* contact the appropriate SPD trial office and let that office know that your client needs to have a new trial attorney appointed.

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[187] In a case that comes within Wis. Stat. (Rule) § 809.30, the state has 45 days to file a notice of appeal from entry of an order granting a postjudgment motion. Wis. Stat. § 808.04(4). In a TPR case, the opposing party has 30 days. Wis. Stat. § 808.04(7m).

[188] If you won plea withdrawal, a new trial, or a new dispositional hearing—any of which would vacate the existing judgment—you cannot immediately go forward with an appeal based on a previously preserved issue, as the judgment that was the object of the original notice of intent is no longer in effect. *State v. Wolfe*, 2019 WI App 32, 388 Wis. 2d 45, 931 N.W.2d 298. However, if the client is convicted again and files a second notice of intent, the suppression issue may yet be challenged on appeal. *See State v. Spaeth*, 2012 WI 95, ¶¶ 17-29, 343 Wis. 2d 220 819 N.W.2d 769.

[189] If the appellate attorney is a private bar attorney and is certified to take the trial case at issue, they or the client may ask the relevant trial office to appoint the appellate attorney to continue with the case. However, the trial office may have a policy that would defeat this request. Furthermore, the attorney should be aware that, if the case ends up on appeal again, the Appellate Division will not appoint an attorney to handle the appeal who represented the client at the trial level in the same matter.

After you have determined that there is nothing further to appeal, that the opposing party is not appealing, and that your client has obtained the relief granted, you should send your client a case closing letter summing up what has occurred. Then you should close the case and electronically file a notice of completion of representation. An example of a notice of completion of representation can be found at Appendix 5.j. If you are a private bar attorney, submit billing information to the SPD's Assigned Counsel Division.

## IV. Pursuing an appeal in the court of appeals

### a. Initiating the appeal and moving toward briefing

#### i. Applicable deadlines—notice of appeal, docketing statement, and statement on transcript

In a Rule 809.30 appeal, if there has been no postjudgment motion you have 60 days from the date that the last transcript is electronically accessible to file the notice of appeal.[190] If there has been a postjudgment motion you have 20 days from the date of entry of the circuit court's order deciding the motion, to file the notice of appeal.[191] In either case, from the date of filing the notice of appeal, you have 14 days to arrange for the service of transcripts on the opposing party and file the statement on transcript.[192]

In a TPR appeal, you have 30 days to file the notice of appeal from the date that the last transcript is electronically accessible.[193] From the date of filing the notice of appeal, you have 5 days to arrange for service of transcripts on the other parties and file the statement on transcript.[194]

- Technical point. In TPR cases, you are required to serve a copy of the notice of appeal "on the person representing the interests of the public, opposing counsel, the guardian ad litem appointed under s. 48.235 (1) (c) for the child who is the subject of the proceeding, the child's parent **and any guardian and any custodian** appointed under s. 48.427 (3)."[195] Service cannot be accomplished through the e-filing system for those not opted in (i.e. non-parties or paper parties), therefore, paper service will be required for those individuals or entities. When guardianship of the child in a TPR case is transferred to the Department of Children and Families (DCF), you can serve them at: Wisconsin Department of Children and Families – Public Adoption, P.O. Box 8916, Madison WI 53708-8916.[196]

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[190] Wis. Stat. (Rule) § 809.30(2)(h).
[191] Wis. Stat. (Rule) § 809.30(2)(j).
[192] Wis. Stat. (Rule) § 809.11(4).
[193] Wis. Stat. (Rule) § 809.107(5)(a). If you file a notice of appeal in a TPR case and have the case remanded for the filing of a postdisposition motion, you do not need to file another notice of appeal after the circuit court decides the motion. In that circumstance, the court of appeals' remand order would describe how to move the case back to the court of appeals after the circuit court reaches a decision.
[194] Wis. Stat. (Rule) § 809.107(5)(c) & (d).
[195] Wis. Stat. (Rule) § 809.107(5)(a).
[196] You can determine who the appointed guardian or custodian is (including DCF) by looking at the form TPR order signed by the court. For example, in form JC-1639 under 1.A. the court should designate "Guardianship, placement and care responsibility, and custody of the child". For DCF, the court should check the box "are transferred pending adoption to" and then enter DCF or something similar such as Wisconsin DCF, Department of Children's and Families, or even Children's or LSS (who contract with DCF).

In cases requiring a docketing statement, which includes Wis. Stat. ch. 48 (other than TPR), 51, 54, 55, and 938 cases, but not criminal, TPR, or ch. 980 cases, you must file the docketing statement at the same time as the notice of appeal.[197]

### ii. Initiating the appeal

#### 1. Overview

To initiate an appeal to the court of appeals, the appellate rules require you to e-file three documents in the circuit court: (1) the notice of appeal; (2) the statement on transcript; and (3) the docketing statement, if required. In addition, if you are filing a motion for a three-judge panel, that motion must also be filed in the circuit court with the notice of appeal.[198] These documents do not need to be served on the court of appeals; under the e-filing rule, the clerk of circuit court will automatically transmit them. You also do not need to physically serve opposing counsel.

The docketing statement (if required), the notice of appeal, and your motion for a three-judge panel (if any) must be filed at the same time. Within 14 days of filing the notice of appeal with the clerk of circuit court, you must file a statement on transcript and arrange for service of transcripts on the other party, unless it is a TPR in which case the statement on transcript is due within 5 days. As always, you must serve a copy of every document on your client.

This section walks you through each of these steps.

#### 2. The notice of appeal

The notice of appeal is a document that is filed with the clerk of circuit court and that, upon filing, initiates the appeal and sets the stage for transfer of jurisdiction from the circuit court to the court of appeals.[199] You must file a separate notice of appeal for each circuit court case number your client is appealing, even if the circuit court disposed of several cases together and the Appellate Division appointed you on all of the cases at once.[200]

The notice of appeal, governed by WIS. STAT. RULE 809.10, must contain:

- A caption with the circuit court case name and number.[201]
- A statement identifying the judgment or order from which your client intends to appeal and the date on which it was entered.[202]

  ✓ Technical point. If your client is appealing after the denial of a postjudgment motion, the notice of appeal should identify both the underlying judgment and the denial of the postjudgment motion as the subjects of the appeal. See the notice of appeal at Appendix 4.e. for an example. A blank document can be found here.

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[197] Wis. Stat. (Rule) § 809.10(1)(d) & 809.30(2)(j).
[198] Wis. Stat. (Rule) § 809.41 & 809.10(1)(g).
[199] Wis. Stat. (Rule) § 809.10(1)(a); *Roberta Jo W. v. Leroy W.*, 218 Wis. 2d 225, 240, 578 N.W.2d 185 (1998).
[200] *See* Wis. Stat. (Rule) § 809.10(1)(b)1. and (3). If you think that consolidation of the appeals might be appropriate, see the "Frequently asked question" regarding consolidation in Chapter Four, Section IV.a.iv., below.
[201] Wis. Stat. (Rule) § 809.10(1)(b)1.
[202] Wis. Stat. (Rule) § 809.10(1)(b)2.

- A statement of whether the appeal arises in one of the types of cases specified in Wis. Stat. § 752.31(2)(that is, whether it will be a one-judge, rather than a three-judge, appeal).[203]

- A statement of whether the appeal is to be given preference pursuant to statute.[204]

  ✓ Technical point. Of the appellate cases that are eligible for SPD-appointed counsel, only appeals of TPR cases and cases regarding parental consent to abortion are given preference pursuant to statute.[205]

- A statement of the date the last transcript was electronically accessible, or service of the circuit court record, if no postjudgment motion was filed; or, if a postjudgment motion was filed, the date of entry of the order deciding the motion; or, if the court of appeals extended the deadline for filing the notice of appeal, the due date that was established by the court of appeals.[206]

- A copy of the SPD order appointing counsel.[207]

The notice of appeal, because it is being filed in the circuit court, must comply with any circuit court e-filing requirements.

### 3. The docketing statement

The docketing statement, if required, must be e-Filed in the circuit court along with your notice of appeal.[208] Criminal, TPR, and ch. 980 appeals do *not* require a docketing statement.[209] CHIPS, youth delinquency, and mental commitment (other than ch. 980) cases *do* require a docketing statement.[210]

You can find the docketing statement form here: Appendix 4.i. In addition to filling out the blanks in the form regarding the nature of the appeal, you must also attach copies of various documents to it.[211]

Among the questions on the docketing statement is whether you would like the appeal to be placed on the court's "expedited" (also known as "fast-track") appeals calendar.[212] An expedited appeal has a shorter briefing schedule and the court of appeals generally decides these appeals much faster (within a couple of months of briefing). It can be ideal for cases, like those under Chapter 51, that require a prompt decision for meaningful relief to be possible.

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[203] Wis. Stat. (Rule) § 809.10(1)(b)3.
[204] Wis. Stat. (Rule) § 809.10(1)(b)4.
[205] Michael Heffernan et al., Appellate Practice and Procedure in Wisconsin § 15.5 (7th ed. 2001); see also Wis. Stat. (Rule) §§ 809.105 and 809.107.
[206] Wis. Stat. (Rule) § 809.10(1)(b)5.
[207] Wis. Stat. (Rule) § 809.10(1)(b)6.
[208] Wis. Stat. (Rule) § 809.10(1)(d).
[209] *Id.*
[210] *Id.*
[211] The necessary documents are similar to those that will ultimately need to be filed in the appendix to the brief-in-chief. *See* Wis. Stat. (Rule) § 809.19(2)(a). A blank document can be found here.
[212] Wis. Stat. § 809.17.

- Frequently asked question. *How does an expedited appeal work?* If, in the docketing statement, you ask for the appeal to be placed on the expedited calendar, the court will usually hold a telephonic "presubmission conference" at which it will determine whether all parties agree to the designation.[213] If all parties agree, the court will enter an order modifying the rules applicable to briefing by shortening deadlines, lowering word limits, and relaxing some formatting rules.[214]

Even if you are not seeking an expedited appeal, you still must file a docketing statement when one is statutorily required. Again, when a docketing statement is required, you must serve a copy on your client.

### 4. Transcript-related obligations

#### a. Overview

Within 14 days of filing the notice of appeal in the circuit court, you must take several actions to ensure that the circuit court record is properly positioned for the appeal. You must obtain a court reporter certification regarding any transcript that you have not yet received (usually the transcript of the postjudgment motion hearing), and file a statement on transcript. For a TPR, the statement on transcript must be filed within 5 days of filing the notice of appeal.[215]

#### b. Arranging for service of transcripts

If you are an SPD staff attorney, in order to arrange for service of transcripts on opposing counsel, you should work with the office administrative staff. If you are an SPD-appointed private bar attorney, you can find the form for requesting transcripts at Appendix 4.j. and a blank document of this form here.

Just fill the form out (making sure to check the box indicating that it is going to opposing counsel and to include opposing counsel's name and address) for each court reporter, and send it directly to the court reporter. The court reporters will bill the SPD directly.[216] Note that, under e-filing, this requirement still exists—the court reporter must be notified that they need to give "access" to another attorney even if the reporter is no longer physically transmitting copies to opposing counsel.

- Technical point. You do not need to arrange for service of the court record (documents filed with the circuit court that you received early in the case) on opposing counsel, only transcripts.

- Practical tip. If you do not want to look up each court reporter's address, just find the appointment paperwork that the Appellate Division sent you at the time of your appointment. That includes our original requests for transcripts, which will contain the names, addresses, and relevant transcripts associated with each reporter.

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[213] Wis. Stat. § 809.17(2). Pay close attention to the notice of presubmission conference. Some appellate districts set up the conference and call you at the appointed time. Others districts set a time and require you (the appellant) to arrange the conference and make the necessary phone calls.

[214] See the court of appeals' internal operating procedures, available here for more information.

[215] Wis. Stat. (Rule) § 809.107(5)(d).

[216] Note that, even though the transcripts will be available online via the e-filing website, you must still arrange for the court reporter to provide "access" to opposing counsel.

### c. Obtaining any necessary court reporter certification

If there is any transcript that has not yet been filed with the clerk of circuit court (because it is still in the process of being prepared), you will need to obtain a certification from the relevant court reporter that you have requested it.[217] By the time of the appeal, the only transcript not yet filed with the clerk should be the postjudgment motion hearing transcript. Thus, if there was no postjudgment motion hearing, as long as you already received all of the transcripts that the SPD originally requested for you, you can skip to the next section.

If you require a certification, the certification must:

- State that your client has requested copies of the relevant transcript(s) to be served both on you and all other parties.
- State that your client has arranged for payment for the transcript(s) and copies (through the SPD).
- Contain both the date of your request and the due date of the transcript(s).[218]

Generally, the court reporter will expect you to prepare the certification for them to sign and return to you. A sample for doing so is found at Appendix 4.k. and a blank document here.

As discussed below, you will need to attach the certification to your statement on transcript, therefore, do not wait until the last day to ask the court reporter for it. Note that the certification process can sometimes be unwieldy; court reporters in some busy jurisdictions (like Milwaukee) are sometimes unaccustomed to this additional responsibility and it is not always feasible to obtain speedy return of the certification in all cases. Depending on the circumstances, you might also consider a motion to extend the time for filing the statement on transcript to accommodate service of the transcripts.

### d. Preparing the statement on transcript

The statement on transcript is a simple document that acts as your own certification that you have taken care of the transcript-related tasks discussed above, and that the record is set for the appeal.[219] The statement on transcript must:

- List each transcript necessary for the appeal that has already been filed with the clerk of circuit court, and state that you have arranged for these transcripts to be served on the other party (or parties) at SPD expense.[220]
- List each transcript necessary for the appeal that has not been filed with the clerk of circuit court, if any, and state that you have arranged for any such transcript to be prepared and filed.[221]

[217] Wis. Stat. (Rule) § 809.11(4)(b).
[218] Wis. Stat. (Rule) § 809.11(4)(b).
[219] *Id.*
[220] *Id.*
[221] *Id.*

- Contain the court reporter certification discussed above, if necessary, regarding any transcript that has not yet been filed with the clerk of circuit court.[222]

You must file the original statement on transcript, including any certification, in the circuit court.[223] Thereafter, the circuit court is responsible for transmitting the SOT to the court of appeals.[224] See Appendix 4.h. and a blank document here.

❖ Practical tip. It is usually convenient to file the statement on transcript at the same time as the notice of appeal, however, if the postjudgment motion hearing transcript has not yet been prepared, you cannot file the statement on transcript without the court reporter certification. For that reason, consider requesting the certification from the court reporter when you first request the transcript, soon after the postjudgment hearing. That way you can file the notice of appeal and statement on transcript, then move the case off your to-do list for a while.

### 5. Motions for a three-judge panel

If you are appealing a case that would ordinarily be decided by one judge, as opposed to a three-judge panel, you may wish to file a motion seeking to have the case converted, especially if you plan to ask for publication. Asking to have the appeal converted is a question of strategy that usually depends on the nature of the issues being litigated on appeal. In any case, if you are filing a motion for a three-judge panel, the e-filing rule makes clear that this motion must be filed in the circuit court and not the court of appeals.[225] The motion must "accompany" the notice of appeal.[226] If you are the respondent in an appeal, you must file your motion for a three-judge panel within 14 days after service of the notice of appeal.[227]

❖ Practical tip. With respect to all of the documents just discussed—the notice of appeal, the docketing statement, the statement on transcript, and the motion for a three-judge panel—the e-filing system automatically serves any opposing party already opted in to the case in circuit court. With respect to the attorney general, Wis. Stat. (Rule) § 809.802 provides that the clerk of the court of appeals is responsible for opting that party in; their notice of "docketing" constitutes service of any initiating documents filed.

## iii. Assessing the court record on appeal

The clerk of circuit court must compile and index the record for appeal.[228] The clerk then grants you electronic access to the proposed index before "electronically transmitting" it to the court of appeals. If there are non-electronic record entries, the clerk will also prepare a list of those record entries.[229]

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[222] *Id.*
[223] *Id.*
[224] Wis. Stat. (Rule) § 809.11(2).
[225] Wis. Stat. (Rule) § 809.10(1)(g).
[226] *Id.*
[227] Wis. Stat. (Rule) § 809.41(1)(d).
[228] Wis. Stat. (Rule) § 809.15(2).
[229] Wis. Stat. (Rule) § 809.15(2).

Do not ignore the proposed record index. Not infrequently, there is some problem with the record.[230] When there is a problem with the record, it is much quicker and easier to address it before the record is sent to the court of appeals. In principle, under e-filing, there should no longer be any "surprises" as to the record which is transmitted to the court of appeals, as it should be identical to the electronic record you will have had access to for the duration of the case. The e-filing rules therefore assert that the document numbers should be the same for both the circuit court and appellate court record.[231]

However, you should continue to carefully examine the record to make sure that any document that you might want to cite is included in the index. With certain bits of the record, you should be particularly careful. Occasionally, exhibits (especially recordings), sealed documents, and/or correspondence do not make it into the indexed record. Often, parts of the record that were created prior to the filing of the complaint, notably including warrants and warrant applications, do not make it into the indexed record.

If anything that was part of the circuit court record is not in the index of the appellate record, or if there is some sort of error in the record, you can usually resolve the issue quickly and easily with the circuit court before the clerk of circuit court sends the record to the court of appeals. In most cases, you can do this by contacting the clerk and explaining the issue. If, however, the issue with the record is more complicated, you may need to file a motion to correct or supplement the appellate record under Wis. Stat. (Rule) § 809.15(4)(c). If the record is still in the circuit court, you will file the motion in the circuit court and the clerk will transmit a copy to the court of appeals.[232] and, while you are not required to physically serve opposing counsel, it may be a good idea to contact them proactively to determine whether a stipulation to correct the record can be agreed upon.

If the record has already been transmitted to the court of appeals, any motion to supplement or correct the record will need to be e-filed in the court of appeals.[233]

- Frequently asked question. What if I want to cite to something that is not indexed—not because of a clerical error, but because it was not filed at the circuit court level? If the document is something that the trial attorney should have presented and did not and/or that you could have placed in the record at the postjudgment motion level and did not, you may be stuck with the record you have. However, it will depend on all of the circumstances. Some documents are amenable to judicial notice—that is, they do not need to be in the record for the reviewing court to rely on them. Further, if opposing counsel stipulates that something should be part of the record, you may succeed with a joint motion to supplement the record. Even without a stipulation, the court of appeals may permit a party to supplement the record. In some circumstances, this may require remanding the case to the circuit court. If you are

[230] Wis. Stat. (Rule) 809.15(1) (items that must be included in the record).
[231] Wis. Stat. (Rule) § 809.15(2).
[232] Wis. Stat. (Rule) § 809.15(4)(c). *See id.*, setting deadlines for the circuit court to act on the motion.
[233] Wis. Stat. (Rule) § 809.15(3)-(4). For a helpful discussion of the procedure for supplementing or correcting the record in both the circuit court and the court of appeals, *see* Michael Heffernan et al., *Appellate Practice and Procedure in Wisconsin* § 7.4 (7th ed. 2012).

presented with a thorny record problem, please feel free to call an Appellate Division attorney manager.

#### iv. Motion practice in the court of appeals

Motions in the appellate courts are generally governed by WIS. STAT. RULE 809.14. The opposing party generally has 11 days (from service of the motion) to file a response.[234] In TPR appeals, the other parties get only 5 days to respond.[235] But the court of appeals can decide a motion for a "procedural order" (that's most motions) quickly, without waiting for a response.[236] If the non-moving party objects to the motion, they can move for reconsideration within 11 days of service of the order.[237]

Any motion that would affect the disposition of the appeal or the filing of a brief, including common motions such as a motion to consolidate appeals, automatically tolls all deadlines from the date of filing until the date that the motion is decided.[238] A motion to supplement or correct the record automatically tolls all deadlines from the date of filing until the date that the motion is denied, or, if the motion is granted, until the date that the supplemental or corrected materials are filed with the court of appeals.[239]

- Frequently asked question. *When do I need to consolidate SPD appeals?* Each judgment requires its own notice of appeal, and each notice initiates a distinct appeal. It makes sense to consolidate two or more appeals if it would be more convenient for you and the court.[240] If you have a criminal client who entered pleas, or went to trial, on multiple cases at once, it often makes sense to consolidate the appeals. The same goes for a TPR client who entered pleas, or went to trial, on multiple cases (involving different children) at once. However, you should consider whether the cases raise identical or related appellate issues. If you are moving to consolidate, we recommend that you file the motion soon after the appeal is docketed in the court of appeals.

### b. Briefing

Wis. Stat. (Rule) § 809.19 governs briefing and covers everything from deadlines (except those for TPR appeals) to margins to substantive content. If you have not already carefully read this entire rule, you should do so now.

#### i. Applicable deadlines – briefing

In a Rule 809.30 appeal not designated as an expedited appeal, the brief-in-chief is due 40 days from the date that the record on appeal is filed.[241] The response brief is due 30 days from the date that the brief-in-chief is filed or served on the respondent or

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234 Wis. Stat. (Rule) § 809.14(1).
235 Wis. Stat. (Rule) § 809.14(1m).
236 Wis. Stat. (Rule) § 809.14(2).
237 *Id.*
238 Wis. Stat. (Rule) § 809.14(3)(a).
239 Wis. Stat. (Rule) § 809.14(3)(b).
240 See Wis. Stat. (Rule) § 809.10(3).
241 Wis. Stat. (Rule) § 809.19(1). As discussed in Chapter Four, Section IV.a.ii.3., above, if your case is designated as an expedited appeal, you will be well aware of this fact because the court will enter an order designating the case as an expedited appeal. In an expedited appeal, the court of appeals sets the briefing schedule by court order.

from the date that the record on appeal is filed, whichever is later.[242] The reply brief is due 15 days from the date that the response brief is filed.[243]

In a TPR appeal, from the date of the filing of the record on appeal, you have 15 days to file the brief-in-chief.[244] From service of the brief-in-chief, the opposing party has 10 days to file the response brief.[245] From the service of the response brief, you have 10 days to file the reply brief.[246]

If there is a GAL involved with the case, and they choose to participate in the appeal, the due date for their brief(s) will be the same as the brief(s) for the party with whom they are aligned.[247]

### ii. Other briefing rules

#### 1. Required contents

##### a. Opening brief

Pursuant to statute, the brief-in-chief (opening brief) in any case not designated as an expedited appeal[248] must contain:

- A table of contents with page references for each section of the brief, including headings of each argument subsection.[249]
- A table of authorities, including cases (listed alphabetically), as well as statutes and any other legal authorities, with page references.[250]
- A statement of the issues presented for review and how the trial court decided each issue.[251]
- A statement as to whether you seek oral argument or publication of the court's opinion, and if so, your reasons for seeking one or both.[252]
- A statement of the case, including a description of its procedural history and the trial court rulings at issue, and a statement of facts relevant to the questions presented (with proper citations to the record).[253]
    - ➢ Practical tip. Depending on the case, you may want to have two sections, usually titled "Statement of the Case" and "Statement of Facts," or a single combined section. The decision to have one or two sections is discussed in Chapter Four, Section IV.b.iii.2.b., below.

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[242] Wis. Stat. (Rule) § 809.19(3)(a)1.
[243] Wis. Stat. (Rule) § 809.19(4)(a).
[244] Wis. Stat. (Rule) §809.107(6)(a).
[245] Wis. Stat. (Rule) § 809.107(6)(b).
[246] Wis. Stat. (Rule) § 809.107(6)(c).
[247] Wis. Stat. (Rule) § 809.107(6)(d).
[248] In an expedited appeal, there are fewer required sections; all requirements will be spelled out in the court order designating the case as an expedited appeal.
[249] Wis. Stat. (Rule) § 809.19(1)(a).
[250] *Id.*
[251] Wis. Stat. (Rule) § 809.19(1)(b).
[252] Wis. Stat. (Rule) § 809.19(1)(c). *See* Wis. Stat. (Rule) § 809.23(1) (criteria for publication).
[253] Wis. Stat. (Rule) § 809.19(1)(d).

- An argument, arranged in the order of the statement of issues presented. Each argument must begin with a statement summarizing the argument, must contain the appellant's contentions and the reasons therefore, and must include appropriately formatted citations to legal authorities.[254]

- A short conclusion stating the precise relief sought.[255]

  - Technical point. When the statute says precise, it means precise. You must define what a "win" would entail. Sample conclusions would include: "John Doe asks this court to reverse the order denying the postconviction motion and remand this case to the circuit court for a *Machner* hearing"; "John Doe asks this court to vacate the dispositional order and remand this case to the circuit court for a new trial"; "John Doe asks this court to vacate the judgment of conviction and, because the evidence presented at trial was insufficient to support the conviction, instruct the clerk of circuit court to enter a judgment of acquittal."

- Reference to an individual by first and last initial or pseudonym, rather than their full name, when the record is required by law to be confidential or as required by Wis. Stat. § 809.86.[256]

  - Technical point. State law now requires that a victim of a crime, other than a homicide victim, not be referred to by "any part of his or her name," but instead by his or her initials or "other appropriate pseudonym or designation," unless good cause can be shown as to why such designation would be insufficient.[257]

- The signature (and state bar number) of the attorney who files the brief or, if the appellant is pro se, the signature of the appellant.[258]

- Reference to the parties by name (e.g., John, Doe, or Mr. Doe), rather than party designation (e.g., Defendant-Appellant), throughout the argument section.[259]

- A signed certification that the brief conforms to the form and length rules contained in RULE 809.19(8)(b), (bm), and (c), in the form described in Rule 809.19(8g).[260]

### b. Appendix

Technically, an appendix could be included in the checklist above; it is a content requirement of the opening brief to which it is appended. But because there are numerous requirements for the content of the appendix itself, it necessitates its own list. At a

[254] Wis. Stat. (Rule) § 809.19(1)(e). Citations should be formatted according to The Bluebook: A Uniform System of Citation and Wis. SCR 80.02.
[255] Wis. Stat. (Rule) § 809.19(1)(f).
[256] Wis. Stat. (Rule) § 809.19(1)(g). See also Wis. Stat. (Rule) § 809.81(8).
[257] Wis. Stat. (Rule) § 809.86.
[258] Wis. Stat. (Rule) § 809.19(1)(h).
[259] Wis. Stat. (Rule) § 809.19(1)(i).
[260] Wis. Stat. (Rule) § 809.19(8g)(a).

minimum, the appendix must contain:

- The findings or opinion of the circuit court (this might be a written decision or an excerpt from the transcript of an oral ruling).[261]
- *Limited* portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.[262]
- A copy of any unpublished opinion cited under WIS. STAT. RULE 809.23(3)(a) or (b).[263]
- If the appeal is taken from a circuit court order regarding an administrative decision, the findings of fact and conclusions of law, if any, and final decision of the administrative agency.[264]
- "A table of contents, which indicates, for each item included in the appendix, the title, page of the appendix on which the record item begins, and circuit court document number."[265] The appendix table of contents must also include "the citation" for any unpublished decision included in the index.[266]
- A signed certification that the appendix complies with Rule 809.19(2)(a) and (am), in the form described in 809.19(2)(ae).[267]

If your appendix contains references to parties required by law to be confidential, you must redact the appendix utilizing "initials or other appropriate pseudonym or designation."[268] You must also include "a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record."[269]

In order to produce a table of contents for the appendix, and to cite to your appendix, you will need to number the pages. The appendix must contain "page numbers centered in the bottom margin using Arabic numerals with sequential numbering starting at '1' on the cover."[270]

Failure to provide the court with a complete appendix can result in the court imposing a monetary sanction on the attorney.[271] Although the rule only requires that an attorney append portions of the transcript the attorney deems essential to understanding the issues presented, some court of appeals judges in the past have interpreted the rule to mean the attorney must append *all* portions of the transcript relevant to deciding the issue. This approach seems to have faded, especially with the advent of e-filing (which

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[261] Wis. Stat. (Rule) § 809.19(2)(a).
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] Wis. Stat. (Rule) § 809.19(8g)(b).
[268] Wis. Stat. (Rule) § 809.19(2)(am).
[269] *Id.*
[270] Wis. Stat. (Rule) § 809.19(8)(bm).
[271] See *In re sanctions imposed in State v. Nielsen*: State of Wis. Ct. of App. v. Nielsen, 2011 WI 94, ¶ 2, 337 Wis. 2d 302, 805 N.W.2d 353.

makes the entire record readily accessible to all the judges tasked with deciding the appeal). Still, you may want to err on the side of inclusion.

You should also pay careful attention to the rules of confidentiality for victims of crime under Wis. Stat. § 809.86. While the statute only requires redaction of a victim's name in "the briefs," most attorneys (and many judges) read the requirement expansively to also require redaction of the victim's name in the appendix.

When you have finalized your appendix—including all necessary redactions—you must e-file the appendix as a single document, ensuring that the electronic copy is sufficiently legible when viewed on a computer screen.[272]

### c. Response brief

The response brief (the brief filed by the respondent in response to the brief-in-chief) must conform to the requirements applicable to the opening brief, except that it need not include a statement of issues, a statement of the case, or an appendix.[273] Thus, it must contain a table of contents, table of authorities, statement on oral argument and publication, argument, and conclusion, as described above.[274] It must also refer to individuals confidentially as required by law, refer to parties by name rather than party designation, and contain the filing attorney's signature and certifications regarding form and length and e-filing, also as described above.[275]

Note that although the response brief does not *need* to include a statement of issues, statement of the case, or appendix, it may contain any of these sections.[276] Thus, if you are the respondent in a state's appeal of an order granting your client's postconviction motion, you should consider whether including any of these sections in your response brief would strengthen your position. It is unlikely that opposing counsel has presented the facts and procedural history in the light most favorable to your client. It generally makes sense to offer a counter-narrative.

If you include an appendix, it must comply with the requirements listed above pertaining to an appellant's brief.[277]

### d. Reply brief

There are few requirements for a reply brief. It must contain an argument and a conclusion and, if it cites to any unpublished opinion under RULE 809.23(3)(a) or (b), it must also contain a supplemental appendix including a copy of the opinion.[278]

Note that while the rule indicates that the reply brief is optional,[279] if you neglect to file one, the court will consider the opposing party's arguments to be conceded.[280] Therefore, you must *always* file a reply brief.

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272 Wis. Stat. (Rule) § 809.19(2)(ae).
273 Wis. Stat. (Rule) § 809.19(3)(a)2.
274 Wis. Stat. (Rule) § 809.19(3)(a)2. & (1)(a)-(c), (e)-(f).
275 Wis. Stat. (Rule) § 809.19(3)(a)2. & (1)(g)-(i) & (8)(g).
276 See Wis. Stat. (Rule) § 809.19(3)(a)2. ("may")
277 Wis. Stat. (Rule) §§ 809.19 (3)(b), 809.19(2)(a).
278 Wis. Stat. (Rule) § 809.19(4)(b).
279 Wis. Stat. (Rule) § 809.19(4)(a) (shall file a reply brief, *or* a statement that a reply brief will not be filed).
280 See Charolais Breeding Ranches, Ltd. v. FPC Securities Corporation, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

## 2. Other technical rules

### a. Opting in electronically

Electronic filing is now mandatory for all licensed Wisconsin attorneys; accordingly, attorneys taking private bar appellate appointments "shall" register for access to the e-filing system if they have not already done so.[281] Registered attorneys must then opt in to all cases for which the attorney expects to file and receive documents electronically.[282] It is also important that you "opt out" after you close any SPD appellate case "to indicate withdrawal from the case as an attorney."[283] Should you have any questions about e-filing, you should consult the e-filing rule (available online here), the clerk of courts FAQ, or the SPD.

### b. Filing and service of briefs

Filing of briefs in the court of appeals work similarly to the filing of documents in the circuit court. As long as the brief is submitted to the electronic filing system before 11:59 P.M. on the date the brief is due, and the brief is later accepted by the clerk, it will be deemed "filed" on that date.[284] You should be aware that it is very common, even for experienced SPD staff attorneys, for the clerk's office to reject an e-filed brief for a technical defect, even a relatively minor one (such as an inaccurate table of contents, an improper signature, or an error in the case caption). Accordingly, you should be exceedingly careful with the new expanded time in which to file your brief. If you file the brief after hours, and it is later rejected, you will have to file a motion to retroactively extend the deadline.

Once a document is accepted by the clerk, the system will automatically generate a "notice of activity" which constitutes service on opposing counsel.[285] If there is a paper party, you are only required to serve one copy on that individual.[286] Under the e-filing rules, you are not required to print and serve multiple copies of your briefs.

The electronic brief must be in text-searchable, Portable Document Format (PDF).[287] The electronic appendix, if any, must be filed separate from the brief and must be a PDF, but need not be text-searchable.[288]

As with all significant documents, you should send a copy of your briefs—and the opposing party's—to your client.

Finally, if your brief challenges the constitutionality of a state statute or if the construction or validity of a statute is challenged, you must serve: (1) the attorney general;[289] (2) the speaker of the assembly; (3) the president of the senate; and (4) the senate majority leader. Because the speaker of the assembly, president of the senate, and the senate majority leaders are not parties, make sure to redact any confidential information.[290]

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[281] Wis. Stat. (Rule) § 809.801(3)(a)1.
[282] Wis. Stat. (Rule) §§ 809.801(3)(f); 801.18(3)(f).
[283] Wis. Stat. (Rule) § 801.18(1)(km), (kr). This can be accomplished by filing a notice of completion of representation. A sample of a circuit court notice of completion can be found in Appendix 5.j.
[284] Wis. Stat. (Rule) § 809.801(4)(am) and (c); § 801.18(4)(c).
[285] Wis. Stat. (Rule) § 809.801(4)(c).
[286] Wis. Stat. (Rule) § 809.19(8)(a)1.
[287] Wis. Stat. (Rule) § 809.801(8)(e).
[288] *Id.*
[289] You can serve the Attorney General by email: 806.04service@doj.state.wi.us
[290] Wis. Stat. § 806.04(11).

The phrase "construction or validity of the statute" has not been interpreted by any case law; accordingly, sometimes it is not always easy to tell when service is required. In general, you should err on the side of caution; while it seems unlikely that dismissal of an appeal would result from failure to comply with the service rule, attorneys have been admonished in opinions issued by the court of appeals for failing to serve these parties. If you are not sure whether service is required, feel free to contact the Appellate Division. Once you serve the legislature, you should notify the court of appeals that you have complied with the statutory requirement. This can be accomplished via a footnote in the brief itself, and you also may want to file a letter stating whom you've served and when. One other important consideration is that the service requirement continues to apply throughout the lifespan of the case; even if you served the legislature with a copy of your postconviction motion, you should also serve them with your appellant's brief and petition for review.

Because the speaker of the assembly, president of the senate, and the senate majority leaders are not parties, make sure to redact any confidential information from your pleadings.

And, please contact the SPD Appellate Division immediately if the legislature attempts to intervene in your case.

### c. Form and length

The brief and appendix[291] must conform to the following:

- It must be "[c]reated by a process that produces a clear, black, image on a white background."[292]
- It must include a white cover page.[293]
- It must be formatted to fit 8 ½ by 11-inch paper.[294]
- If a monospaced font is used: 10 characters per inch, double-spaced.[295]
- If a proportional serif font is used: minimum 13-point body text, 11-point for block quotes and footnotes. Italics may be used only for citations, headings, emphasis, and foreign words; bold may be used only for citations, headings, and emphasis. Line spacing in body text must be between 1.15 and 1.5 lines or an equivalent line spacing; additional space between paragraphs is permitted but not required. Block quotes and footnotes must be single spaced.[296]
- Margins must be a minimum of 1.25 inches on the right and left sides and a minimum of 1 inch on the top and bottom.[297]

[291] The contents of the appendix generally do not (and need not) comply with the font and margin specifications of Wis. Stat. (Rule) § 809.19(8)(b)3.
[292] Wis. Stat. (Rule) § 809.19(8)(b)1.
[293] *Id.*
[294] Wis. Stat. (Rule) § 809.19(8)(b)2.
[295] Wis. Stat. (Rule) § 809.19(8)(b)3.b.
[296] Wis. Stat. (Rule) § 809.19(8)(b)3.c.
[297] Wis. Stat. (Rule) § 809.19(8)(b)3.e.

- An attorney's signature which complies with Wis. Stat. (Rule) § 809.801(12)(a).

- You must also include page numbers, beginning with the cover of the brief, starting at "1." The page number must be in Arabic numerals and centered at the bottom of the page.[298]

In addition, the front cover must contain:

- The name of the court (*i.e.* the Wisconsin Court of Appeals District [ ]).

- The caption, including the full name of each party in the circuit court (except as required for confidentiality); each party's designation in the circuit court (plaintiff/defendant or petitioner/respondent), and each party's designation in the court of appeals (appellant/respondent); and the case number.

- The court and judge appealed from.

- The title of the document.

- The name and address (and state bar number) of counsel filing the document.[299]

As to length, if you use a monospaced font (for example, Courier New), the opening brief and response brief each shall not exceed 50 pages and the reply brief shall not exceed 13 pages.[300] If you use a proportional serif font (for example, Times New Roman), the opening brief and response brief each shall not exceed 11,000 words, and the reply brief shall not exceed 3,000 words.[301] In determining the length of your brief, count the statement of the case (including, if separated out, the statement of facts), the argument, and the conclusion.[302] You do *not* count the caption, tables of contents and authorities, statement of issues, statement on publication and oral argument, signatures, and certifications.[303] However, if you are counting words, you must include the words in any footnotes.[304] Finally, the definition of a word has now been amended to include "numbers or symbols" meaning that record citations now count as "words."[305]

As noted in the brief content list, above, you must include with your brief a certification that you have complied with these rules.[306] *See* Appendix 4.o. and Appendix 4.p. for a sample cover page and the certification page to a brief.

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298 Wis. Stat. (Rule) § 809.19(8)(bm).
299 Wis. Stat. (Rule) § 809.19(9).
300 Wis. Stat. (Rule) § 809.19(8)(c).
301 Wis. Stat. (Rule) § 809.19(8)(c). A motion to increase the page or word limit for a particular brief is permitted, although this sort of motion is disfavored and often denied. See Michael Heffernan al., Appellate Practice and Procedure in Wisconsin § 11.31 (7th ed. 201).
302 Wis. Stat. (Rule) § 809.19(8)(c).
303 Wis. Stat. (Rule) § 809.19(8)(c).
304 *See id.*
305 Wis. Stat. (Rule) § 809.01(35).
306 Wis. Stat. (Rule) § 809.19(8g).

### d. Adding supplemental authorities after briefing

After briefing, if you learn about a new decision that is pertinent to your case, you may advise the court of the decision through a letter directed to the clerk of the court of appeals and served on the other parties.[307] This letter should provide the court with proper citation to the new authority, including pinpoint citations to specific propositions made in the new authority, and discuss the impact of the new authority on your case.[308] It would make sense to attach a copy of the decision to the letter.

Of course, opposing counsel may also alert the court to supplemental authority through such a letter.[309] If opposing counsel does so, you may file a response to the letter within 11 days after service of the letter.[310]

### e. Citation format

It may be tempting to take a casual attitude toward citation, justifying this attitude by telling yourself that you are focusing on what is more important: writing a good brief. It is important to remember, however, that accurate and consistent citations are critical elements of a good brief. Proper citations show the source of your arguments and the authority for the court to grant your client relief.

Moreover, on a personal level, this state's appellate courts have been known to castigate and occasionally sanction attorneys for not providing citations, including pinpoint citations, for factual or legal propositions.

## 3. Citing to the record

As noted in Chapter Four, Section IV.a.iii., above, after the clerk of circuit court compiles the court record but before it is sent to the court of appeals, the clerk must compile a record index.[311] In this index, each record item is assigned a number.[312]

In your brief, every sentence containing a factual proposition should generally be followed by a citation to the record. In the past, appellate jurists have told the Appellate Division that they prefer the following format for citations to the record: ([record index number]:[page number]). Thus, a sentence referring to a fact found on page 45 of a trial transcript indexed as document number 12 might look like this: "According to Officer Friendly, Mr. Doe was not wearing a blue shirt at the time of the arrest. (12:45)."

If you are citing to a portion of the record that is included in the appendix, you will need to cite to the appendix page number. Thus, if the relevant portion of the transcript referenced above is found on page 122 of the appendix, your sentence might look like this: "According to Officer Friendly, Mr. Doe was not wearing a blue shirt at the time of the arrest. (12:45; App. 122)."

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[307] Wis. Stat. (Rule) § 809.19(10). If the relevant decision was by the COA, the statutory section suggests that you should not use this procedure until the court enters a publication order for the decision. *Id.* However, COA has informed the Appellate Division that the court would want to know about a decision that may be persuasive on a material issue, even prior to publication. *See* Wis. Stat. (Rule) § 809.23(3) (regarding citation of unpublished decisions).

[308] Wis. Stat. (Rule) § 809.19(10).

[309] See *Id.*

[310] Wis. Stat. (Rule) § 809.19(11).

[311] Wis. Stat. (Rule) § 809.15(2).

[312] Wis. Stat. (Rule) § 809.15(2).

### iii. Citing to legal authority

Supreme Court Rule 80.02 prescribes the manner for citation of published Wisconsin opinions. It provides that any first reference to a published case must include parallel citations to the public domain citation, if any (there will always be a public domain citation for Wisconsin cases published on or after January 1, 2000), the Wisconsin Reports, and the North Western Reporter.[313] Subsequent references (short cites) can cite to any one of these reports, but need not cite to all of them, and should be internally consistent.[314]

Further, each specific reference must include a pinpoint citation to the relevant paragraph if the paragraph number was printed (paragraph numbers are included in Wisconsin cases published on or after January 1, 2000), or, if the paragraph number was not printed, to the relevant page of the cited reporter.[315]

Wisconsin Statutes Rule 809.23(3) limits citation of unpublished state opinions.[316] An unpublished opinion decided prior to July 1, 2009, may not be cited "except to support a claim of claim preclusion, issue preclusion, or law of the case."[317] An unpublished opinion decided on or after July 1, 2009, may be cited as persuasive (but not mandatory) authority if it was "authored by a member of a three-judge panel or by a single judge under s. 752.31(2)."[318] If you cite an authored, unpublished decision issued on or after July 1, 2009, under this rule, you must file and serve a copy of the opinion with the paper in which the opinion is cited.[319] If you cite the unpublished decision in a brief,[320] this copy must appear in the appendix.[321]

As to other legal authority, the supreme court has adopted the rules laid out in The Bluebook: A Uniform System of Citation and SCR 80.02.[322] If you do not already own the most current version of the Bluebook, by all means, buy it now. In addition, the Wisconsin State Bar publishes the Wisconsin Guide to Citation, which applies Bluebook rules to commonly cited state authorities, including jury instructions and secondary authorities.[323] This book can be helpful as a quick reference.

### iv. Writing a persuasive brief

#### 1. Introduction: telling an engaging story

If you have worked as a trial attorney you probably know that the key to winning over a jury is telling an engaging story. Winning over an appellate judge is not so different. While you could get away with writing a brief mechanically—chronicling the facts, describing the applicable law in boilerplate fashion, then dutifully applying the law to the case—this is not likely to get a busy judge's attention and is not particularly persuasive.

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[313] Wis. SCR 80.02(1).
[314] Wis. SCR 80.02(2).
[315] Wis. SCR 80.02(3).
[316] Note that Wis. Stat. (Rule) § 809.23(3) does not address citation to unpublished opinions from other jurisdictions.
[317] Wis. Stat. (Rule) § 809.23(3)(a)
[318] Wis. Stat. (Rule) § 809.23(3)(b). This would not include any "per curiam opinion, memorandum opinion, summary disposition order, or other order." *Id.*
[319] Wis. Stat. (Rule) § 809.23(3)(c).
[320] When citing an unpublished Wisconsin COA opinion, you should not use the public domain citation, as that simply references a table for an unpublished opinion and not the actual opinion itself. Here is a correct sample citation for an unpublished case: *State v. Darden*, No. 11AP883-CR, unpublished slip op., ¶ 16 (WI App May 3, 2012).
[321] Wis. Stat. (Rule) § 809.19(2)(a).
[322] Wis. Stat. (Rule) § 809.19(1)(e); see *also* State Bar of Wisconsin, *Wisconsin Guide to Citation* (6th ed. 2005).
[323] *See generally* State Bar of Wisconsin, *Wisconsin Guide to Citation* (11thed. 2023-24).

With appellate storytelling you are weaving together a factual and a legal story. You are also telling a story of injustice, in which the theme may be something like police or prosecutorial misconduct, defense counsel incompetence, judicial sloppiness or bias, or client ignorance or naiveté.

It helps to begin the writing process by formulating a clear statement that encapsulates your theme in plain English. Imagine that a friend, or your favorite bartender or barista, were to ask: "Why should your client win his appeal?" Your thematic statement could serve as the response to this question. It need not, and indeed should not, be technical. You would not respond to your friend's question by saying: "The circuit court violated a rule requiring it to explain that it was not bound by the parties' plea agreement at the plea hearing." But you might say: "My client's attorney talked him into taking a plea, and the judge accepted the plea, without anyone ever telling my client that the judge could sentence him to double the time the prosecutor asked for!"

You will probably not include this precise statement anywhere in your brief, however, you should use it to guide your writing. You want the final brief to cause a reader to think, "it's not fair that this defendant's attorney talked them into taking a plea, and the judge accepted the plea, without anyone ever telling the client that the judge could sentence him to double the time the prosecutor asked for!" When you are editing your brief, if you find instead that it projects a dry, technical message, you may need to do some significant editing.

This is not to say that you can provide shallow legal analysis for the sake of a good story. You cannot. Your (nonfiction) story must be built on a discussion of the facts and law that is scrupulously accurate, precise, and complete, but accuracy is not an excuse for a dry recitation of the facts, and completeness should not be achieved through boilerplate. A good appellate story presents significant facts in a meaningful order, discusses the law in a way that is relevant to the case at hand, and seamlessly weaves together facts and law.

### 2. Tips and strategies – section by section

#### a. Statement of issues

Many writing instructors teach that the issues section is the most important section of the brief. Many state court of appeals judges claim that it is irrelevant. We presume that the truth lies somewhere in the middle and urge you to take the time to craft well-written issues that introduce readers to your argument before setting out the facts.

Here are a few strategies for crafting good issue statements:

- If an issue (like most) involves the application of law to particular facts, it is often better to state the issue specifically, not generically, in order to set the stage for your factual section.

*Rather than this:* Was the evidence presented at trial insufficient to sustain the jury's verdict?

*Try this:* Was the evidence presented at trial insufficient to show that John Doe possessed more than five grams of cocaine, given that the only evidence of the weight of the drugs Mr. Doe possessed was a police officer's testimony that he saw Mr. Doe consume white powder that 'looked like about five or six grams'?

- Do not be afraid of multiple- sentence issues. A multiple-sentence issue is better than a single-sentence issue that is difficult to follow.

*Rather than this:* Has the defendant established deficient performance under the *Strickland* standard where he has shown that trial counsel neglected to object to prejudicial hearsay suggesting that John Doe had been the only person with access to a locked storage area in an apartment building where the drugs were found and, and where trial counsel testified at the *Machner* hearing that he did not believe this was hearsay because it provided context and could not explain what hearsay exception this related to?

*Try this:* A hearsay statement was the only evidence presented at trial indicating that John Doe alone had access to the area of an apartment building where drugs were found. Mr. Doe's trial counsel did not object to this highly prejudicial hearsay statement. At the *Machner* hearing, the attorney testified that he thought the statement was admissible because it provided the jury with 'context'—even though there is no hearsay exception specific to 'context.' Did the attorney's failure to object amount to deficient performance under *Strickland v. Washington* and its progeny?"

- If an issue relies on more than one legal theory, it should probably be broken down into more than one issue.

*Rather than this:* When there is no evidence that a police officer received information about John Doe from dispatch that would provide the officer with probable cause that Mr. Doe had committed a crime under the collective knowledge doctrine, does the officer's witnessing of Mr. Doe talking to a drug dealer and reaching into the dealer's car provide the officer with probable cause to arrest him?

*Try this:* Can the collective knowledge doctrine be used to justify an arrest if the collective knowledge was not communicated to the arresting officer?" *and* "John Doe spoke to a man the arresting officer believed was a drug dealer, and, in the course of their conversation, reached into the man's car. The officer saw this happen but had no other information even suggesting Mr. Doe had committed a crime. Did the officer have probable cause to arrest Mr. Doe?"

After writing your argument section, carefully re-read your issues statement to ensure that the tone and content are consistent with your argument. If your beautifully-written issues statement doesn't quite match your argument, it's best to start over.

### b. Statement of the case/facts

The statement of the case and statement of the facts (whether presented separately or in a single section) are critical. They will introduce your story and frame your argument.

The first principle of a factual section is that it must be correct, precise, and complete. If it is sloppy, misleading, or argumentative, your readers will lose faith in you and your argument. Thus, the following are not so much *tips* for writing about factual material as *rules* that you ignore at your peril:

- Place a record citation after each statement containing a factual proposition, whether or not it contains a quote.

- Make sure that every sentence that states a factual proposition is scrupulously and precisely true. To avoid inadvertent errors, double-check record citations before filing your brief.

- Never make argumentative statements in your factual sections. Do not say: "Even though Mr. Doe had done nothing more than bump his left tires on the median once, the officer pulled him over." Instead, say, "The officer saw Mr. Doe bump his left tires on the median one time, then immediately pulled him over."

- Never omit a fact that is necessary to understanding the nature or procedural posture of the case or relevant to deciding an issue presented on appeal, even if (or especially if) it is harmful. You can and should neutralize harmful facts in the context of argument.

Complying with the above four rules should avoid sanctions related to your factual section and help boost your credibility. Now here are a few tips for making it more readable:

- Decide whether to keep the procedural and historical facts together or to separate them based on what is more readable and helpful. You may want to separate procedural from historical facts if the historical facts form the basis for your issues and the recitation of procedural facts might be distracting.[324] But there are many circumstances where it makes sense to combine them.

- Do not describe everything that happened in the case and note every date of every procedural or historical event. This is tedious and boring and will keep your reader from recognizing what events were truly important. You need only discuss details that are necessary to understanding the nature and procedural posture of the case or that are relevant to an issue presented on appeal.

- Do not necessarily describe facts in procedural chronological order (e.g., "and then Mr. Doe testified that . . . and then Ms. Doe testified that . . ."). This is rarely engaging. A historical story (e.g., the story of the crime or the police encounter) may best be presented in historical order, rather than witness by witness, noting factual disputes as they arise. There are other possibilities as well. You may describe facts as they unfolded in an investigation. You may describe facts in order of relevance. You are free to order your facts for maximum readability and clarity, so long as your description of the facts remains correct, precise, and complete.

- Think carefully about how to label important people, things, and events. Is your client "Jane" or "Doe" or "Ms. Doe"? Is the complainant "the victim" or "the complainant" or "the student"? Did your client hold a "weapon" or a "pocket knife"? Did the police officer "pat her down" or "frisk her"? Words matter. Choose words consistent with your theme, and use them consistently.

[324] For instance, if you are litigating a basic suppression issue in a case with a complex procedural history, you will probably want to separate the Statement of the Case (the procedural history) from the Statement of Facts (the evidence presented at the suppression hearing).

### c. Argument

There is no one way to structure a good argument section and, in fact, if the argument sections of all of your briefs are structured the same, you may want to consider whether your writing has become mechanical. But here are a few tips for making your argument more persuasive:

- Start your argument section with a summary or a road map. Just like a reporter, you do not want to bury your lede. When you are making a logical argument it often takes a long time to tie up the logical threads. By starting your argument section with a brief summary, you will help the reader follow your argument as it unfolds.

- Carefully craft your argument headings so that readers can preview your argument in the table of contents and can easily follow your argument as they go. Primary (usually roman numeral) headings should mirror your issues statements. With any complex argument (involving two or more prongs or logical steps), include as many sub-headings as necessary to clearly map out your argument.

- Eliminate excessive boilerplate language. When describing the *Strickland* standard, the probable-cause standard, or any number of other uncontroversial legal standards that everyone knows by heart, you can (and should) reduce your recitation of the standard to just one sentence or two or three. Avoid string cites unless you can point to a reason for citing to multiple authorities and, if you have such a reason, make it known through explanatory parentheticals.

- Acknowledge negative authority. While you may want to save some points for your reply brief, your brief-in-chief should usually note obvious negative authority and provide some explanation of how it is inapplicable, distinguishable, or unimportant.

- Acknowledge, and pay attention to, the standard of review applicable to each claim.

- Refute the circuit court's rejection of your client's claim, and, if applicable, address the circuit court's relevant factual findings, directly and fully. Do not act as if you are arguing on a blank slate.

- It is often better to avoid separating "the law" and "the application of the law" into entirely distinct segments. There are exceptions, but in most circumstances, an argument will develop more naturally, and be more engaging, if it weaves together facts and law.

- Do not only provide the court with the technical legal basis for providing your client relief, even if you believe the legal argument is air tight. It is always beneficial to explain why the error below harmed your client, was unfair, or set a dangerous precedent.

### 3. Resources

If you have the time and ability, we recommend the National Legal Aid and Defender Association (NLADA)'s Appellate Defender Training, which usually is held annually.[325] The NLADA's curriculum includes 3 days of intensive, hands-on brief-writing instruction with a focus on storytelling. The training is not free, but the NLADA gives out a limited number of scholarships each year.

The State Bar of Wisconsin's Appellate Practice Section periodically holds short brief-writing workshops. This is not a substitute for a more comprehensive training, but it can be a good learning opportunity.

The State Public Defender's Appellate Division periodically holds a 3-day appellate skills academy that includes some writing instruction and discussion.[326] This training is not solely focused on brief writing—it also includes instruction on appellate procedure, postconviction practice, and other matters—but it does include some brief-writing instruction.

As for written materials, our favorite guides to brief writing share an author: *The Winning Brief*, by Bryan A. Garner, and *Making Your Case: The Art of Persuading Judges* by Antonin Scalia and Bryan A. Garner. Both books are readable and helpful for novice and experienced attorneys alike. *The Winning Brief* is the more detailed primer, but both books are vastly more comprehensive than the brief-writing tips provided in this handbook. Of course, there are many other excellent legal writing guides available at most any law library. If you are interested, you can ask a reference librarian to help you find one.

We also recommend that you read briefs frequently, particularly ones written by attorneys you know to be strong writers,[327] read good books in your spare time, and attend writing workshops when possible.

## V. Post-COA decision actions

### a. Addressing a win in the court of appeals

If you are reading this section because you have won a case in the court of appeals, congratulations! Note that if the court of appeals denied any portion of the relief you requested, you will need to read on about further steps to take regarding the relief you've been denied.

If you won it all, mark your calendar for the 31st day after the issuance of the court of appeals decision.

If, by the end of the 30th day, your opponent has not with a petition for review in the state supreme court, you will need to ensure that your client actually gets the relief granted. If any significant proceedings must be had in the circuit court (a new trial, a new sentencing hearing, etc.), contact the relevant SPD trial office (a directory is posted on the SPD website) to ask for the appointment of a trial attorney.[328] Once the court of

[325] The NLADA website is found here.
[326] For more information on this program, contact us at the numbers on the cover of this handbook.
[327] See the Wisconsin Law Library website for links to online brief databases.
[328] As noted in Chapter Four, Section III.d.iii., above, appellate attorneys should not generally represent the client in further trial court proceedings. If the appellate attorney is a private bar attorney and is certified to take the trial case

appeals issues a remittitur for the case (returning jurisdiction to the circuit court),[329] you will need to either follow up with the circuit court or satisfy yourself that the newly-appointed trial attorney is doing so. Depending on the relief granted, after the circuit court acts, you may need to additionally follow up with the Department of Corrections or some other entity, as discussed in Chapter Four, Section III.d.iii., above.

If the opposing party files a petition for review, you will need to consider whether to file a response under Wis. Stat. (Rule) § 809.62(3). A response must be filed within 14 days after service of the petition and can address any one or more of the following:

- Reasons for denying the petition.
- Defects that may prevent ruling on the merits of any issue in the petition.
- Material misstatements of fact or law in the petition.
- Alternative grounds supporting the result of the court of appeals' decision or a result *less* favorable to the petitioner.
- Any other issues the supreme court would need to decide if it were to grant the petition.[330]

This response would have the same form, length, and filing requirements as a petition for review, discussed in Chapter Four, Section V.b.iv., below.[331] If the supreme court ultimately grants the opposing party's petition for review, see Chapter Four, Section VI., below, for further discussion.

### b. Addressing a loss in the court of appeals

#### i. Overview

As noted in Chapter One, Section I.c.i., above, your SPD appointment continues through the filing of a petition for review or through supreme court review except in a few circumstances that would have occurred early in the case.

In the unusual case where you have litigated an arguably meritorious appeal to the court of appeals, but later determine that any motion for reconsideration or petition for review would be frivolous, a situation described in Chapter Five, Section VI., below, you should discuss with your client the no-merit petition for review procedure outlined in that section.

Otherwise, after a court of appeals loss, you will need to file a motion for reconsideration and/or a petition for review.

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at issue, the attorney or the client may ask the relevant trial office to appoint the appellate attorney to continue with the case. However, the trial office may have a policy that would defeat this request. Furthermore, the attorney should be aware that, if the case ends up on appeal again, the Appellate Division will not appoint an attorney to handle the appeal who represented the client at the trial level in the same matter.

[329] The remittitur should be issued on the 31st day after the court of appeals issues its decision "or as soon thereafter as practical." Wis. Stat. (Rule) § 809.26(1).

[330] Wis. Stat. (Rule) § 809.62(3). As to the last matter, the response should address whether and how the other issues were raised in the court of appeals, and whether and how that court decided the issues. *Id.*

[331] Wis. Stat. (Rule) § 809.62(4).

Note that if you raise multiple claims in the court of appeals, you may end up winning on some claims and losing on others. In that circumstance, you and your client must think carefully about petitioning for review on the claims for which you did not prevail. While both parties have 30 days to file a petition for review, note that if one party files a petition for review, the statute gives the opposing party an extra 30 days to file a cross-petition.[332] For example, assume that you ask for both resentencing and (for different reasons) a new trial in the court of appeals. The court of appeals grants you a resentencing, but denies your request for a new trial. While you could petition for review on the request for a new trial, you need to be aware that this could trigger an opposing party to file cross-petition seeking to reverse your resentencing win.

#### ii. Motion for reconsideration v. petition for review

If the court of appeals denies your client any portion of the requested relief, the first thing you must consider is whether the best course of action is a motion for reconsideration directed to the court of appeals or a petition for review directed to the state supreme court. This is a strategic decision for you, the attorney, rather than the client.

Generally, you can presume that a petition for review is the best course of action. If the court of appeals correctly stated the material facts and (at least arguably) the applicable law, a motion for reconsideration would be pointless, even if (in your opinion) the court got its analysis or the result dead wrong. A motion for reconsideration is not an opportunity to reargue points that you made in your brief or make new arguments. It is not a "rebuttal" argument.

On the other hand, if the court of appeals misstated a critical fact or misinterpreted an important legal authority not open to such interpretation, a motion for reconsideration may be a good idea. The state supreme court takes cases that will have statewide impact; it generally does not take cases simply because the court of appeals made a factual or logical error.

Note that you cannot file a motion for reconsideration in a TPR appeal.[333]

#### iii. Moving the court of appeals for reconsideration

##### 1. Applicable deadline

In a Rule 809.30 appeal, from the date that the court of appeals issues its decision, you have 20 days to file a motion for reconsideration.[334] *This deadline may not be extended.*[335]

##### 2. Discussion

If the best course of action is a motion for reconsideration directed to the court of appeals, Wis. Stat. (Rule) § 809.24 governs the motion. By the deadline noted above, you must file a motion that may not exceed five pages if a monospaced font (like Courier New) is used or 1,100 words if a proportional serif font (like Times New Roman) is used.[336] No separate memorandum or brief in support of the motion is permitted.[337]

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[332] Wis. Stat. (Rule) § 809.62(3m)(a).
[333] Wis. Stat. (Rule) § 809.24(4).
[334] Wis. Stat. (Rule) § 809.24(1).
[335] Wis. Stat. (Rule) § 809.82(2)(e).
[336] Wis. Stat. (Rule) § 809.24(1).
[337] Wis. Stat. (Rule) § 809.24(1).

Further, no response to the motion is permitted unless ordered by the court.[338] The motion "must state with particularity the points of law or fact alleged to be erroneously decided in the decision and must include supporting argument."[339]

Where there has been a motion for reconsideration, no party may file a petition for review until the motion for reconsideration has been resolved.[340] As outlined below, where there has been a motion for reconsideration, the deadline for filing a petition for review begins to run from the date the motion is denied or, if granted, from the date the court of appeals issues an amended decision.[341]

### iv. Petitioning the supreme court for review

#### 1. Technical matters

##### a. Applicable deadline

The petition for review is due within 30 days of the date that the court of appeals issues its decision.[342] This deadline is the same for both Rule 809.30 and TPR appeals.[343]

If a motion for reconsideration was timely filed in the court of appeals and denied, the petitioner has 30 days from the denial of the motion to file the petition.[344] If a motion for reconsideration was timely filed and granted, the petitioner has 30 days from the date an amended decision is issued to file the petition.[345]

With mandatory e-filing, the petition for review may be electronically filed—meaning that you are no longer required to have the document physically received by the clerk's office by the 5:00 P.M. deadline. As long as the document is e-filed by 11:59 P.M. and later accepted by the clerk, the PFR will be considered timely. However, the PFR deadline is still presumptively "jurisdictional," meaning that if your document is ultimately not accepted, then the court will not be able to accommodate the late filing.[346] Accordingly, we strongly encourage you to e-file your PFR early, if at all possible, to accommodate any technical issues or rejected documents.

In the unfortunate event that you miss the petition deadline, you must contact the SPD Appellate Division immediately for the possible filing of a writ of habeas corpus.[347] If the court were to grant such a writ under these circumstances, permitting the filing of a petition for review, you would be responsible for filing the petition and you may be responsible for litigating the case in the supreme court if the petition is granted.

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[338] Wis. Stat. (Rule) § 809.24(1).
[339] *Id.*
[340] Wis. Stat. (Rule) § 809.62(1m)(b). This section also describes how the court and the parties deal with a petition for review that was filed prior to the filing of a motion for reconsideration. Wis. Stat. (Rule) § 809.62(1m)(c)-(e).
[341] Wis. Stat. § 808.10(2).
[342] Wis. Stat. § 808.10(1).
[343] Wis. Stat. § 808.10(1); Wis. Stat. (Rule) § 809.107(6)(f). Note that this deadline runs from the date that the decision is issued, not the date that it is served on you.
[344] Wis. Stat. § 808.10(2).
[345] *Id.*
[346] *State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶12, 247 Wis. 2d 1013, 1020. In an emergency, the court may accept a timely filed non-conforming petition (e.g., an incomplete petition) and permit you to later supplement it with a petition that fully complies with the rules.
[347] *See State ex re. Schmelzer v. Murphy*, 201 Wis. 2d 246, 248-49, 548 N.W.2d 35 (1996).

### b. Required contents

Pursuant to statute, the petition must contain:

- A table of contents.[348]
- A statement of the issues presented for review, including those that the court of appeals did not actually decide (if you want them to be reviewed), how each issue was raised in the court of appeals, and how the court of appeals decided each issue.[349]
- A concise statement of the statutory criteria for granting review that apply to your case, discussed in Chapter Four, Section V.b.iv.2.a., below, or other substantial and compelling reasons for review.[350]
- A statement of the case, including a description of the nature of the case; the procedural history of the case, including the disposition of the trial court and the court of appeals; and a statement of facts not included in the court of appeals' opinion that are relevant to the issues presented, including appropriate citations to the record.[351]
- An argument amplifying the reasons relied on to support the petition, arranged in the order of the statement of issues.[352]
- An appendix containing, in the following order:
    - The decision and opinion of the court of appeals.
    - The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition.
    - Any other portions of the record necessary for an understanding of the petition.
    - A copy of any unpublished opinion cited under Rule 809.23(3)(a) or (b).[353]
    - A signed certification that the petition conforms to the formatting rules contained in Rule 809.19(8)(b) and (bm), in the form described in Rule 809.19(8g).[354]

[348] Wis. Stat. (Rule) § 809.62(2)(b). Although, unlike with a brief, the statutes do not specify the need for page references for each section of the brief, including headings of each argument subsection, the table should include these references. *See id.*
[349] Wis. Stat. (Rule) § 809.62(2)(a). Note that, if the supreme court takes the case, it ordinarily will not decide any issue not presented here. *Id.*
[350] Wis. Stat. (Rule) § 809.62(2)(c).
[351] Wis. Stat. (Rule) § 809.62(2)(d).
[352] Wis. Stat. (Rule) § 809.62(2)(e). Note that any argument not raised in the petition may be deemed waived. *Id.*
[353] Wis. Stat. (Rule) § 809.62(2)(f).
[354] Wis. Stat. (Rule) § 809.62(4).

- ✓ In TPR cases, the petition for review will need your client's signature—*see* *Appendix 4.n.*[355] Due to confidentiality requirements, the client's signature should be redacted leaving only the first and last initial of your client's name on the copies filed with the Court.[356] For example, if your client's name is John Smith, the signature should appear J[redacted] S[redacted]. You should, however, keep the original unredacted signature pages in your file. Additionally, you should drop a footnote stating: "The parent's signature has been redacted in order to comply with the confidentiality requirements of cases involving children."

### c. Filing and service

As with a brief in the court of appeals, e-filing of the PFR constitutes service on the parties.[357] Paper parties still need to be served via traditional means.[358] You can check whether someone is considered a "paper party" by clicking on "View parties" in the e-filing system under the appropriate case number. Notice for the parties will be designated as "e-notice" for parties that have opted in and "Paper" for paper parties. Note that in TPR cases, the GAL may not be opted in, thus requiring service by traditional methods.

Additionally, as noted in Chapter 2, Section III.c.ii.2.a, if your petition challenges the constitutionality of a state statute or if the construction or validity of a statute is challenged, you must serve: (1) the attorney general; (2) the speaker of the assembly; (3) the president of the senate; and (4) the senate majority leader. Because the speaker of the assembly, president of the senate, and the senate majority leaders are not parties, make sure to redact any confidential information.

### d. Form and length

The form (but not the length) of the petition and appendix are governed by the same rules as briefs, which are found at Rule 809.19(8)(b); § 809.19(8)(bm) and § 809.19(8g) as described in Chapter Four, Section IV.b.ii.2.c., above.[359] With e-filing, the petition and appendix must be filed as separate documents, each with a front cover containing the caption, and the cover should be white.[360] Both the petition and appendix "must have page numbers centered in the bottom margin using Arabic numerals with sequential numbering starting at '1' on the cover."[361]

As for length, if you use a monospaced font (like Courier New), the petition may not exceed 35 pages.[362] If you use a proportional serif font (like Times New Roman), the petition may not exceed 8,000 words.[363] The rules ask petitioners to make petitions "as short as possible."[364]

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[355] Wis. Stat. (Rule) § 809.107(6)(f).
[356] Wis. Stat. (Rule) § 809.81(8).
[357] Wis. Stat. (Rule) § 809.62(1m)(a)2; § 809.802(2).
[358] Wis. Stat. (Rule) § 809.80(2)(e).
[359] Wis. Stat. (Rule) § 809.62(4).
[360] Wis. Stat. (Rule) § 809.19(9).
[361] Wis. Stat. (Rule) § 809.19(8)(bm).
[362] Wis. Stat. (Rule) § 809.62(4).
[363] Wis. Stat. (Rule) § 809.62(4).
[364] Wis. Stat. (Rule) § 809.62(4). You would do well to apply this sound advice to any piece of persuasive writing.

As noted in the petition content list, you must include with your petition a certification that you have complied with Rule 809.19(8)(b), and (bm).[365]

### 2. Writing a persuasive petition

#### a. Statement of reasons for review

A critical but sometimes mechanically stated section of a petition for review is the statement of reasons for review, which is generally titled something like "Criteria for Review" or "Reasons for Granting Review."[366] This section should concisely place your client's legal issues in a broader legal context so the supreme court can quickly and clearly see that the case is worth their time and should set the tone for your argument.

Rule 809.62(1r) lists five "criteria" for review – situations that can show that a case is appropriate for supreme court review. These criteria are:

- A real and significant question of federal or state constitutional law is presented.[367]
- The petition for review demonstrates a need for the supreme court to consider establishing, implementing, or changing a policy within its authority.[368]
- A decision by the supreme court will help develop, clarify, or harmonize the law, *and*
    - The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation, *or*
    - The question presented is a novel one, the resolution of which will have statewide impact, *or*
    - The question presented is not factual in nature, but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.[369]
    - The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the state supreme court or other court of appeals' decisions.[370]
    - The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.[371]

Before starting to write a petition for review, try to explain in plain language, and in just a few sentences, why the supreme court should want to take your case. Ideally, this brief explanation should evoke one of the criteria listed in Rule 809.62(1r), but it

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[365] Wis. Stat. (Rule) § 809.62(4) (referring to Wis. Stat. (Rule) § 809.19(8)(d)).
[366] *See* Wis. Stat. (Rule) § 809.62(2)(c).
[367] Wis. Stat. (Rule) § 809.62(1r)(a).
[368] Wis. Stat. (Rule) § 809.62(1r)(b).
[369] Wis. Stat. (Rule) § 809.62(1r)(c).
[370] Wis. Stat. (Rule) § 809.62(1r)(d).
[371] Wis. Stat. (Rule) § 809.62(1r)(e).

need not cite to it directly. Then craft this explanation into an opening paragraph for your criteria for review section that is likely to grab a busy court commissioner's attention.

Here are a couple of examples of compelling opening paragraphs taken from real petitions for review:

- "Rapid advancement in technology is revolutionizing the way we communicate. This case is at the intersection of modern internet communication systems, fundamental First Amendment protections, and state laws governing harassment. It is appropriate for supreme court review because its decision about the application of long-standing legal principles to technological innovations will begin to build an analytical framework that can be used by courts throughout the state as new questions arise."

- "The first issue presented regards the meaning of a charge that has been 'dismissed outright.' This seemingly simple and straightforward phrase has proven difficult to define. Although this court and the court of appeals appear to recognize a distinction for sentencing purposes between a charge that is 'read-in' versus dismissed outright, what that distinction might be has been much discussed but never defined."

Remember that if none of your issues fit within the criteria listed in Rule 809.62(1r), that does not necessarily mean that there is no arguable basis for a petition. The (1r) criteria are not exclusive and you may argue other reasons that a case presents "substantial and compelling reasons for review."[372] However, you should aim for something other than "the court of appeals was wrong."

After providing the supreme court with a short, concise explanation why it should review your case, the statement of reasons for review should generally summarize the facts essential to understanding the reason for review and the legal basis of your argument. Remember, while the statement of reasons for review may be the most important section of a petition, it should be short and sweet, as short as a paragraph and no longer than a couple of pages. You can provide the court with detail in the factual and argument sections.

### b. Statement of the case

Often, your statement of the case (and, if included, the statement of facts) can be lifted from your court of appeals brief. However, you must add a description of the court of appeals' disposition of the case. In addition, if the court of appeals ignored or minimized a factual matter that you consider critically important, you may want to revise the statement in order to emphasize (or just improve your description of) the matter.

### c. Argument

Your argument can often include portions of the argument that you presented to the court of appeals. The focus, however, will be different: rather than emphasizing the reasons your client should be granted relief, you will emphasize the reasons the supreme court should grant review. While in the court of appeals you likely worked to make the answer to the question(s) presented seem clear, here it will behoove your client to

[372] Wis. Stat. (Rule) § 809.62(2)(c).

demonstrate that the question(s) presented are both unsettled and important. In addition, you will need to address the court of appeals' decision in your statement of the case and facts, as well as your argument.

## VI. Litigating an appeal accepted by the supreme court

Any time the supreme court accepts review of an SPD-appointed case, you should immediately notify the Appellate Division. If you are a private bar attorney, the Appellate Division has discretion to reappoint the case to another attorney depending on your experience and workload, as well as your desire to litigate the case in the supreme court.

If you litigate a case in the supreme court, the court sets the briefing schedule in its order granting review. This schedule is generally shorter than the one in the court of appeals and each deadline typically runs from the filing, not service, of some document. The rules regarding motions and briefs are the same as in the court of appeals (and are governed by the same statutory sections), as discussed in Chapter Four, Section IV.b.ii., with the exception that you must add a "petitioner" party designation to the caption.[373]

Note that you are strongly urged to file your brief(s) by the court's imposed deadline and not request any extensions. The supreme court disfavors extensions and does not grant them as freely as the court of appeals.

The biggest difference between litigating in the court of appeals and the supreme court is usually the oral argument. Oral argument is very rarely held in the court of appeals but is always held in the supreme court. The same book we recommend in Chapter Four, Section IV.b.iii.3., above, regarding brief-writing, is also helpful for preparing for oral argument: *Making Your Case: The Art of Persuading Judges*, by Antonin Scalia and Bryan A. Garner. We also recommend attending several oral arguments in the months or weeks leading up to your argument, to get a feel for the room, the justices, and the procedure. If you cannot make it to Madison, at a minimum, you can watch oral arguments live on the Wisconsin Eye online channel. Finally, put together a panel of other attorneys for a moot court or brainstorming session. If you are looking for volunteers, feel free to contact the Appellate Division.

[373] Wis. Stat. (Rule) § 809.19(9).

# CHAPTER FIVE:

## REPRESENTATION IN A NO-MERIT CASE

### I. Introduction

If your review of the record, conversations with your client, and factual and legal inquiries reveal no issues of arguable merit for appeal, you are presented with what this handbook calls a "no-merit case." In a no-merit case, your responsibilities, that is, the conversations that you must have with your client and the actions that you must take, are prescribed by statutory and case law. If you have not already carefully read Wis. Stat. (Rule) § 809.32, you should do so now.

Note that it is impossible to reach a no-merit conclusion simply based upon your review of the transcripts and court record. As a practical matter, because appeals in Wisconsin can involve matters outside of the record or can challenge matters of record that the client did not know or understand, you can never conclude that a case is meritless until you have fully discussed with your client all aspects of the case. As a technical matter, the no-merit statute requires that "the attorney shall discuss" with the client "all potential issues identified by the attorney and the person, and the merit of an appeal on these issues."[374] This requires a discussion, not a written exchange, and when filing a no-merit report you must certify to the court that you have had this discussion.[375]

### II. Client consultation and counseling regarding no-merit options

After you determine that a case does not present any arguably meritorious issues for appeal, you must give your client a detailed explanation of the no-merit options, as required by Rule 809.32(1)(b). You must first explain that your client has three options: (1) ask you to close the case without further action, waiving the right to direct appeal; (2) ask you to withdraw from the case so the client can appeal pro se or with the help of retained counsel; or (3) proceed with filing a no-merit report with the court of appeals.[376]

You must explain that filing a no-merit report is the default action.[377] In other words, if your client does not choose another option, you are statutorily required to file a no-merit report.[378]

You should inform your client that if they choose (actively or by default) a no-merit report, upon the client's request, you will send them a copy of the court record and transcripts within 5 days of receipt of the request.[379] If the client chooses either of the other options, upon request, you will send the materials as soon as you have closed

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[374] Wis. Stat. (Rule) § 809.32(1)(b)1.

[375] Wis. Stat. (Rule) § 809.32(1)(c).

[376] Wis. Stat. (Rule) § 809.32(1)(b)1. In explaining this, although the statute presents these as "three" options, you may choose to discuss with your client "four" options, so that you can clearly distinguish between your client's right to proceed pro se and the right to proceed with retained counsel. *Id.*

[377] Wis. Stat. (Rule) § 809.32(1)(b)2.

[378] *Id.*

[379] Wis. Stat. (Rule) § 809.32(1)(b)2. & (1)d. You should generally make and send a copy, rather than the original, because you will need your copy for drafting the report and/or supplemental report, or for taking action if the no-merit report is rejected. Private bar attorneys will be reimbursed for copy and postage costs. You may not send the client a copy of the PSI. Wis. Stat. § 972.15(4m). However, if the client needs a copy of the PSI in order to respond to your no-merit report, consider filing a motion with the court to allow them to have a copy. *See* Wis. Stat. § 972.15(4) (allowing disclosure upon authorization of the court).

the case, if not before.[380]

You must further explain the basics of the process applicable to no-merit reports, in order to help your client decide if they would like a no-merit report. At a minimum, you must explain that after you file the no-merit report, the client will have the opportunity to file a response to that report.[381] If a response is filed, you "may file a supplemental no-merit report and affidavit or affidavits containing facts outside the record, possibly including confidential information, to rebut allegations made in the [client's] response to the no-merit report."[382]

You should inform your client that the court will review the no-merit report, as well as any response filed by the client, any supplemental no merit report that you file, and the record and transcripts. If the court agrees with your no-merit conclusion, it will affirm the judgment and release you from further representation.[383] If the court disagrees with your no-merit conclusion, it will order further action or proceedings.[384]

In the process of explaining these statutorily-mandated points you should describe how each of the options would operate and the risks and benefits of each. Although these options may seem fairly straightforward to you, they can be confusing to clients, who often need help understanding the difficulties of proceeding pro se, the unusual nature of the attorney-client relationship in a no- merit appeal, and/or the effect of waiving the right to appeal.

The explanation of the mechanics of the no-merit process can be done in writing,[385] and it is advisable to put it in writing, but you should always discuss the client's no-merit options orally as well in order to answer his questions and dispel any misconceptions.

If after presenting your client with his no-merit options your client declines to have you file a no-merit report, it is important that you send the client a letter confirming that decision. This will help you avoid any misunderstanding and will provide documentation if later there is a disagreement about what decision your client made.

## III. Closing the case without action

### a. Applicable deadline

There is no specific deadline in regard to closing a case without court action and the client can choose to do this any time. Even if some court action has previously been taken, your client can choose to end the appeal.[386]

However, you should always ascertain your client's decision regarding moving forward with the appeal or ending it before the appeal deadline runs out. You should never let a deadline lapse under the assumption that your client will probably choose to

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[380] Wis. Stat. (Rule) § 809.32(1)(b)2.

[381] Wis. Stat. (Rule) § 809.32(1)(b)2. It is advisable to explain to your client that the response need not be formal; usually, it is filed in the form of a letter.

[382] Wis. Stat. (Rule) § 809.32(1)(b)2. It is advisable to explain to your client when and why a supplemental no-merit report containing confidential information might need to be filed. These matters are discussed in Chapter Five, Section V.d.iv., below.

[383] Wis. Stat. (Rule) § 809.32(3).

[384] *See* Wis. Stat. (Rule) § 809.32(3).

[385] *See State ex rel. Flores v. State*, 183 Wis. 2d 587, 614, 516 N.W.2d 362 (1994).

[386] If the case is in the court of appeals, your client would terminate the appeal by having you file a Notice of Voluntary Dismissal. *See* Wis. Stat. (Rule) § 809.18. A blank form can be found here.

close the case and, if not, you can revive the case by filing an extension motion. Any time an extension motion is warranted the motion should be filed before the deadline that is to be extended has lapsed.

### b. Discussion

A client's decision to close the case without appellate action will have the effect of waiving the right to a direct appeal. This is a significant waiver and must be one your client makes knowingly and intelligently.[387] Yet there are sound reasons for a client to choose this option, particularly if they trust your opinion that there is no non-frivolous issue that could be raised on appeal.

If your client chooses this option, you should send them a closing letter describing their decision to not appeal, the conversation(s) that led to that decision, and the fact that you are closing your client's case at their direction.[388] An example of such a closing letter is found at Appendix 5.b. In a TPR case, if your client affirmatively decides to not file a notice of appeal you must notify opposing counsel and others required to be served under § 809.107(2).[389]

If your client authorizes you to close the case without court action, they may still change their mind; you should therefore wait until after the appeal deadlines have expired before you formally close the case, file a notice of completion of representation,[390] and, if you are a private bar attorney, submit billing information to the SPD.

## IV. Withdrawing for your client to appeal pro se or with retained counsel

### a. Applicable deadline

The motion to withdraw, along with a motion to extend the time for filing the postjudgment motion or notice of appeal, must be filed by the deadline for filing a postjudgment motion or notice of appeal in order to preserve the right to appeal.

That is to say that, in a Rule 809.30 appeal, you have 60 days to file the motion from the date the last transcript is electronically accessible to you.[391] In a TPR appeal, from the service of the record or the last transcript, whichever is later, you generally have 30 days to file the motion.[392]

### b. Filing the motion to withdraw

If your client chooses to discharge you in order to appeal pro se or with the help of retained counsel, you should file a motion to withdraw from the case.[393] If a notice of appeal has not yet been filed, you must file this motion with the circuit court.[394] If a notice of appeal has been filed, you must file this motion with the court of appeals.[395] In the rare circumstance that your client is asking you to withdraw prior to the deadline for filing a petition for review in the supreme court or while you are representing your client

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[387] *State ex rel. Flores v. State*, 183 Wis. 2d 587, 617, 516 N.W.2d 362 (1994).
[388] *See id. at* 623 (describing this method of memorializing the client's decision).
[389] Wis. Stat. (Rule) § 809.107(5)(am).
[390] A sample notice of completion of representation can be found at Appendix 5.j.
[391] *See* Wis. Stat. (Rule) § 809.30(2)(h).
[392] Wis. Stat. (Rule) § 809.107(2)(bm).
[393] *See* Wis. Stat. (Rule) § 809.30(4)(a); *State v. Thornton*, 2002 WI App 294, ¶¶21-24, 259 Wis. 2d 157.
[394] Wis. Stat. (Rule) § 809.30(4)(a).
[395] Wis. Stat. (Rule) § 809.30(4)(a).

in the supreme court, you should contact the SPD Appellate Division to discuss the situation.

Whether you file the motion in the court of appeals or the circuit court, you should inform the court of your client's decision to proceed pro se or with the help of retained counsel. You should also inform the court that you have explained to your client the difficulties and disadvantages of self-representation and, that once you have withdrawn from the case, the SPD will not appoint another attorney to represent your client on appeal. A form for filing a motion to withdraw is found at Appendix 5.d.

Given that your client has a right to appeal pro se or with retained counsel of their choice, there is no need to say anything more regarding the circumstances that led to your client's decision.[396] *As an ethical matter, you generally should not say anything more and you should* never *tell the court that you have determined that the case presents no issues of arguable merit for appeal.*[397]

At the same time you file the motion to withdraw you should file a motion with the court of appeals for an extension of time for filing the postjudgment motion or notice of appeal, with the requested date either tied to the circuit court's decision on the motion to withdraw or set far enough in the future to ensure, that once the motion to withdraw is decided, your client has sufficient time to take whatever action they deem appropriate.

You must serve a copy of the motion to withdraw and motion for time on the opposing party (including, if applicable, any other parties and/or the GAL), your client, and, if you are a member of the private bar, the SPD's Appellate Division.[398]

### c. Actions after the court decides the motion to withdraw

Upon entry of the circuit court's order granting your motion to withdraw, you should promptly:

- Inform your former client (and, if applicable, newly retained counsel) of the court's decision and the deadline for filing a postconviction motion or notice of appeal.
- Send all of your case materials to your former client or, if they are represented, his new attorney unless your client has specifically asked you to do something else.
- If you are a private bar attorney, close the case and submit billing information to the SPD.

Courts usually grant motions to withdraw. Generally, the only basis for denying the motion (so long as your client confirms with the court that they actually want you to withdraw) would be a finding that your client is incompetent to proceed pro se, if it is their intent to appeal pro se.[399]

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[396] *See* Wis. Stat. (Rule) § 809.32(1)(b)1.c. (noting the defendant's right to appeal pro se); *see also* Wis Const. art. I, § 21 (regarding the right to defend oneself).

[397] *See* Wis. SCR 20:1.6; *see also State ex rel. Ford v. Holm*, 2004 WI App 22, ¶ 25, n.7, 269 Wis. 2d 810, 676 N.W.2d 500 (stating that counsel need not provide such information in a motion to withdraw).

[398] Wis. Stat. (Rule) § 809.30(4)(a). After receiving a copy of this sort of motion, the Appellate Division will submit a notice to the court as to whether it will appoint successor counsel. *Id.* As noted, except in extraordinary circumstances, the Appellate Division will not appoint successor counsel.

[399] *See* Wis. Stat. (Rule) § 809.32(1)(b)1.c. (noting the defendant's right to appeal pro se); *see also* Wis. Const. art. I, § 21 (regarding the right to defend oneself).

If you face a court order denying your motion to withdraw, you will need to consider whether there is a basis for appealing that decision. If so, and your client wants to appeal the decision, you may request a stay of the applicable appellate deadlines and proceed with an appeal of the decision denying the motion to withdraw.

If there is no basis for appealing the judge's decision, because there is no non-frivolous argument that you can make challenging the determination that your client is incompetent to appeal pro se, your duties are less clear. If you find yourself in this situation, we would urge you to contact an Appellate Division attorney manager to discuss the matter.

## V. Litigating a no-merit appeal in the court of appeals

### a. Applicable deadlines

In a no-merit appeal, you must file with the circuit court the no-merit notice of appeal by the later of: 180 days after you receive access to the last transcript or 60 days from entry of the circuit court's order determining a postjudgment motion.[400] For an example of a no-merit notice of appeal and no-merit statement on transcript, see Appendix 5.e. and Appendix 5.f.

Your statement on transcript must be filed with the circuit court "with" the notice of appeal.[401] However, the deadline for filing the no-merit report is now 14 days after the date that the record is filed in the court of appeals.[402] The service requirements are identical for these documents, with the noted exception that there will automatically be a paper party—the client—who you must continue to serve via traditional means.

If your client chooses to respond to the no-merit report, they must do so within 30 days after service of the report.[403] If you file a supplemental no-merit report, you must do so within 30 days after the response is filed.[404]

In a TPR appeal, you must file the no-merit notice of appeal within 30 days after you receive access to the last transcript.[405] You will need your client's signature in support for the no-merit notice of appeal, see Appendix 4.g. You must file a statement on transcript within 5 days after that.[406] Then, you must file the no-merit report within 15 days after the date the court record is filed with the court of appeals (which should occur within 15 days of the filing of the notice of appeal).[407]

If your TPR client responds to the no-merit report, they must do so within 10 days after service of the report.[408] If you file a supplemental no-merit report, you must do so within 10 days after receiving your client's response, although you should note that "receipt" will be via e-filing and the court of appeals will no longer transmit a paper copy to you.[409]

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[400] Wis. Stat. (Rule) § 809.32(2).
[401] Wis. Stat. (Rule) § 809.32(2).
[402] Wis. Stat. (Rule) § § 809.32(2)(d).
[403] Wis. Stat. (Rule) § 809.32(1)(e).
[404] Wis. Stat. (Rule) § 809.32(1)(f).
[405] Wis. Stat. (Rule) § 809.107(5)(a).
[406] Wis. Stat. (Rule) § 809.107(5)(d).
[407] Wis. Stat. (Rule) § 809.107(5m).
[408] Wis. Stat. (Rule) § 809.107(5m).
[409] Wis. Stat. (Rule) § 809.107(5m).

### b. Ethical note

If your client chooses to pursue a no-merit appeal, it is important to remember that you continue to represent the client unless and until the court of appeals releases you from representation. Thus, throughout the no-merit process, you have a continuing ethical responsibility to respond to communications, maintain confidentiality unless required by law to do otherwise, and otherwise represent the client's interests to the extent possible.

### c. Initiating the appeal

#### i. The no-merit notice of appeal

A notice of appeal filed in a no-merit case is substantially similar to an ordinary notice of appeal, governed by Wis. Stat. (Rule) § 809.10, as discussed in Chapter Four, Section IV.a.ii.2., above.[410] *See* Appendix 5.e. However, the notice of appeal should be labeled a "No-Merit Notice of Appeal."[411] Additionally, it must state the date when the no-merit notice of appeal is due and specify whether the deadline is calculated from the service of the last transcript or from the denial of a postjudgment motion.[412]

With a no-merit notice of appeal, you do not need to file a docketing statement, regardless of the case type.[413]

As with an ordinary notice of appeal, you must e-file the no-merit notice of appeal, along with the order appointing counsel, in the circuit court.[414] You must serve copies of these documents on your client.

In TPR cases, it is unresolved whether you must include your client's signature with the no-merit notice of appeal. A signature is required for notices of appeal in Wis. Stat. (Rule) § 809.107(5)(a), but no-merit notices of appeal are not specifically addressed. The safest course would be to include the client's signature when possible.[415] Due to the short deadlines involved in TPR cases, you should bring a notice of appeal, and also a signature page for a potential petition for review to your meeting with the client. The notice of appeal signature line can also be used for a no-merit notice of appeal. *See* Appendix 4.g.

#### ii. The statement on transcript

A statement on transcript filed in a no-merit case should contain the same information as in a regular appeal, as discussed in Chapter Four, Section IV.a.ii.4.d., above.

The statement on transcript is filed in the circuit court "with" the notice of appeal. It must also be served on your client by traditional means.

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[410] *See* Wis. Stat. (Rule) § 809.10(1) & 809.32(2).
[411] Wis. Stat. (Rule) § 809.32(2).
[412] Wis. Stat. (Rule) § 809.32(2).
[413] Wis. Stat. (Rule) § 809.10(1)(d).
[414] Wis. Stat. (Rule) § 809.10(1)(a).
[415] Wis. Stat. (Rule) § 809.107(5)(a). Due to confidentiality requirements, the client's signature should be redacted, leaving only the first and last initial of the client's name on the copies filed with the Court. For example, if the client's name is John Smith, the signature should appear J[redacted] S[redacted]. However, keep the original unredacted signature pages in the file. Additionally, include a footnote stating that "The parent's signature has been redacted in order to comply with the confidentiality requirements of cases involving children."

### d. The no-merit report

#### i. Form and required contents

Rule 809.32 specifies that the no-merit report "shall identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit." Generally, the original no-merit report need not, and should not, contain factual assertions about confidential matters outside the record.

As for the structure, Rule 809.32 does not specify the precise form that the no-merit report should take. There are, however, some format and length requirements. With respect to length, the word limit is 13,000 words for a proportional serif font and 50 pages for a monospaced font.[416] The report must also comply with the formatting requirements of Wis. Stat. (Rule) § 809.19(8)(b) and (bm). You must also include a certification that you have complied with the length requirements.[417]

Appellate Division staff attorneys use a template that substantially complies with the form specifications of Rule 809.19(8)(b), but does not include a table of contents or table of cases. Staff attorneys include a statement of issues, a statement of the case (often including a statement of facts), a modified argument section, and a conclusion.

The statement of issues may be titled something like "Statement of Issues that Might Support an Appeal" and address such issues as:

- Was the defendant's (or respondent's) plea knowing and voluntary?
- Was the evidence presented at trial sufficient to support the jury verdict?
- Was the trial procedurally defective?
- Was the sentence (or disposition) illegal, an abuse of discretion, or otherwise improper?

The statement of the case and, if separated, statement of facts, are generally the same as this section (or these sections) in an arguably meritorious appeal, as discussed in Chapter Four, Section IV.b.iii.2.b., above.

The modified argument section may be titled "Issues that Might Be Raised on Appeal and Why They Are Without Merit," or something to that effect. Its subsections should mirror the statement of issues.

Finally, the conclusion should reiterate to the court that counsel has found no arguably meritorious issues that may be raised on appeal and ask the court to relieve counsel of further representation.

#### ii. Writing the no-merit report

The purpose of a no-merit report is to inform the court that you have considered all possible appellate issues and describe for the court your basis for concluding that each possible issue is not arguable in the present case.[418]

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[416] Wis. Stat. (Rule) § 809.32(1)(a).
[417] Wis. Stat. (Rule) § 809.32(1)(c).
[418] *See* Wis. Stat. (Rule) § 809.32(1)(a).

You will have to address the sentence or disposition. You should describe the substantive law governing the ultimate sentence or disposition and the law governing the hearing and the exercise of the court's discretion. You should cite to portions of the record showing that the ultimate sentence or disposition imposed was lawful and that there would be no arguable merit to any argument that the procedure was inappropriate or that the court erroneously exercised its discretion.

In a plea case, the expectations for the no-merit report's discussion of plea procedure are also fairly clear. You should cite to law describing the circuit court's duty to conduct a colloquy regarding your client's understanding of the nature of the case and his rights and then cite to portions of the record showing that the court discharged this duty. If the plea colloquy was defective in some way but the client has informed the appellate attorney that they understood the information not conveyed at the plea hearing, such that the attorney cannot file a *Bangert* motion in good faith, there is no clear rule for ethically addressing this in a no-merit report. Some attorneys conclude that they cannot address the matter at all, unless and until the client raises it in a response to the report. Many others reference in the report an inability to allege that the client did not understand the matter at issue, without explicitly describing confidential communications.

In a plea case, once you have discussed the plea and sentencing, there is usually nothing else to address because a valid plea waives all non-jurisdictional defects. However, the court's decision on any suppression motion would be appealable, so, if there was a suppression motion litigated prior to the plea, you would need to address your determination that any appeal of the suppression issue would be frivolous.[419]

In a trial case, the court of appeals' expectations about what aspects of the trial should be addressed in a no-merit report are less clear. There is no doubt that you must address the sufficiency of the evidence and any significant issues raised by the trial attorney. Beyond that, the range of potential, but unpreserved, issues that would have no arguable merit is nearly limitless. While some appellate attorneys may simply inform the court of appeals that they have investigated the case and found no arguably meritorious, but unpreserved, issues, the court of appeals has occasionally indicated that it wants a more specific accounting. Accordingly, it may be wise to enumerate categories of common claims, noting that you found none that would present an arguable basis for appeal, including defects in the jury selection process, errors related to the opening and closing arguments, the admissibility of material evidence, etc., and include citations to the record.

### iii. Filing and service of the no-merit report

The court of appeals will only accept a no-merit report for filing if the attorney includes two certifications: the no-merit certification required by Rule 809.32(1)(c) and the length certification discussed above.

There is no requirement that a no-merit report contain an appendix or an appendix certification.[420] In cases presenting discrete potential issues that could only arise in one or two hearings, like plea cases or sentencing-after-revocation-of-probation cases, the court of appeals would surely find it helpful if you append your report with the transcript of the relevant hearing or portion of hearing. In a trial case, theoretically,

[419] *See* Wis. Stat. §§ 971.31(10) & 938.297(8) (providing that an order denying a motion to suppress evidence may be appealed even after the entry of a guilty or no-contest plea).
[420] See Wis. Stat. (Rule) §§ 809.107(5m) & 809.32(1)(a).

any portion of the record could reveal an arguable issue, which makes it difficult or impossible to compile a reasonable appendix.

You must e-file the no-merit report, including the necessary certifications, with the clerk of the court of appeals by the applicable deadline.[421] You must also serve the report on your client.[422] A sample letter to the Client to accompany the no-merit report can be found at Appendix 5.g.

As for the court records and transcripts, in a TPR case, you must always serve copies of these on your client and should do so at the same time you serve the report, if not before.[423] In any other kind of case, you are to serve copies of these materials on your client upon their request – and within 5 days of that request.[424]

- Practice tip. Some attorneys find it easier to make transmittal of the record and transcripts to their clients at the time the no-merit reports are filed to be the default option. This is fine, so long as you tell your client ahead of time that you will send the record and transcripts when you send the no-merit report unless the client asks you to send it sooner than that or asks that you not to send it at all. Note that clients convicted of particularly sensitive crimes, like sexual assault of a child, will often prefer you *don't* send them the record; having case documents with them in prison can put them at risk.

You must notify the court of appeals that you have served your client with the report and provide the court of appeals with the client's mailing address.[425] Whenever you serve your client with the court record and transcripts, you must also notify the court of appeals that you have done so.[426] These notifications may be given via letter to the clerk of the court of appeals.[427] An example of this type of letter is found at Appendix 5.h.

#### iv. Addressing a client response to your no-merit report

Your client is not required to file a response to your no-merit report and, in practice, many clients do not respond. When a client does respond, the court of appeals will make the response available through the e-filing system; the court will no longer send you a copy.[428]

Prior to filing the original no-merit report, you should have counseled your client that, if they respond to the no-merit report, you could file a supplemental no-merit report and affidavits rebutting the client's response "containing facts outside the record, possibly including confidential information, to rebut allegations made in the person's response to the no-merit report."[429]

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[421] Wis. Stat. (Rule) § 809.32(1)(a).
[422] Wis. Stat. (Rule) § 809.32(1)(d) & (2).
[423] Wis. Stat. (Rule) § 809.107(5m).
[424] Wis. Stat. (Rule) § 809.32(1)(d).
[425] Wis. Stat. (Rule) § 809.32(1)(d).
[426] Wis. Stat. (Rule) § 809.32(1)(d).
[427] See Wis. Stat. (Rule) § 809.32(1)(d).
[428] Wis. Stat. (Rule) § 809.32(1)(e).
[429] *See* Wis. Stat. (Rule) § 809.32(1)(b)2.

This does not mean that you are required to file a supplemental no-merit report or other document with the court of appeals any time a client files a response to your original no-merit report. The provision for a supplemental no-merit report addresses the attorney's potential need to "rebut allegations" of "facts outside the record."[430] This is based on the attorney's ethical duty of candor toward the tribunal.[431]

Thus, if your client has alleged a material factual matter in his response to the no-merit report that you know to be false, you may have to file a supplemental report. For example, if your criminal client has alleged that trial counsel provided ineffective assistance by neglecting to present evidence of an alibi, namely that the client was working at the time of the crime, and you investigated this matter and found that your client was *not* working at the time of the crime, you would probably need to reveal this information to the court.

However, you would not need to respond if your client has alleged a factual matter that is irrelevant to any legal question. If your client makes only legal arguments, again, you would not need to respond. You are not your client's legal opponent, you are his attorney. Therefore, in many cases where the client responds, there may be no need for you to file anything else.

Where you have determined that you do need to file a supplemental no- merit report to rebut a factual allegation, file and serve it just as you did the original no-merit report.[432] You do not need to include an additional no-merit certification, however, you should electronically file the supplemental report and include an electronic filing certification with the supplemental report.[433]

Where you have determined that you will not file a supplemental report, you do not need to take any additional action. As a courtesy, however, you may want to inform the court of appeals, by letter, that you do not intend to file a supplemental no-merit report unless the court orders you to do so. You should also serve this letter on opposing counsel (including, if applicable, any other parties and/or the GAL) and your client.

### a. Post-no-merit-decision actions

#### i. Final steps where the court of appeals accepts the no- merit report

If the court of appeals accepts your no-merit report, it will release you from further representation. In this circumstance, you will have two remaining obligations: (1) notifying your client of the court of appeals' decision—*see* Appendix 5.i.; and (2) notifying your client of the right to petition the state supreme court for review.[434] It is good practice to inform your client of the specific deadline for filing a petition for review and send the client a copy of Rule 809.62.

Then, you may close the case and private bar attorneys may submit billing information.

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[430] Wis. Stat. (Rule) § 809.32(1)(f).
[431] *See* Wis. SCR 20:3.3. Under this rule, if your client has offered a tribunal material evidence and you know of its falsity, you must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." *Id.*
[432] Wis. Stat. (Rule) § 809.32(1)(f).
[433] Wis. Stat. (Rule) § 809.32(1)(f).
[434] Wis. Stat. (Rule) § 809.32(3).

#### ii. Next steps where the court of appeals rejects the no-merit report

In the event that the court of appeals rejects the no-merit report, your obligations will depend on the particulars of the court of appeals' order. Often, the court of appeals will identify an arguably meritorious issue and instruct you to consult with the client about whether the client would like to pursue it and report back. Sometimes it requires other actions. If you are in this situation and have any question as to how to proceed, please do not hesitate to call the Appellate Division and an attorney manager can help you determine what to do next.

As a matter of policy, where the court of appeals has rejected a no-merit report, the Appellate Division will in some cases entertain a client's request for the appointment of new counsel. Therefore, if your client asks you whether they can have another attorney handle the appeal, you should instruct them to contact our office or you can contact our office yourself. We will decide as to whether to appoint new counsel on a case-by-case basis. If the court rejected a no-merit report because of a relatively trivial matter (e.g., your failure to challenge a DNA surcharge), it is unlikely the SPD would grant a request for appointment of new counsel. However, when an attorney has missed a critical issue such that the client can no longer have confidence in his attorney's ability to effectively represent them, the SPD may appoint new counsel.

## VI. Filing a no-merit petition for review in the state supreme court

### a. Applicable deadline

The deadline for filing a no-merit petition for review is the same as the deadline for filing an ordinary petition for review: 30 days after the date on which the court of appeals issued its decision.[435] *Just as with an ordinary petition for review, this deadline is jurisdictional and cannot be extended.*[436]

### b. When this procedure is used

The no-merit procedure in the state supreme court is infrequently used. It applies to a case in which the attorney previously determined that there was an arguably meritorious issue, but, after the court of appeals denied relief, decides that there is no arguably meritorious issue for the state supreme court. Given that the court of appeals does not make factual findings, the only thing that will be different about a case after the court of appeals issues its decision will be the existence of the court of appeals' adverse legal determination.

Therefore, some attorneys take the position that a no-merit petition for review is never appropriate. Even if the case does not present an issue that would arguably meet one of the statutory criteria for review, as discussed in Chapter Four, Section V.b.iv.2.a., above, those criteria are not exhaustive.[437]

Most appellate attorneys find that no-merit petitions for review are occasionally appropriate. For instance, in a case in which the attorney argued a highly fact-specific, and perhaps minimally arguable, issue to the court of appeals, the attorney may find it

[435] Wis. Stat. (Rule) § 809.32(4)(b). If a motion for reconsideration is filed in the court of appeals, the rules also remain the same. See Wis. Stat. (Rule) § 809.32(4)(b) & (5) & 808.10.
[436] *See State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶12, 247 Wis. 2d 1013, 1020.
[437] Wis. Stat. (Rule) § 809.62(1r).

impossible to argue in good faith that there is any "special and important" reason for review.[438] Or an attorney may simply conclude, after reading the court of appeals' decision, that the issue was never arguable in the first place.

An attorney should carefully consider the appropriateness of filing a no- merit petition for review in any case. But, if after consideration the attorney determines that the no-merit procedure is the only way to ethically protect the client's right to petition for review, they should not hesitate to use it.

### c. Form and contents of the no-merit petition for review

A no-merit petition for review is quite different from a no-merit report filed with the court of appeals. The caption informs the supreme court that you have determined the case presents no non-frivolous basis for supreme court review but you do not actually explain to the court the basis for your determination that there is no basis for review.[439]

The no-merit petition for review has only two sections: a statement of the case and an appendix.[440] In drafting the statement of the case, you can usually copy the statement of the case from your court of appeals brief (assuming that statement was complete) and add a description of the court of appeals' opinion.[441] The appendix requirement is identical to the requirement applicable to an ordinary petition for review, as discussed in Chapter Four, Section V.b.iv.1.b., above.[442]

This filing is intended to preserve the client's right to take action to ask the supreme court for review. As discussed below, the client is responsible for filing all of the other required contents of an ordinary petition for review.[443]

### d. Filing and service of the no-merit petition for review

You should file and serve the no-merit petition for review in the same manner as an ordinary petition for review, as discussed in Chapter Four, Section V.b.iv.1.c., above.

### e. Arranging for your client to file a supplemental petition for review

Unlike with a no-merit appeal to the court of appeals, when you file a no- merit petition for review, your client *must* file a supplemental petition in order for it to be considered. The attorney's portion of the no-merit petition for review and the client's supplemental portion are due on the same day.[444]

This procedure is challenging. Once the court of appeals issues its decision, you will need to consult with your client about his options for seeking review in the supreme court. By the time you determine that you will have to file a no-merit petition for review, it may be difficult for both you and your client to file the parts of the petition that you are each responsible for on time.

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[438] Wis. Stat. (Rule) § 809.62(1r); see also Wis. Stat. (Rule) § 809.62(2)(c) (noting that the petition must explain "substantial and compelling reasons for review").
[439] *See* Wis. Stat. (Rule) § 809.32(4)(a).
[440] Wis. Stat. (Rule) § 809.32(4)(a) & 809.62(2)(d) & (2)(f).
[441] *See* Wis. Stat. (Rule) § 809.62(2)(d).
[442] *See* Wis. Stat. (Rule) § 809.62(2)(f).
[443] Wis. Stat. (Rule) § 809.32(4)(a).
[444] Wis. Stat. (Rule) § 809.32(4)(b).

The most critical thing is that you file *your* portion of the no-merit petition for review on time. This will comply with the jurisdictional deadline and protect your client's ability to provide the supreme court with reasons for reviewing his case. If you file your portion by the deadline but believe that your client will need additional time to file the supplemental petition for review, you may file a motion to extend the time for your client to file the supplemental petition.

The statute does not specify the procedure for transmitting to the client the record and transcripts. It is good practice, however, to send your client copies of the court record and transcripts when you send your portion of the no-merit petition for review, if not earlier, unless the client does not want them.

### f. Following up on the supreme court's decision on the no-merit petition

If the supreme court denies review, your client's direct appeal is concluded and you are relieved of further representation. If the supreme court accepts review of your client's case upon a no-merit petition for review, immediately notify the Appellate Division. We will likely assign new counsel.

Either way, once you are done, you can close the case and, if you are a private bar attorney, submit billing information to the SPD.

# APPENDIX CONTENTS

**Appendix to Chapter One**



**Appendix to Chapter Two**



**Appendix to Chapter Three**

**Appendix to Chapter Four**



**Appendix to Chapter Five**

# 809.30 Appellate Time Table

| For criminal appeals and those under ch. 48 (except TPR), 51, 55, 938, and 980. | | |
|---|---|---|
| **BETWEEN** | **AND** | **TIME** |
| Sentencing or final adjudication | Filing of notice of intent to seek postconviction or postdisposition relief (NOI) | **20 days**<br>809.30(2)(b) |
| Filing of NOI | Clerk of court's transmission of the NOI, judgment, and court reporter list to SPD, or to unrepresented person or retained counsel | **5 days**<br>809.30(2)(c) |
| SPD's receipt of materials from clerk of circuit court | SPD's appointment of counsel and request for transcripts and court record | **30 days** (if indigency does not need to be determined)<br><br>**or 50 days** (if indigency must be determined or re-determined)<br>809.30(2)(e) |
| Filing of NOI | Retained counsel or unrepresented person's request for transcripts and court record | **30 days**<br><br>**or 90 days** (if denied SPD representation)<br>809.30(2)(f) |
| Request for transcripts and court record | Service of transcripts and court record on appellant or counsel | **60 days**<br><br>**or 20 days** (for service of transcript of post-judgment hearing, after hearing on post-judgment motion)<br>809.30(2)(g) |
| Service of later of: last transcript or court record | Filing of notice of appeal (and, in ch. 48, 51, 55 & 938 cases, a docketing statement)<br>*OR*<br>Filing of post-judgment motion (PCM) | **60 days**<br><br>809.30(2)(h)&(j);<br>809.10(1) |
| Filing of PCM | Entry of order determining PCM | **60 days**<br>809.30(2)(i) |
| Entry of order determining PCM | Filing of notice of appeal (and, in ch. 48, 51, 55 & 938 cases, a docketing statement) | **20 days**<br>809.30(2)(j) |

| | | |
|---|---|---|
| Service of later of: last transcript or court record | Filing of no-merit notice of appeal and no-merit report | **180 days**<br>**or 60 days** after entry of order determining PCM, whichever is later<br>809.32(2) |
| Transmission of record from circuit court to court of appeals for no-merit report | Filing of no-merit report | 14 days after filing of record in COA<br>809.32(2)(d) |
| Filing of notice of appeal | Filing of statement on transcript and arranging for service of transcripts | **14 days**<br>809.11(4) |
| Filing of notice of appeal | Transmission of record from circuit court to court of appeals (COA) | **40 days**<br>809.30(2)(k) |
| Filing of record in COA | Filing of appellant's brief | **40 days**<br>809.19(1) |
| Filing of appellant's brief | Filing of respondent's brief | **30 days** after the later of: service of appellant's brief, filing of appellant's brief, or filing of record in COA<br>809.19(3)(a); 801.15(5) |
| Filing of respondent's brief | Filing of reply brief | **15 days** after the later of: service of respondent's brief or filing of that brief<br>809.19(4); 801.15(5) |
| Filing of reply brief | COA decision | **Varies depending on court's schedule** |
| COA decision | Filing of motion to reconsider<br>* Note that no extensions of this deadline are permitted * | **20 days**<br>809.24(1) |
| COA decision | Filing of petition for review or no-merit petition for review<br>* Note that no extensions of this deadline are permitted * | **30 days** (note that if a motion to reconsider was timely filed, the 30-day deadline runs from the date the COA denies the motion or issues an amended decision)<br>809.62(1m); 808.10(2) |
| Filing of petition for review | Filing of response to petition for review | **14 days**<br>(plus 3 days for mailed service)<br>809.62(3); 801.15(5) |
| Filing of response to petition for review | Decision of Supreme Court on granting review | **Varies depending on court's schedule** |

**Appendix 1.b.**

# TPR Appellate Time Table

Termination of parental rights cases are appealed under 809.107.

| BETWEEN | AND | TIME |
|---|---|---|
| Filing of the dispositional order or other final, appealable order | Filing of the notice of intent to pursue postdisposition or appellate relief (NOI)<br><br>***The parent must sign the NOI** | **30 days**<br>809.107(2)(bm) |
| Filing of NOI | Clerk of court's transmission of the NOI, judgment, and court reporter list to SPD Intake, or to unrepresented person or retained counsel | **5 days**<br>809.107(3) |
| SPD's receipt of materials from Clerk of Court | SPD's appointment of counsel and request for transcripts and court record | **15 days**<br>809.107(4)(a) |
| Filing of NOI | Retained counsel or unrepresented person's request for transcripts and court record | **15 days**<br>**or 30 days** (if denied SPD representation)<br>809.107(4)(b) |
| Request for transcripts and court record | Service of transcripts and court record on appellant or counsel | **30 days**<br>809.107(4m) |
| Service of later of: last transcript or court record | Filing of notice of appeal<br>***The parent must sign the NOA** | **30 days**<br>(plus 3 days for mailed service)<br>809.107(5)(a); 801.15(5) |
| Service of later of: last transcript or court record | Service of notice of abandonment of appeal on other parties | **30 days**<br>(plus 3 days for mailed service)<br>809.107(5)(am); 801.15(5) |
| Filing of notice of appeal | Filing of statement on transcript and arranging for service of transcripts on other parties | **5 days**<br>809.107(5)(c); 809.107(5)(d) |
| Filing of notice of appeal | Transmission of record from circuit court to court of appeals (COA) | **15 days**<br>809.107(5)(b) |
| Filing of record in COA | Filing of No Merit report | **15 days**<br>809.107(5m) |
| Filing of record in COA | Filing of motion for remand for post-judgment fact finding<br>***Affidavit required** | **15 days**<br>809.107(6)(a); 809.107(6)(am) |
| COA order granting remand | Filing of postdisposition motion and subsequent postdisposition proceedings | **Varies-** set by court of appeals in order remanding the case.<br>809.107(6) (am) |

| | | |
|---|---|---|
| Entry of circuit court order determining postdisposition motion | Return of record from circuit court to COA | **Varies** – set by court of appeals in order remanding the case. |
| Filing of record or return of record to COA | Filing of appellant's brief | **15 days**<br>809.107(6)(a) |
| Filing of appellant's brief | Filing of respondent's brief | **10 days** after service of the appellant's brief<br>809.107(6)(b); 801.15(5) |
| Filing of respondent's brief | Filing of reply brief | **10 days** after service of the respondent's brief<br>809.107(6)(c); 801.15(5) |
| Filing of reply brief | COA decision | **30 days**<br>809.107(6)(e)<br>*COA may extend on own motion |
| COA decision | Filing of petition for review<br>*No motion for reconsideration permitted (809.24)<br>* No extensions of this deadline permitted *<br>***The parent must sign the PFR** | **30 days**<br>809.107(6)(f) |
| Filing of petition for review | Filing of response to petition for review | **14 days**<br>(plus 3 days for mailed service)<br>809.62(3); 801.15(5) |

# Civil Appeal Time Table

| For final orders that must be appealed under civil rules, including those arising out of habeas corpus, certiorari, § 974.06, and summary contempt proceedings | | |
|---|---|---|
| **BETWEEN** | **AND** | **TIME** |
| Entry of judgment or other final, appealable order | Filing of notice of appeal and docketing statement<br><br>* Note that no extensions of this deadline are permitted * | **90 days**<br><br>**or 45 days** (if written notice of entry of judgment filed under 808.06); 808.04(1); 809.10 |
| Filing of notice of appeal and docketing statement | Filing of statement on transcript (SOT) and ordering of transcripts | **10 days**<br>809.11(4); 809.16(1) |
| Ordering of transcripts | Filing of transcripts | **60 days**<br>809.16(3) |
| Filing of transcripts or, if the SOT noted that no transcripts were necessary for the appeal, filing of the SOT | Transmission of record from circuit court to court of appeals (COA) | **20 days** (but no more than 90 days after notice of appeal unless enlarged)<br>809.15(4) |
| Filing of record in COA | Filing of appellant's brief | **40 days**<br>809.19(1) |
| Filing of appellant's brief | Filing of respondent's brief | **30 days** after the later of: service of appellant's brief, filing of appellant's brief, or filing of record in COA<br>809.19(3)(a); 801.15(5) |
| Filing of respondent's brief | Filing of reply brief | **15 days** after the later of: service of respondent's brief or filing of respondent's brief<br>809.19(4); 801.15(5) |
| Filing of reply brief | COA decision | **Varies depending on court's schedule** |
| COA decision | Filing motion to reconsider<br><br>* Note that no extensions of this deadline are permitted * | **20 days**<br>809.24(1) |
| COA decision | Filing of petition for review<br><br>* Note that no extensions of this deadline are permitted * | **30 days** (unless a motion to reconsider was timely filed, in which case the 30-day deadline begins to run on the date the COA denies the motion or issues an amended decision)<br>809.62(1m); 808.10(2). |
| Filing of petition for review | Filing of response to petition for review | **14 days**<br>809.62(3); 801.15(5) |

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2024XX0000000 – CR

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STATE OF WISCONSIN,

Plaintiff,

v. Dane County
Case No. 24-CF-000

JOHN DOE,

Defendant.

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**MOTION TO EXTEND THE TIME FOR FILING A POSTCONVICTION MOTION OR NOTICE OF APPEAL**

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The defendant, John Doe, by undersigned counsel, moves the court pursuant to Wis. Stat. Rule 809.82(2)(a) to extend the time for filing a postconviction motion or notice of appeal under Wis. Stat. Rule 809.30(2)(h) by 60 days, until July 8, 2024. The grounds for this motion are as follows:

1. On April 10, 2023, John Doe was convicted of Disorderly Conduct. The Dane County Circuit Court, the Honorable John Public presiding, sentenced Mr. Doe to 90 days in jail.

2. The defendant filed a timely notice of intent to pursue postconviction relief, after which undersigned counsel was appointed to represent them on appeal. On March 8, 2024, counsel received access to the last transcript. Therefore, counsel has calculated the present deadline for filing a postconviction motion or notice of appeal as May 7, 2024. See Wis. Stat. Rule 809.30(2)(h) & 801.15(5).

3. Undersigned counsel is unable to meet this deadline because . . .

*[Here, describe with particularity why you need more time, taking care to avoid revealing confidential information that is not necessary to the motion. Common reasons include needing additional time to investigate matters outside of the record or consult with your client regarding appellate options, or your client needing additional time to decide how to proceed on appeal.]*

FOR THE REASONS STATED, undersigned counsel, on behalf of Mr. Doe, respectfully requests that this court find that good cause exists to extend the time for filing a postconviction motion or notice of appeal until July 8, 2024.

Dated this 7th day of May, 2024.

Respectfully submitted,

*Electronically signed by Jane Smith*
JANE SMITH
Attorney at Law
State Bar No. 123456

123 Main Street
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000-000-000
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Attorney for John Doe

cc: Jeff Okazaki
Clerk of Circuit Court

Ismael Ozanne
District Attorney

Criminal Appeals Unit
Assistant Attorney General

John Doe
Defendant

# Wisconsin State Public Defender (SPD)
# MINIMUM ATTORNEY PERFORMANCE STANDARDS
# APPELLATE DIVISION

Public Defender staff and appointed private bar attorneys are expected to meet the following minimum performance standards in postconviction and appellate cases. The attorney shall:

1. Provide zealous, effective and high-quality representation to the client at all stages of the appointed case.
2. Know to a reasonably proficient standard all relevant Wisconsin substantive law and procedure, be familiar with federal law and procedure, and keep abreast of developments in substantive and procedural law.
3. Comply in all respects with the Rules of Appellate Procedure; Wis. Administrative Code ch. PD, other rules, laws, and statutes relevant to the case; the Rules of Professional Conduct for Attorneys and SPD Policies & Procedures.
4. Interview the client to determine the client's position or goals in the appeal and to detect and explore issues or concerns not reflected in the record. The attorney is expected to speak personally with the client. The attorney shall be available for written and telephone consultation with the client.
5. Provide the client with general information regarding the process and procedures which will be undertaken. Keep the client informed of all significant developments in the client's case. Provide the client with a copy of each substantive document filed in the case by all parties (prosecution, defense, guardian, amicus, etc.), except when not permitted by confidentiality or court rules.
6. Address issues of bail (especially for the client with a short sentence) or release pending appeal (especially in ch. 48, 51, 55 and 938 cases), jail credit and restitution, and refer such matters to the trial attorney when appropriate.
7. Thoroughly review the complete circuit court record, all relevant transcripts and the presentence investigation report to identify issues of arguable merit. When warranted, counsel shall also thoroughly review the trial attorney's file, exhibits, discovery materials or other records; consult with the trial attorney; and investigate alleged facts or potential issues outside the record.
8. Request and, if approved, utilize experts, investigators and interpreters when appropriate.
9. Discuss with the client the merits and the strategy considerations - which include both the potential risks and benefits - of pursuing all identified issues. While it is the client's decision to decide whether to appeal and what remedy to seek, it is counsel's obligation to

determine which issues have merit and the manner in which they will be pursued. Counsel, consistent with *Jones v. Barnes*, 463 U.S. 745 (1983), need not raise every non- frivolous argument and may sift and winnow out weaker issues for strategic advocacy purposes. Counsel must also consider that counsel's failure to raise an issue on direct appeal may prevent the client from raising the issue in a subsequent s. 974.06 collateral review proceeding, absent sufficient reason, consistent with *State v. Escalona-Naranjo,* 185 Wis. 2d 168, 517 N.W.2d 157 (1994). If the client insists on pursuing a meritless issue or one that the attorney has winnowed out consistent with *Jones v. Barnes*, the attorney shall fully inform the client of the options (to proceed as counsel recommends, *pro se*, or with privately retained counsel) and the consequences of each option.

10. If the attorney is of the opinion that a case contains no issue of arguable merit, communicate that decision to the client before filing a no-merit notice of appeal or no- merit brief. The attorney must inform the client of any right to a no merit report under the statutes and laws of this state. The attorney must inform the client of the client's rights and attorney's obligations under Wis. Stat. Rules 809.107 (5m) or 809.32. The attorney must inform the client, consistent with *State ex rel. Flores v. State*, 183 Wis. 2d 587, 516 N.W.2d 362 (1994), of the client's options (to have counsel file the no-merit report, to discharge counsel and proceed *pro se* or with privately retained counsel, or to have counsel close the case with no court action) and the possible consequences of each option, including the disadvantages of proceeding without counsel. The attorney must document this exchange and send a letter to the client confirming the client's choice.

11. When filing any motion, conform to the applicable local court rules and practice procedures. Postconviction or postjudgment motions should contain carefully drafted nonconclusory factual allegations and appropriate citations to the record and law warranting relief. It is the attorney's responsibility to seek extensions for the circuit court to decide motions where appropriate. The attorney shall ensure entry of a written order disposing of the motion.

12. When filing a brief, conform to the applicable rules of the court in which the brief is being filed. All briefs shall have a professional, neat appearance free of typographical errors or misspellings. Briefs must adequately and accurately state the facts of the case and contain complete and accurate record citations. Briefs shall make appropriate use of legal authority referenced by a consistent method of citation that conforms to court rules or, where no rule exists, the *Harvard Citator*. Briefs shall utilize federal and foreign jurisdiction cases and non-case reference materials such as law reviews, treatises, and scientific works where appropriate.

13. Inform the client of his or her rights and the attorney's obligations in regard to proceeding to the next appellate court level and take steps to ensure that such rights as fall within the scope of the attorney's

appointment are not procedurally defaulted.

14. Respond in a prompt and forthright manner to all inquiries and requests for information from the client, the parties, opposing counsel, the SPD, the court, the clerk of court, and any successor attorney.

15. Maintain a complete up-to-date case file for every case. The file shall contain, at minimum, all correspondence, including a closing letter or memo; copies of all documents filed; proof of service for all transcripts, court records or other papers that trigger a time limit; copies of all court orders or decisions; notations in summary form as to all action taken, advice given, and telephone and in-person communications; a record of documents provided to the client; and a case activity log or voucher that documents the attorney's time spent on the case.

16. At the termination of representation, inform the client in writing of the reason for closing the file and any options for further action the client may have on direct appeal. If counsel cannot contact the client via mail, the closing information and the reason why the closing letter was not sent should be recorded in a memo to the file.

17. When requested at the termination of representation, promptly deliver to the client or the client's successor attorney the full contents of the client's case file. Note that, pursuant to Wis. Stat §972.15 (4) and (4m), the attorney may forward the attorney's copy of the presentence investigation report to a successor attorney, but may not forward it to the client without prior authorization from the circuit court.

18. Promptly close the file upon completion of representation and submit case closing documents. Retain the client file consistent with the Rules of Professional Conduct for Attorneys and SPD Policy.

19. Cooperate with any successor attorney in the case.

October 2002
Revised October 2006, February 2014

# BASIC PLEA CHECKLIST

A. Plea agreement

   a. Meeting of the minds?

   b. Illusory or premised on illegal deal?

B. Plea colloquy

   a. Court considered the defendant's characteristics

      i. Age/education

      ii. Alcohol/drugs

      iii. General comprehension

   b. Defendant understood essential elements of the crime(s)

   c. Defendant understood range of punishments

   d. Court explained that it was not bound by plea agreement

   e. Defendant verified that there had been no promises or threats (other than the plea agreement described on the record)

   f. Defendant understood rights waived by plea

      i. Jury trial

      ii. Unanimous verdict

      iii. Proof beyond reasonable doubt

      iv. Confront/call witnesses

      v. Self-incrimination

   g. Court gave immigration warning

   h. Court found a factual basis (and, if Alford plea, strong evidence of guilt)

C. Defendant had the assistance of counsel

   a. Counsel effectively represented the defendant leading up to the plea decision

   b. Counsel correctly advised the defendant of consequences of plea, including weighty collateral consequences like immigration and sex offender registration

D. Any other concerns apparent from the record or raised by the defendant?

**Appendix 2.b.**

## PLEA CHECKLIST: APPELLATE REVIEW OF PLEA COLLOQUY/PLEA AGREEMENT

Client: _____ County/Case No(s): _____

Judge: _____ Plea Hrg. Date: _____

Plea Agreement:_____

_____

**Plea Colloquy**

_____ Court explains charges[1]:

_____

_____ Court states maximum penalty[2]:

_____

_____ Court ensures plea agreement is understood.

_____ Court advises it is not bound by plea agreement or any sentencing recommendations and may impose up to the maximum penalty.[3]

_____ Court ensures no threats or promises were made other than the terms of the plea agreement.[4]

_____ Court advises that conviction may have immigration consequences for non-citizens.[5]

_____ Court determines defendant had assistance of counsel, or knowingly waived right to counsel.[6]

---

[1] Wis. Stat. §971.08(1)(a) requires the court to ("determine that the plea is made…with the understanding of the nature of the charge and the potential punishment if convicted"); *State v. Brown*, 2006 WI 100, ¶29, 293 Wis. 2d 594, 716 N.W.2d 906 (stating that a "plea will not be voluntary unless the defendant has a full understanding of the charges against him"); *State v. Bangert*, 131 Wis. 2d 246, 268, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) ("Whether the trial court communicates the elements of the crime at the plea hearing or…refers to the document or portion of the record predating the plea hearing, the operative time period for determining the defendant's understanding of the charge remains the plea hearing itself"); *State v. Howell*, 2007 WI 75, ¶55, 301 Wis. 2d 350, 734 N.W.2d 48 (finding that the failure of the circuit court to ensure the defendant understood party-to-a-crime liability during plea colloquy provided grounds for plea withdrawal).

[2] *Brown*, 2006 WI 100, ¶35, (finding that the court must "[e]nsure the defendant's understanding of the crime with which he is charged and the range of punishments to which he is subjecting himself to by entering the plea"). *But see State v. Cross,* 2010 WI 70, ¶4, 326 Wis. 2d 492, 786 N.W.2d 64 (holding that where the circuit court had informed the defendant of a maximum sentence that was "higher, but not substantially higher, than that authorized by law," there had been no *Bangert* error), and *State v. Taylor*, 2013 WI 34, ¶¶1-9, 347 Wis. 2d 30, 829 N.W.2d 482 (involving a misstatement of the maximum sentence that was lower than the applicable maximum).

[3] *Brown,* 2006 WI 100, ¶35 (stating that, at the plea colloquy, the court must "[e]stablish personally that the defendant understandings that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement"); *see also State v. Hampton,* 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14 ("in taking plea of guilty or no contest from a criminal defendant, the circuit court must advise the defendant personally on the record that the court is not bound by the plea agreement and ascertain whether the defendant understands that information").

[4] *Brown*, 2006 WI 100, ¶35 (holding that the court must "[a]scertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney").

[5] Wis. Stat. §971.08(1)(c); *Padilla v. Kentucky*, 559 U.S. 356 371 (2010) ("It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation resulting from a guilty plea" and the failure to do so amounts to deficient performance).

[6] *State v. Klessig*, 211 Wis. 2d 195, 203, 564 N.W.2d 716 (1997) (holding that, before a defendant can proceed pro se, the circuit court must ensure that he is knowingly and voluntarily waiving his right to counsel and that he is competent to proceed pro se); *State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996) (noting that a defendant may establish a manifest injustice by showing that counsel's conduct or advice was objectively unreasonable and that, but for counsel's error, the defendant would not have entered a plea)

_____ Court determines defendant understands that by entering a plea, the defendant is waiving constitutional rights:[7]

_____ Right to testify
_____ Right to remain silent/right against self-incrimination;
_____ Right to confront state's witnesses and cross-examine them;
_____ Right to compel witness testimony and present evidence;
_____ Right to jury trial and to 12-person unanimous verdict;
_____ Right to hold state to their burden of proving beyond a reasonable doubt each and every element of the charged offense(s).

_____ Court determines factual basis exists for plea:[8]

_____ Client agrees factual basis exists;
_____ Defense counsel stipulates to adequate factual basis (if an *Alford*[9] plea, "strong proof of guilt" exists).

_____ Court determines that the plea is knowing, intelligent and voluntary.[10]

_____ Court determines extent of defendant's education and general comprehension;
_____ Court determines defendant is not under the influence of any drugs or alcohol, or taking medication that would interfere with ability to understand proceedings.

_____ Client enters a plea to each charge verbally, "guilty" or "no contest."

**Plea Questionnaire/Waiver of Rights Form**

_____ Signed and dated by client and counsel.

_____ Specifies correct offense(s).

_____ Enumerates elements of the offense(s) (or includes attached jury instructions).

_____ Specifies correct maximum penalty (and mandatory/presumptive minimum(s), if applicable).

_____ Accurately states plea agreement.

_____ Circuit court uses plea form as a tool, not as replacement for plea colloquy with client.[11]

[7] *Brown,* 2006 WI 100, ¶35, (holding that the court must "[i]nform the defendant of the constitutional rights he waives by entering a plea"); *but see State v. Moederndorfer,* 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987) (finding that it was sufficient for the court to inquire about the waiver of constitutional rights enumerated in the plea questionnaire without going over each individual right).

[8] Wis. Stat. §971.08(1)(b); *State v. Lackshire,* 2007 WI 74, ¶53, 301 Wis. 2d 418, 734 N.W.2d 23 (finding that the colloquy was defective where the circuit court failed to sufficiently inquire into the factual basis for the plea and there was a question as to the factual basis); *but see Spinella v. State,* 85 Wis. 2d 494, 499, 271 N.W.2d 91 (1978) (stating that where there is a negotiated pela, "the trial court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea").

[9] *State v. Smith*, 202 Wis. 2d 21, 23, 549 N.W.2d 232 (1996) (noting that, in order to accept an *Alford* plea, the court must find strong proof of guilt).

[10] *Brown*, *Id.* (holding the court must "[d]etermine the extent of the defendant's education and general comprehension" in order to assess his ability to understand the issues at the hearing.

[11] *See State v. Cajujuan Pegeese*, 2019 WI 60, ¶36, 387 Wis. 2d 119, 928 N.W.2d 590.

# BASIC SENTENCING CHECKLIST

A. Sentence imposed

B. State recommendation
   a. Consistent w/ plea agreement?

C. Defense recommendation

D. Total exposure

   a. Without plea

   b. With plea

E. Sentence hearing

   a. Court exercised discretion

      i. Protection of the public

      ii. Gravity of the offense

      iii. Character of the offender

   b. Court relied on accurate information

   c. Court provided opportunity for allocution

   d. If sentencing after revocation and different judge, court demonstrated familiarity with original sentencing hearing

F. Ultimate sentence

   a. Legal – including application of any enhancer?

   b. Harsh and excessive?

   c. If re-sentencing, vindictive?

G. Defendant had the assistance of counsel

H. Sentence credit

I. Eligibility for ERP/SAP or CIP

J. Fines & fees

K. Basis for sentence modification?

L. Any other concerns apparent from the record or raised by the defendant?

**Appendix 2.d.**

## SENTENCING CHECKLIST: APPELLATE REVIEW OF IMPOSITION OF SENTENCE

**Client:** _____ County/Case No(s): _____

Judge: _____ Sentencing Hrg. Date: _____

Sentence Imposed: _____

Maximum Possible: _____

**Recommendations:**

State: _____ PSI: _____

Defense: _____

____ Prosecution properly states terms of plea agreement, if applicable.[456]

____ Term of incarceration and/or probation falls within the applicable maximum.[457]

____ If sentenced under a penalty enhancer,[458] the state proved or the defendant admitted to the basis for the provision at or before sentencing.[459]

____ Court explained its reasoning, with reference to proper sentencing factors:[460]

____ Gravity of offense: _____

____ Character of defendant: _____

____ Protection of the public: _____

____ Court considered probation (if requested) before imposing the minimum period of incarceration necessary to meet its objectives.[461]

____ The sentence is not legally "harsh and excessive."[462]

____ The factual information the court discussed at sentencing was accurate.[463]

---

[456] *Santobello v. NY,* 404 U.S. 257, 262 (1971); *see also State v. Smith,* 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997).

[457] Wis. Stats. §§ 973.01, 939.51(3) (describing maximum penalties for felonies and misdemeanors); §§ 939.62, 939.621, 939.63, 939.632, 939.635, 939.645 (providing for increased penalties for certain offenders); §§ 973.09(2), 973.09(4) (describing max term of probation, and max term of conditional jail).

[458] Wis. Stats. §§ 939.62, 939.621, 939.63, 939.632, 939.635, 939.645 (providing for increased penalties for certain offenders); §961.48 (altering the classification of second or subsequent drug offenses).

[459] *State v. Liebnitz*, 231 Wis. 2d 272, 603 N.W.2d 208 (1999) (addressing application of habitual criminality enhancer based on admission); *State v. Koeppen*, 195 Wis. 2d 117, 536 N.W.2d 386 (Ct. App. 1995) (addressing the proof necessary to sustain a habitual criminality enhancer where there is no admission).

[460] *Harris (Robert Lee) v. State*, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977) (internal citations omitted). Additional factors the court may consider include: (1) past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of PSI; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public, and; (12) the length of pretrial detention. *State v. Harris (Denia)*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984) (internal citations omitted).

[461] *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197.

[462] *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (Stating that a sentence is legally excessive only when it would "shock the public sentiment."); *State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990) (finding that modification of sentence was within court's discretion where it found original sentence unduly harsh in light of co-defendant's sentence).

[463] *State v. Tiepelman*, 2006 WI 66, ¶¶9, 26-27; 291 Wis. 2d 179, 717 N.W.2d 1 (recognizing defendant's right to be sentenced

____ The court provided the defendant with an opportunity for allocution.[464]

____ Court awarded all credit due.[465]

____ Court properly determined prison programming eligibility, if applicable.[466]

____ If sentenced after revocation by a different judge, the judge demonstrated familiarity with the original sentencing.[467]

____ If resentenced on remand after appeal, court did not impose harsher sentence due to vindictiveness.[468]

____ Defendant had the assistance of counsel.[469]

____ The judgment of conviction is accurate and all surcharges fines and fees were lawfully imposed.[470]

on accurate information and noting that defendant arguing for re-sentencing based on inaccurate information must show actual reliance).

[464] Wis. Stat. § 972.14(2); *see also State v. Greve,* 2004 WI 69, ¶35, 272 Wis. 2d 444, 681 N.W.2d 479 (discussing the right).

[465] Wis. Stat. § 973.155(1)(a).

[466] Wis. Stat. § 973.01(3g) and (3m).

[467] *State v. Reynolds*, 2002 WI App 15, ¶¶8-10, 249 Wis. 2d 798, 643 N.W.2d 165.

[468] *State v. Sturdivant*, 2009 WI App 5, ¶8, 316 Wis. 2d 197, 763 N.W.2d 185.

[469] *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997).

[470] Wisconsin Circuit Fee, Forfeiture, Fine and Surcharge Tables, *available here*.

# PRE-TRIAL/TRIAL ISSUES GUIDE

## *A. Potential Pre-trial Issues*

(1) Properly charged by information or complaint
(2) Offense (elements) properly charged (and specific offense)
(3) Charge properly amended
(4) Venue Proper
(5) Double jeopardy-collateral estoppel
(6) Delay in commencing prosecution
(7) Substitution of judge
(8) Generally
(9) Exclusion on race or sex
(10) Change of place of trial
(11) Valid counsel waiver
(12) Fitness for trial properly determined
(13) Continuance problem
(14) Discovery problem
(15) Joinder-Severance problem
(16) Speedy trial problem
(17) Jury selection problem
(18) Valid jury waiver

## *B. Potential Suppression Issues*

### *1. Search and Seizure*

(1) Standing problem
(2) Warrant
(3) Probable cause, facts furnished to judge, hearsay-reliability delay in obtaining
(4) Particularly described place/person to be searched and items to be seized
(5) Issued by neutral judge and comply with procedures
(6) Improper execution of-time of, manner of entry, scope of search
(7) Warrantless
(8) Warrantless entry
(9) Incident to arrest-probable cause for arrest, search prior to arrest, scope of search
(10) Consent to search-valid consent authority of 3d party to consent, scope of search
(11) Plain view-police saw from place they were lawfully viewing
(12) advertent, immediately apparent that item was evidence of crime
(13) Motor vehicles-improper stop, scope of search, probably cause
(14) Inventory search-right to seize, need to open, scope too broad, crime related purpose
(15) Stop and frisk-sufficient grounds for stop, was it an arrest, scope of search too broad
(16) Emergency search-time to obtain warrant, scope of search
(17) Search by private party-acting as police agent
(18) Administrative search
(19) Eavesdropping
(20) Fruit of poisoned tree problem
(21) Proper suppression hearing, findings of fact, conclusions of law

### *2. Confessions/ admissions*

(1) Miranda violation-in custody, interrogation, proper warnings, effective waiver
(2) Interrogation after a request for counsel, or to remain silent
(3) Involuntary
(4) Use of defendant's silence
(5) Impeachment with inadmissible statements
(6) Statements after illegal arrest
(7) Plea negotiation statements
(8) Use of co-defendant statements
(9) Statements during mental exam
(10) Proper suppression hearing

### 3. ***Identification***

(1) Suggestive
(2) Independent basis for
(3) Right to counsel at
(4) Photographic
(5) Proper suppression hearing

## C. ***Potential Trial Issues***

### 1. ***Generally***

(1) Public trial
(2) Defendant present (trial in absentia)
(3) Physical restraints
(4) Defendant in jail clothes
(5) Interpreter problems
(6) Joinder/severance

### 2. ***Defense counsel***

(1) Right
(2) Waiver of
(3) Counsel fees
(4) Ineffective assistance
(5) Conflict of interest
(6) Right to argue, object, make offer of proof

### 3. ***Prosecutor***

(1) Misstating law or evidence
(2) Make insinuations
(3) Continuing with argument/question after objection sustained
(4) Using false evidence
(5) Comments on
(6) Defendant not testifying
(7) Defendant's failure to call witnesses
(8) Facts not in evidence (opinion)
(9) Rulings of judge/exclusion of evidence
(10) Race
(11) Defense counsel
(12) Victim's family/injuries
(13) Misc. matters
(14) Defendant

### 4. ***Judge***

(1) Comments/insinuations
(2) Opinion on evidence/defenses
(3) Questioning witnesses
(4) Hostility toward defense counsel
(5) Substitution of
(6) Private investigation by

### 5. ***Witnesses***

(1) Obtaining and calling
(2) Experts for indigents
(3) Discovery of
(4) Competency of
(5) Cross-examination of
    a. Impeachment
    b. Bias
    c. Immoral conduct
    d. Drug use
    e. Prior convictions
    f. Pending Cases
    g. Insinuations

### 6. ***Evidence***

(1) Right to present
(2) Relevant/material
(3) Objections/offers of proof
(4) Limited purpose
(5) Curative admissibility
(6) Character/reputation
(7) Courtroom demonstrations
(8) Escape/flight/tampering
(9) Hearsay
    a. Admissions
    b. Co-conspirator statements;
    c. Consistent statements

d. Corroborative complaints
e. Dying declarations
f. Prior identification statements
g. Inconsistent statements
h. Penal interest, against
i. Physician, statements to
j. Testimony from prior proceedings
k. Spontaneous declarations
l. State of mind
m. "Completeness" doctrine
n. Hearsay statements of child
o. Business records
p. Past recollection recorded

(10) Judicial notice

(11) Opinion
a. Non-expert
b. Expert

(12) Other crimes
a. Substance evidence
b. Impeachment

(13) Photographs

(14) Physical evidence-foundation, chain of custody

(15) Privileged communications

(16) Scientific evidence

(17) Writings
a. Best evidence rule
b. Business records
c. Refreshing recollection
d. Past recollection recorded

## *7. Jury*

(1) Right to-Waiver of
(2) Selection of
(3) Impartial
(4) Communications with
(5) Questions form
(6) Sequestration
(7) Instructions to
(8) Polling of
(9) Impeachment of verdicts

## *8. Verdict*

(1) Sufficiency/evidence of every element
(2) Proof conform to charge (variance)
(3) Affirmative defense rebutted
(4) Conviction based on
a. Circumstantial evidence
b. Presumptions
c. Conflicting, confusing testimony
d. Doubtful identification
e. Accomplice testimony
(5) Inconsistent verdicts
(6) Multiple verdicts on same acts
(7) Unanimity re act(s) underlying the verdict
(8) General verdict

# CORRECTIONAL INSTITUTIONS, MENTAL HEALTH FACILITIES, COUNTY JAILS, OUT-OF-STATE FACILITIES, MISCELLANEOUS

| Correctional Institutions | Address | Phone and Fax Numbers |
|---|---|---|
| **Chippewa Valley Correctional Treatment Facility**<br>Christine Suter, Warden | 2909 East Park Avenue<br>Chippewa Falls, WI 54729 | Phone: (715) 720-2850<br>Fax: (715) 720-2859 |
| **Columbia Correctional Institution**<br>Larry Fuchs, Warden<br>(Maximum Security) | 2925 Columbia Drive<br>P.O. Box 900<br>Portage, WI 53901 | Phone: (608) 742-9100<br>Fax: (608) 742-9111 |
| **Dodge Correctional Institution**<br>Jason Benzel, Warden<br>(Maximum Security) | 1 W. Lincoln Street<br>P.O. Box 700<br>Waupun, WI 53963<br>**FOR SHIPMENT USE:**<br>644 Maxon Street<br>Waupun, WI 53963 | Phone: (920) 324-5577<br>Fax: (920) 324-5354<br><br>Reception Fax:<br>(920) 324-6281 |
| **Fox Lake Correctional Institution**<br>Michael Meisner, Warden<br>(Minimum & Medium Security) | W10237 Lake Emily Road<br>P.O. Box 200<br>Fox Lake, WI 53933-0200 | Phone: (920) 928-3151<br>Fax: (920) 928-6929 |
| **Green Bay Correctional Institution**<br>Chris Stevens, Warden<br>(Maximum Security) | 2833 Riverside Drive, 54301<br>P.O. Box 19033<br>Green Bay, WI 54307 | Phone: (920) 432-4877<br>Fax: 920-448-6545 |
| **Jackson Correctional Institution**<br>Lizzie Tegels, Warden<br>(Minimum/Medium Security) | N6500 Haipek Road<br>P.O. Box 233<br>Black River Falls, WI 54615 | Phone: (715) 284-4550<br>Ext. 7344<br>Fax: (715) 284-7335 |
| **Kettle Moraine Correctional Institution**<br>Jon Noble, Warden<br>(Medium Security) | W9071 Forest Drive<br>P.O. Box 282<br>Plymouth, WI 53073 | Phone: (920) 526-3244<br>Fax: (920) 526-9620 |
| **Milwaukee Secure Detention Facility**<br>Steven R. Johnson, Warden | 1015 North 10th Street, 53233<br>P.O. Box 05911<br>Milwaukee, WI 53205 | Phone: (414) 212-3535<br>ext. 0<br>Fax: (414) 212-6811 |
| **New Lisbon Correctional Institution**<br>Dan Cromwell, Warden<br>(Medium Security) | 2000 Progress Road, 53950<br>P.O. Box 4000<br>New Lisbon, WI 53950 | Phone: (608) 562-6400<br>Fax: (608) 562-6410 |
| **Oakhill Correctional Institution**<br>Wayne Olson, Warden<br>(Minimum Security) | 5212 County Highway M<br>P.O. Box 938<br>Oregon, WI 53575 | Phone: (608) 835-3101<br>Ext. 2802 or Option 2<br>Fax: (608) 835-6090 |
| **Oshkosh Correctional Institution**<br>Cheryl Eplett, Warden<br>(Medium Security) | 1730 West Snell Road, 54901<br>P.O. Box 3310<br>Oshkosh, WI 54903 | (920) 231-4010<br>Ext. 2180-Records<br>Fax: (920) 236-2615 |

| | | |
|---|---|---|
| **Prairie du Chien Correctional Institution**<br>Peter J. Jaeger, Warden<br>(Minimum Security) | 500 East Parrish Street<br>P.O. Box 9900<br>Prairie du Chien, WI 53821 | Phone: (608) 326-7828<br>Fax: (608) 326-5969 |
| **Racine Correctional Institution**<br>Robert Miller, Warden<br>(Minimum/Medium Security) | 2019 Wisconsin St., 53177<br>P.O. Box 900<br>Sturtevant, WI 53177 | Phone: (262) 886-3214<br>Records: Ext. 3, Ext. 2<br>Fax: (262) 886-3514 |
| **Racine Youthful Offender Correctional Facility**<br>Je'Leslie Taylor, Warden<br>(Medium Security) | 1501 Albert Street<br>P.O. Box 2500<br>Racine, WI 53401 | Phone: (262) 638-1999<br>Ext. 8 for records<br>Fax: (262) 638-1777 |
| **Redgranite Correctional Institution**<br>Chris Stevens, Interim Warden<br>(Medium Security) | 1006 County Road EE<br>P.O. Box 925<br>Redgranite, WI 54970 | Phone: (920) 566-2600<br>Fax: (920) 566-2610 |
| **Stanley Correctional Institution**<br>Chris Buesgen, Warden<br>(Medium Security) | 100 Corrections Drive<br>Stanley, WI 54768 | Phone: (715) 644-2960<br>Fax: (715) 644-2966 |
| **Sturtevant Transitional Facility**<br>Lisa Avila, Superintendent<br>(Minimum Security) | 9351 Rayne Road, 53177<br>P.O. Box 903<br>Sturtevant, WI 53177 | Phone: (262) 884-2410<br>Fax: (262) 375-5595 |
| **Taycheedah Correctional Institution**<br>Michael Gierach, Warden<br>(Maximum & Medium Security) | 751 County Road K, 54935<br>P.O. Box 3100<br>Fond du Lac, WI 54936 | Phone: (920) 929-3800<br>Fax: (920) 929-2946 |
| **Waupun Correctional Institution**<br>Bradley Mlodzik, Warden<br>(Maximum Security) | 200 South Madison Street<br>P.O. Box 351<br>Waupun, WI 53963 | Phone: (920) 324-5571<br>Fax: (920) 324-7250 |
| **Wisconsin Secure Program Facility**<br>Gary Boughton, Warden<br>(Maximum Security) | 1101 Morrison Drive<br>P.O. Box 1000<br>Boscobel, WI 53805 | Phone: (608) 375-5656<br>Fax: (608) 375-5595 |

| Youth Institutions | Address | Phone and Fax Numbers |
|---|---|---|
| **Copper Lake School** | W4380 Copper Lake Road<br>Irma, WI 54442 | Phone: (715) 536-8386 |
| **Eau Claire Academy** | 550 North Dewey<br>Eau Claire, WI 54703 | Phone: (715) 834-6681<br>Fax: (715) 834-9954 |
| **Fond du Lac Juvenile Detention Center** | 63 Western Ave<br>Fond du Lac WI 54935 | Phone: (920) 929-3398 |
| **Homme Youth and Family Programs** | W18105 Hemlock Road<br>Wittenberg, WI 54499 | Phone: (715) 253-2116 |
| **Lad Lake, Inc**<br>Donelle Hauser, President/CEO | P.O. Box 158<br>Dousman, WI 53118 | Phone: (262) 965-2131 |

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|---|---|---|
| **Lincoln Hills School** | W4380 Copper Lake Road<br>Irma, WI 54442 | Phone: (715) 536-8386 |
| **Mendota Juvenile Treatment Center**<br>Greg VanRybroek, Director | 301 Troy Drive<br>Madison, WI 53704 | Phone: (608) 301-1000<br>Fax: (608) 301-1358 |
| **Northwest Regional Juvenile Detention Center**<br>Kevin Cummings,<br>Juvenile Detention Manager | 721 Oxford Avenue<br>Eau Claire, WI 54703 | Phone: (715) 839-6086<br>Fax: (715) 839-1663 |
| **Norris Adolescent Treatment Center**<br>(River's Edge Campus) | W247 South 10395 Center Drive<br>Mukwonago, WI 53149 | Phone: (262) 662-5900<br>Fax: (262) 662-5688 |
| **Norris Adolescent Treatment Center**<br>(River Bend Place) | 801 East Washington Street<br>West Bend, WI 53095 | Phone: (262) 662-5909<br>Fax: (262) 662-5688 |
| **Racine Detention Center**<br>Antonio Chavez, Detention Superintendent | 1717 Taylor Avenue<br>Racine, WI 53403 | Phone: (262) 638-6729 |
| **Rawhide Boys Ranch**<br>Alan Loux, President & CEO | E7475 Rawhide Road<br>New London, WI 54961 | Phone: (920) 982-6100<br>Fax: (920) 982-5040 |
| **Rock County Juvenile Detention Center**<br>(a/k/a Youth Services Center) | 210 East Highway 14<br>Janesville, WI 53545 | Phone: (608) 757-5930 |
| **St. Charles Youth & Family Services**<br>Cathy Connolly, President | 151 South 84th Street<br>Milwaukee, WI 53214 | Phone: (414) 476-3710<br>Fax: (414) 778-5985 |
| **Vel R. Phillips Juvenile Justice Center**<br>Dean Heus, Principal<br>(Milwaukee Juvenile Detention Center) | 10201 West Watertown Plank Rd<br>Wauwatosa, WI 53226 | Phone: (414) 257-4857 |

| Mental Health Facilities | Address | Phone and Fax Numbers |
|---|---|---|
| **Badger Prairie Health Care Center** | 1100 E. Verona Ave.<br>Verona, WI 53593 | Phone: (608) 845-6601 |
| **Brewster Village**<br>(a/k/a Outagamie Health Center) | 3300 West Brewster Street<br>Appleton, WI 54914 | Phone: (920) 832-5400 |
| **Brown County Mental Health Center** | 3150 Gershwin Drive<br>Green Bay, WI 54311 | Phone: (920) 391-4700 |
| **Community Treatment Alternatives**<br>(a/k/a Journey Mental Health Center) | 25 Kessel Court, Suite 105<br>Madison, WI 53711 | Phone: (608) 280-2700<br>Fax: (608) 280-2707 |
| **Fond du Lac County Health Care Center** | 459 East First Street<br>Fond du Lac, WI 54935 | Phone: (920) 929-3085<br>Fax: (920) 929-3102 |
| **Mendota Mental Health Institute**<br>Greg Van Rybroek, Director | 301 Troy Drive<br>Madison, WI 53704 | Phone: (608) 301-1000<br>Fax (608) 301-1358 |
| **Milwaukee County Mental Health Clinic**<br>(Behavioral Health Services) | 1919 W. North Ave – #200<br>Milwaukee, WI 53205 | Phone: (414) 257-7610 |
| **North Central Health Care Facilities**<br>(Wausau Campus) | 2400 Marshall Street<br>Wausau, WI 54403 | Phone: (715) 848-4600 |

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| **Trempealeau County Health Care Center**<br>(Pigeon Falls HCC) | W20410 State Road 121<br>Whitehall, WI 54773 | Phone: (715) 538-4312<br>Fax: (715) 538-2426 |
| **Waukesha County Mental Health Center** | 1501 Airport Road<br>Waukesha, WI 53188 | Phone: (262) 548-7950<br>Fax: (262) 896-8046 |
| **Winnebago Mental Health Institute**<br>Ashley Katz, Director of Social Services | P.O. Box 9<br>Winnebago, WI 54985<br>1300 South Drive<br>Winnebago, WI 54901 | Phone: (920) 235-4910<br>(Records: x2207)<br>Fax: (920) 236-2931 |

| Correctional Farm Operations | Address | Phone and Fax Numbers |
|---|---|---|
| **Bureau of Correctional Enterprises**<br>Wes Ray, Bureau Director<br>Corey Flier, Agriculture Manager | 3099 E. Washington Ave., 53704<br>P.O. Box 8990<br>Madison, WI 53708 | Phone: (608) 240-5200<br>Phone: (920) 324-2912 |
| **Oregon Farm**<br>Eric Trumm, Farm Supervisor | 5140 Cty Hwy M<br>P.O. Box 25<br>Oregon, WI 53575 | Phone: (608) 835-5784 |
| **The Grow Academy**<br>(Non-Secure Residential Programming) | 4986 County Highway M<br>Oregon, WI 53575 | Phone: (608) 835-5700 |
| **Waupun Dairy**<br>Kory Fietz, Supervisor | 900 South Madison<br>Waupun, WI 53963 | Phone: (920) 324-8771 |
| **Waupun Farm**<br>Jason Hensel, Farm Supervisor | W6199 Hwy 49 E<br>P.O. Box 900<br>Waupun, WI 53963 | Phone: (920) 324-2912 |

| County Jails | Address | Phone and Fax Numbers |
|---|---|---|
| **Adams County Jail**<br>*No inmate list provided* | 401 Adams Street<br>Friendship, WI 53934 | Phone: (608) 339-4239 |
| **Ashland County Jail**<br>*Inmate list provided* | 220 6th Street E<br>Ashland, WI 54806 | Phone: (715) 685-7640<br>Fax: (715) 682-7039 |
| **Barron County Jail**<br>*Inmate list provided* | 1420 State Highway 25 North<br>Barron, WI 54812 | Phone: (715) 537-5559<br>Fax: (715) 537-6231 |
| **Bayfield County Jail**<br>*No inmate list provided* | 615 North Second Avenue East<br>P.O. Box 115<br>Washburn, WI 54891 | Phone: (715) 373-6117<br>Fax: (715) 373-6323 |
| **Brown County Jail**<br>*Inmate list provided* | 3030 Curry Lane<br>Green Bay, WI 54311 | Phone: (920) 448-4250<br>Fax: (920) 391-6808 |
| **Buffalo County Jail**<br>*No inmate list provided* | 407 South 2nd Street<br>Alma, WI 54610 | Phone: (608) 685-4433<br>Fax: (608) 685-3379 |

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|---|---|---|
| **Burnett County Jail**<br>*Inmate list provided* | 7410 County Road K, #122<br>Siren, WI 54872 | Phone: (715) 349-2128 |
| **Calumet County Jail**<br>*Inmate list provided* | 206 Court Street<br>Chilton, WI 53014 | Phone: (920) 849-1447<br>Fax: (920) 849-1489 |
| **Chippewa County Jail**<br>*Inmate list provided* | 50 East Spruce Street<br>Chippewa Falls, WI 54729 | Phone: (715) 726-7704 |
| **Clark County Jail**<br>*No inmate list provided* | 517 Court Street<br>Neillsville, WI 54456 | Phone: (715) 743-5380<br>Fax: (715) 743-4009 |
| **Columbia County Jail**<br>*No inmate list provided* | 403 Jackson Street<br>Portage, WI 53901 | Phone: (608) 742-6476<br>Fax: (608) 745-4809 |
| **Crawford County Jail**<br>*No inmate list provided* | 224 North Beaumont Road<br>Prairie du Chien, WI 53821 | Phone: (608) 326-8414 |
| **Dane County Jail** (Public Safety Building)<br>*Inmate list provided*<br>**City-County Building Jail**<br>(Maximum Security)<br>**Dane County Jail Diversion**<br>**Dane County Juvenile Detention Center** | 115 West Doty Street<br>Madison, WI 53703<br>210 Martin Luther King Jr. Blvd<br>Madison, WI 53703<br>2120 Rimrock Road<br>Madison, WI 53713<br>210 Martin Luther King Jr. Blvd<br>Madison, WI 53703 | Phone: (608) 284-6100<br><br><br><br><br>Phone: (608) 266-4983 |
| **Dodge County Jail**<br>(a/k/a Dodge County Detention Facility)<br>*No inmate list provided* | 216 West Center Street<br>Juneau, WI 53039 | Phone: (920) 386-3734<br>Fax: (920) 386-3243 |
| **Door County Jail**<br>*No inmate list provided* | 1203 South Duluth Avenue<br>Sturgeon Bay, WI 54235 | Phone: (920) 746-5652<br>Fax: (920) 746-5674 |
| **Douglas County Jail**<br>*Inmate list provided* | 1310 North 14th Street<br>Superior, WI 54880 | Phone: (715) 395-1375<br>Fax: (715) 395-7384 |
| **Dunn County Jail**<br>*Inmate list provided* | 615 Stokke Parkway Drive<br>Menomonie, WI 54751 | Phone: (715) 232-2220<br>Fax: (715) 232-1845 |
| **Eau Claire County Jail**<br>*Inmate list provided* | 710 Second Avenue<br>Eau Claire, WI 54703 | Phone: (715) 839-4702<br>Fax: (715) 839-6269 |
| **Florence County Jail**<br>*No inmate list provided* | 501 Lake Avenue<br>P.O. Box 678<br>Florence, WI 54121 | Phone: (715) 528-3346<br>Fax: (715) 528-5350 |
| **Fond du Lac County Jail**<br>*No inmate list provided* | 63 Western Avenue<br>Fond du Lac, WI 54935 | Phone: (920) 929-3394 |
| **Forest County Jail**<br>*No inmate list provided* | 100 South Park Avenue<br>Crandon, WI 54520 | Phone: (715) 478-3331<br>Fax: (715) 478-3515 |
| **Grant County Jail**<br>*No inmate list provided* | 8820 US-61<br>Lancaster, WI 53813 | Phone: (608) 723-6372<br>Fax: (608) 723-5203 |

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|---|---|---|
| **Green County Jail**<br>*No inmate list provided* | 2827 6th Avenue<br>P.O. Box 473<br>Monroe, WI 53566 | (608) 328-9598 or<br>Communications Center<br>(608) 328-9400 |
| **Green Lake County Jail**<br>*No inmate list provided* | 571 County Road A<br>Green Lake, WI 54941 | Phone: (920) 294-4059<br>Fax: (920) 294-4195 |
| **Iowa County Jail**<br>*No inmate list provided* | 109 East Leffer Street<br>Dodgeville, WI 53533 | Phone: (608) 930-9500<br>Fax: (608) 471-1075 |
| **Iron County Jail**<br>*No inmate list provided* | 300 Taconite Street<br>Hurley, WI 54534 | Phone: (715) 561-3800 |
| **Jackson County Jail**<br>*No Inmate list provided (call)* | 30 North 3rd Street<br>Black River Falls, WI 54615 | Phone: (715) 284-5357<br>Fax: (715) 284-8184 |
| **Jefferson County Jail**<br>*No inmate list provided* | 411 South Center Avenue<br>Jefferson, WI 53549 | Phone: (920) 674-7310 |
| **Juneau County Jail**<br>*No inmate list provided* | 200 Oak Street<br>Mauston, WI 53948 | Phone: (608) 847-9419 |
| **Kenosha County Jail (Pre-Trial Facility)**<br>*Inmate list provided (Inmate search)* | 927 54th Street<br>Kenosha, WI 53140 | Phone: (262) 605-5111<br>Fax: (262) 653-6908 |
| **Kenosha County Detention Center** | 4777 88th Avenue<br>Kenosha, WI 53144 | Phone: (262) 605-5800<br>Booking (262) 605-5451 |
| **Kewaunee County Jail**<br>*No inmate list provided* | 620 Juneau Street<br>Kewaunee, WI 54216 | Phone: (920) 388-7157 |
| **La Crosse County Jail**<br>*Inmate list provided* | 333 Vine Street<br>La Crosse, WI 54601 | Phone: (608) 785-9630<br>Fax: (608) 785-5640 |
| **Lafayette County Jail**<br>*No inmate list provided* | 138 West Catherine Street<br>Darlington, WI 53530 | Phone: (608) 776-4870 |
| **Langlade County Jail**<br>*No inmate list provided* | 840 Clermont Street<br>Antigo, WI 54409 | Phone: (715) 627-6444<br>Fax: (715) 627-6432 |
| **Lincoln County Jail**<br>*Inmate list provided* | 1104 East First Street<br>Merrill, WI 54452 | Phone: (715) 536-6275<br>Fax: (715) 536-3466 |
| **Manitowoc County Jail**<br>*Inmate list provided* | 1025 South 9th Street<br>Manitowoc, WI 54220 | Phone: (920) 683-4228<br>Fax: (920) 683-4405 |
| **Marathon County Jail**<br>*Inmate list provided*<br>**Juvenile Detention Facility** | 500 Forest Street<br>Wausau, WI 54403<br>7015 Packer Drive<br>Wausau, WI 54401 | Phone: (715) 261-1700 |
| **Marinette County Jail**<br>*No inmate list provided* | 2161 University Drive<br>Marinette, WI 54143 | Phone: (715) 732-7630<br>Fax: (715) 732-7632 |
| **Marquette County Jail**<br>*No inmate list provided* | 67 West Park Street<br>P.O. Box 630<br>Montello, WI 53949 | Phone: (608) 297-2115<br>Fax: (608) 297-9045 |

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|---|---|---|
| **Menominee County Jail**<br>*No inmate list provided* | c/o Shawano County Jail<br>405 North Main Street<br>Shawano, WI 54166 | Phone: (715) 526-7950<br>Fax: (715) 526-3070 |
| **Milwaukee County Jail**<br>*Inmate list provided* | **Criminal Justice Facility**<br>949 North 9th Street<br>Milwaukee, WI 53233 | Phone: (414) 226-7070 |
| **Monroe County Jail**<br>*No inmate list provided* | 112 South Court Street<br>Sparta, WI 54656 | Phone: (608) 269-8759<br>Fax: (608) 269-2164 |
| **Oconto County Jail**<br>*No list provided* | 301 Washington Street<br>Oconto, WI 54153 | Phone: (920) 834-6918 |
| **Oneida County Jail**<br>*No inmate list provided* | 2000 East Winnebago Street<br>Rhinelander, WI 54501 | Phone: (715) 361-5180 |
| **Outagamie County Jail**<br>*Inmate list provided* | 320 South Walnut Street<br>P.O. Box 1779<br>Appleton, WI 54913 | Phone: (920) 832-5266 |
| **Ozaukee County Jail**<br>*Inmate list provided* | 1201 South Spring Street<br>Port Washington, WI 53074 | Phone: (262) 284-8446<br>Fax: (262) 284-8496 |
| **Pepin County Jail**<br>*No inmate list provided* | 740 7th Avenue West<br>P.O. Box 39<br>Durand, WI 54736 | Phone: (715) 672-5945<br>Fax: (715) 672-5143 |
| **Pierce County Jail**<br>*Inmate list provided* | 555 Overlook Drive<br>P.O. Box 9<br>Ellsworth, WI 54011 | Phone: (715) 273-1124<br>Fax: (715) 273-1137 |
| **Polk County Jail**<br>*Inmate list provided* | 1005 West Main Street<br>Balsam Lake, WI 54810 | Phone: (715) 485-8370 |
| **Portage County Jail**<br>*No inmate list provided*<br>**Juvenile Detention Center** | 1500 Strongs Avenue<br>Stevens Point, WI 54481 | Phone: (715) 346-1259<br>Phone: (715) 346-1263 |
| **Price County Jail**<br>*Inmate list provided* | 164 Cherry Street<br>P.O. Box B<br>Phillips, WI 54555 | Phone: (715) 339-3011 #1<br>Fax: (715) 339-3015 |
| **Racine County Jail**<br>*Inmate list provided* | 717 Wisconsin Avenue<br>Racine, WI 53403 | Phone: (262) 636-3929<br>Fax: (262) 636-3470 |
| **Richland County Jail**<br>*No inmate list provided*<br>**Richland County Juvenile Detention** | 181 West Seminary Street<br>Richland Center, WI 53581<br>221 West Seminary Street<br>Richland Center, WI 53581 | Phone: (608) 647-2106<br>Fax: (608) 647-2106<br>Phone: (608) 647-8821<br>Fax: (608) 647-6611 |
| **Rock County Jail**<br>*No inmate list provided* | 200 East U.S. Highway 14<br>Janesville, WI 53545 | Phone: (608) 757-8000<br>Atty Call: (608) 757-7957 |
| **Rusk County Jail**<br>*Inmate list provided* | 311 East Miner Avenue<br>Ladysmith, WI 54848 | Phone: (715) 532-2189<br>Fax: (715) 532-2288 |

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|---|---|---|
| **St. Croix County Jail**<br>*Inmate list provided* | 1101 Carmichael Road<br>Hudson, WI 54016 | Phone: (715) 386-4752 |
| **Sauk County Jail**<br>*No inmate list provided* | 1300 Lange Court<br>Baraboo, WI 53913 | Phone: (608) 355-3210<br>Fax: (608) 355-3591 |
| **Sawyer County Jail**<br>*Inmate list provided* | 15880 East 5th Street<br>P.O. Box 567<br>Hayward, WI 54843 | Phone: (715) 634-4858<br>Fax: (715) 715-634-3845 |
| **Shawano County Jail**<br>*No inmate list provided* | 405 North Main Street<br>Shawano, WI 54166 | Phone: (715) 526-7950<br>Fax: (715) 526-3070 |
| **Sheboygan County Jail**<br>*Inmate list provided*<br>**Sheboygan County Juvenile Detention** | 2923 S. 31st Street (Adult)<br>525 North 6th Street (Juveniles)<br>Sheboygan, WI 53081 | Phone: (920) 459-1300<br>Fax: (920) 459-1307<br>Fax: (920) 759-0547 |
| **Taylor County Jail**<br>*No inmate list provided* | 224 South Second Street<br>Medford, WI 54451 | Phone: (715) 748-1431 |
| **Trempealeau County Jail**<br>*Inmate list provided* | 36245 Main Street<br>Whitehall, WI 54773 | Phone: (715) 538-2311 x452<br>Fax: (715) 538-2148 |
| **Vernon County Jail**<br>*No inmate list provided* | 1320 Bad Axe Court<br>Viroqua, WI 54665 | Phone: (608) 638-5780<br>Fax: (608) 638-5785 |
| **Vilas County Jail**<br>*Inmate list provided* | 330 Court Street<br>Eagle River, WI 54521 | Phone: (715) 479-0628 |
| **Walworth County Jail**<br>*Inmate list provided* | 1770 County Road NN<br>Elkhorn, WI 53121 | Phone: (262) 741-4500<br>Fax: (262) 741-4671 |
| **Washburn County Jail**<br>*No inmate list provided* | 421 Highway 63<br>P.O. Box 429<br>Shell Lake, WI 54871 | Phone: (715) 468-4720 |
| **Washington County Jail**<br>*No inmate list provided* | 500 Rolfs Avenue<br>West Bend, WI 53090 | Phone: (262) 335-4427<br>Fax: (262) 335-4426 |
| **Waukesha County Jail**<br>*Inmate list provided*<br>**Waukesha County Huber Center** | 515 West Moreland Blvd.<br>Waukesha, WI 53187<br>1400 Northview Road<br>Waukesha, WI 53188 | Phone: (262) 548-7170<br>Huber: (262) 548-7181<br>Fax: (262) 896-8254 |
| **Waupaca County Jail**<br>*Inmate list provided* | 1402 East Royalton Street<br>Waupaca, WI 54981 | Phone: (715) 256-4545 |
| **Waushara County Jail**<br>*No inmate list provided* | 430 East Division Street<br>Wautoma, WI 54982 | Phone: (920) 787-6591<br>Fax: (920) 787-6524 |
| **Winnebago County Jail**<br>*No inmate list provided* | 4311 Jackson Street<br>Oshkosh, WI 54901 | Neenah: (920) 727-2888<br>Oshkosh: (920) 236-7380<br>Fax: (920) 236-7302 |
| **Wood County Jail**<br>*No inmate list provided* | 400 Market Street<br>P.O. Box 8095<br>Wisconsin Rapids, WI 54494 | Phone: (715) 421-8730<br>Fax: (715) 421-8775<br>Huber: (715) 421-7868 |

| Federal Institutions | Address | Phone and Fax Numbers |
|---|---|---|
| **Federal Bureau of Prisons**<br>Chicago, Illinois | Inmate's full name & D.O.B. | Phone: (312) 886-2114 or (312) 886-2115 |
| **Federal Inmate Locator** | Inmate's full name & D.O.B. | Phone: (202) 307-3126 |

| Illinois | | |
|---|---|---|
| **Illinois Division of Corrections**<br>(217) 522-2666 | P.O. Box 19277<br>Springfield, IL 62794 | Inmate Full Name & D.O.B.<br>**Inmate Search** |
| **Stateville Correctional Center** | P.O. Box 112<br>Joliet, IL 60434 | Phone: (815) 727-3607<br>Fax: (815) 727-5511 |

| Minnesota | | |
|---|---|---|
| **Minnesota Department of Corrections**<br>Minnesota DOC Directory | 1450 Energy Park Drive – # 200<br>St. Paul, MN 55108 | Phone: (651) 642-0200<br>Fax: (651) 642-0223 |
| **Minnesota Correctional Facility – Stillwater**<br>William Bolin, Warden | 970 Pickett Street<br>Bayport, MN 55003 | Phone: (651) 779-2700<br>Fax: (651) 351-3603<br>MCF-Stillwater.doc@state.mn.us |
| **Minnesota Correctional Facility – Oak Park Heights**<br>Kathy Halvorson, Warden | 5329 Osgood Avenue North<br>Stillwater, MN 55082 | Phone: (651) 779-1400<br>Fax: (651) 779-1385<br>MCF-Oak-Park-Heights.doc@state.mn.us |
| **Minnesota Correctional Facility – St. Cloud**<br>Jesse Pugh, Warden | 2305 Minnesota Boulevard SE<br>Box B<br>St. Cloud, MN 56302 | Phone: (320) 240-3000<br>Fax: (320) 240-3054<br>MCF-St-Cloud.doc@state.mn.us |

| Miscellaneous | Address | Phone and Fax Numbers |
|---|---|---|
| **Attorney General**<br>**Criminal Appeals Unit** | 17 West Main Street, 6th Floor<br>P.O. Box 7857<br>Madison, WI 53707 | Phone: (608) 266-1221<br>Fax: (608) 267-2779 |
| **Behavioral Health Resource Center** | 818 West Badger Road Suite 102<br>Madison, WI 53713 | Phone: (608) 267-2244<br>bhrc@danecounty.gov |
| **Clerk Court of Appeals/Supreme Court**<br>Samuel A. Christensen, Clerk | 110 East Main Street, Suite 215<br>P.O. Box 1688<br>Madison, WI 53701-1688 | Phone: (608) 266-1880<br>Fax: (608) 267-0640 |
| **Department of Corrections**<br>**Inmate Search** | 3099 East Washington Ave,<br>Madison, WI 53704 | Phone: (608) 240-5000<br>Fax: (608) 240-3300<br>Records: (608) 240-3750<br>DOCGeneral@wisconsin.gov |

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| **Division of Community Corrections (DCC)**<br>Lance Wiersma, Administrator | Department of Corrections<br>Division of Community Corrections<br>P.O. Box 7925<br>Madison, WI 53707-7925 | Phone: (608) 240-5300<br>Fax: (608) 240-3850 |
| **LAIP**<br>Legal Assistance to Institutionalized Persons Project | UW Law School<br>975 Bascom Mall<br>Madison, WI 53706 | Phone: (608) 262-2240<br>info@law.wisc.edu |
| **OFFICE OF LAWYER REGULATION**<br>(investigates claims of attorney misconduct)<br>Timothy C. Samuelson, Director | P.O. Box 4648<br>Madison, WI 53701<br>110 East Main Street - Suite 315<br>Madison, WI 53703 | Phone: (608) 267-7274<br>Fax: (608) 267-1959 |
| **INTERSTATE COMPACT OFFICE** | https://pwp.interstatecompact.org/<br>https://interstatecompact.org/ | Phone: (608) 240-5388 |
| **IMMIGRATION & CUSTOMS ENFORCEMENT** | 310 East Knapp Street<br>Milwaukee, WI 53202 | Phone: (414) 792-7198<br>Chicago.Outreach@ice.dhs.gov |
| **Milwaukee County Courthouse**<br>901 North 9th Street<br>Milwaukee, WI 53233<br>Phone: (414) 278-5362<br>Fax: (414) 223-1262 | Register in Probate<br>901 North 9th Street – Room 207<br>Milwaukee, WI 53233<br>Phone: (414) 278-4444<br>Safety Building<br>821 West State Street<br>Milwaukee, WI 53233 | Children's Court Center<br>10201 West Watertown Plank Road<br>Wauwatosa, WI 53226<br>Clerk: (414) 257-7700<br>Fax: (414) 454-4074 |
| **Wisconsin DOC Probation and Parole** | Various | Various |
| **Wisconsin Innocence Project** | UW Law School<br>975 Bascom Mall<br>Madison, WI 53706 | Phone: (608) 262-2240<br>Fax: (608) 262-5485<br>info@law.wisc.edu |

**DEPARTMENT OF CORRECTIONS**
Division of Management Services
DOC-1163 (Rev. 5/2023)

**WISCONSIN**
Wisconsin Statutes – Sections 19.35, 19.36, 19.62(5), 118.125, 134.98 and 938.78

# AUTHORIZATION FOR DISCLOSURE OF NON-HEALTH CONFIDENTIAL RECORDS

**NOTICE: DO NOT USE TO AUTHORIZE DISCLOSURE OF PROTECTED HEALTH RECORDS. USE FORM DOC-1163A**

**INDIVIDUAL/AGENCY BEING AUTHORIZED TO RELEASE RECORD(S)**

| NAME OF INDIVIDUAL / AGENCY | | TELEPHONE NUMBER | FAX NUMBER |
|---|---|---|---|
| ADDRESS | CITY | STATE | ZIP CODE |

**SUBJECT OF RECORD(S)**

| NAME | IDENTIFYING/DOC NUMBER | DATE OF BIRTH | |
|---|---|---|---|
| ADDRESS | CITY | STATE | ZIP CODE |

**RECORD(S) MAY BE RELEASED TO**

| NAME OF INDIVIDUAL / AGENCY | | TELEPHONE NUMBER | FAX NUMBER |
|---|---|---|---|
| ADDRESS | CITY | STATE | ZIP CODE |

**SPECIFIC INFORMATION AUTHORIZED FOR DISCLOSURE**

**I understand that the information I am authorizing for release may contain my Personally Identifiable Information (PII), such as my complete date of birth, driver's license number, WI Department of Transportation state identification number, Social Security number or other personal information as defined in Wis. Stat. § 134.98.**

**I understand that for release of my Protected Health Information (PHI), I must submit a signed DOC-1163A for disclosure of any of my health / treatment information including Alcohol & Other Drug Abuse (AODA) / Substance Use Disorder (SUD) treatment, mental health information or other Protected Health Information, etc.**

## INSTRUCTIONS: Check All That Apply Below

**ADULT - DIVISION OF ADULT INSTITUTIONS (DAI) AND DIVISION OF COMMUNITY CORRECTIONS (DCC):**

☐ **DAI - Institution Social Service File (Use DOC-1163A for disclosure of information relating to therapy/counseling provided by DOC treatment staff or any other health information.)**

☐ **DAI – Legal File**

☐ **DCC - Client Case File**

☐ **Juvenile record information included in DOC adult records**

☐ **Specific record(s) authorized for release:** _____

**Identify Time Period Of Records –**
**If no start and end dates are indicated, only records pertinent to the last 12 months will be provided.**

**YOUTH - DIVISION OF JUVENILE CORRECTIONS (DJC): Records pertaining to a juvenile as allowable under Wis. Stat. § 938.78(2)**

☐ **DJC Facility Case File** ☐ **DJC Field Case File**

☐ **Specific record(s) authorized for release:** _____

**Identify Time Period Of Records –**

**If no start and end dates are indicated, only records pertinent to the last 12 months will be provided.**

☐ **EDUCATION - Complete for adult and/or juvenile student education records:** ☐ **ADULT** ☐ **YOUTH / JUVENILE**

☐ Regular education information/records (including attendance records) ☐ SPED information/record(s) e.g. IEP, MMPI, M-Team, etc. ☐ High school credits ☐ Disciplinary Actions

☐ High School Transcript ☐ GED or HSED Scores ☐ Vocational/technical school or college transcript

☐ Other: _____

☐ **Purpose for disclosure of education records (REQUIRED):** _____

**Identify Time Period of Records –** _____

**If no start and end dates are indicated, only records pertinent to the last 12 months will be provided.**

**OTHER**

Type(s) of information / record(s): _____

Identify Time Period of Records

**YOUR RIGHTS WITH RESPECT TO THIS AUTHORIZATION**

Signing of Authorization - I am under no legal obligation to sign this authorization. If I do, I have a right to receive a copy.

AODA/SUD Record(s) - My record(s) may contain alcohol and other drug abuse information. If so, I must sign DOC-1163A or that information will be redacted before the Protected Health Information (PHI) record(s) are released.

Re-disclosure of Information/Record(s) - If I authorize release of record(s) to an individual or agency covered by federal or state laws that prohibit re-disclosure, the recipient cannot re-disclose the records without a signed information release from me, a court order or other specific authorization under the law. However, if I consent to release record(s) to an individual/agency not covered by federal or state laws that prohibit re-disclosure, my private record(s) may not remain confidential.

Right to Inspect and/or Copy Information/Record(s) - I have the right to inspect and copy my records as permitted under state and federal law. I may be charged a reasonable fee for copies.

**AUTHORIZATION EXPIRATION: DATE / EVENT**

**This Authorization is in effect until the following date or event:** _____

**If no date/event is entered, this Authorization expires one year from the date of signing.**

**I have read or had read to me the contents of this authorization. I have had an opportunity to discuss and ask questions, and understand the purpose of this authorization request. By signing and dating this authorization, I am confirming that it accurately reflects my wishes regarding disclosure of my confidential information.**

| SIGNATURE OF INDIVIDUAL WHO IS SUBJECT OF RECORD*# | | DATE SIGNED[1] |
|---|---|---|
| SIGNATURE OF OTHER PERSON LEGALLY AUTHORIZED TO CONSENT TO DISCLOSURE (If Applicable)*# | TITLE OR RELATIONSHIP TO INDIVIDUAL WHO IS SUBJECT OF RECORD | DATE SIGNED[2] |

* Youth/Juvenile Records: The authorization must specify the record(s) and the party to whom the record(s) may be disclosed. It must be signed by the parent, guardian, or legal custodian of the juvenile who is the subject of the record, or the juvenile, if 14 years of age or older, per Wis. Stat. § 938.78(am).

# Education/Student Records: The authorization must be signed and dated by the parent, guardian or individual acting as a parent in the absence of a parent/guardian, or by an "eligible student" (18 years of age or older or under 18 and attending a postsecondary institution). It must specify the record(s) that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made, per 34 CFR § 99.30(b).

DEPARTMENT OF CORRECTIONS
Division of Management Services
DOC-1163A (Rev. 3/2024)

WISCONSIN
Wisconsin Statutes
§§ 146.81-84, 252.15, 938.78 and 51.30
Federal Regulations
42 CFR Part 2 & 45 CFR Parts 160 & 164

# AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION (PHI)

## INDIVIDUAL / AGENCY BEING AUTHORIZED TO DISCLOSE PHI

| NAME OF INDIVIDUAL / AGENCY | | TELEPHONE NUMBER | FAX NUMBER |
|---|---|---|---|
| ADDRESS | CITY | STATE | ZIP CODE |

## SUBJECT OF PROTECTED HEALTH INFORMATION (PATIENT)

| PATIENT NAME | DOC NUMBER | HOUSING UNIT | DATE OF BIRTH | TELEPHONE NUMBER |
|---|---|---|---|---|
| ADDRESS | CITY | STATE | ZIP CODE | |

## RECIPIENT(S) OF PROTECTED HEALTH INFORMATION

| NAME OF INDIVIDUAL(S) / ORGANIZATON(S) (e.g. Lawyer, Physician, Patient, Family) | TELEPHONE NUMBER | FAX NUMBER |
|---|---|---|
| ADDRESS | CITY / STATE / ZIP CODE | |

**NOTICE**: Records of the Department of Corrections that contain Protected Health Information (PHI) may include a Division of Adult Institutions and/or Division of Juvenile Corrections Health Care Record, Social Services File or Division of Community Corrections file. The records include those created by DOC and non-DOC health care providers. Disclosure of PHI can be written, electronic or verbal.
**READ CAREFULLY AND CHECK APPROPRIATE BOXES.**

## SPECIFIC PROTECTED HEALTH INFORMATION AUTHORIZED FOR USE/ DISCLOSURE

☐ **Two-Way Release** By checking this box, I authorize the individuals/agencies named in this authorization, to disclose to each other, the PHI identified below on an ongoing basis for the duration of this authorization.

☐ **Check the box to the left if a copy of an entire record may be disclosed and explain below why the entire record is needed.** Entire record includes all the types of information listed below plus correspondence, consents/refusals, medication administration sheets, flow sheets and miscellaneous documents. **If this box is checked, no checkboxes in the section below need to be checked. If no start and end dates are given below, only the last 12 months will be provided.**

## DOCUMENTS AUTHORIZED FOR USE/DISCLOSURE

- ☐ Problem List
- ☐ Record of Immunizations and TB test Results
- ☐ Medical History/Physical Exam
- ☐ Progress Notes
- ☐ Prescriber's Orders/Medications
- ☐ Consultations
- ☐ Laboratory Results
- ☐ Specific Form Numbers:
- ☐ Medical Imaging Reports (X-Rays, MRIs, etc.)
- ☐ Psychiatric (may include AODA/SUD diagnoses)
- ☐ Psychological (may include AODA/SUD diagnoses)
- ☐ AODA / SUD Program/Treatment Information
- ☐ Optical
- ☐ Dental
- ☐ Patient Request Folder/OnBase (e.g. Health Service Requests, Medication/Medical Supply Refill Requests)

**THIS AUTHORIZATION MAY INCLUDE MEDICAL, MENTAL HEALTH, DEVELOPMENTAL DISABILITY AND ALCOHOL/DRUG ABUSE/SUBSTANCE USE DISORDER INFORMATION, AND HIV TEST RESULTS, UNLESS EXCLUDED BELOW.**

**Describe time period of records by entering start and end dates.** If no dates are entered, records for the most recent 12 months will be provided. FROM: TO:

If Authorization is **limited** to medical or mental health conditions(s), or includes specific youth/juvenile information, describe (include time period):

☐ **LOCATION**: I authorize the disclosure of my location knowing that this will reveal that I am in a mental health or AODA / SUD treatment facility.

## PURPOSE OR NEED FOR DISCLOSURE OF PROTECTED HEALTH INFORMATION (check applicable category)

- ☐ Ongoing health care/treatment
- ☐ Further Medical Care
- ☐ Other
- ☐ Review by patient
- ☐ Review by family member/friend
- ☐ Legal representation/proceedings (Court/Administrative)
- ☐ Disability/Social Security Determination

Continued

| PATIENT NAME | DOC NUMBER |
|---|---|
| | |

**PATIENT RIGHTS**

Right to Receive Copy of This Authorization. Patients have a right to receive a copy of this form after signing it.

Right to Refuse to Sign This Authorization. DOC can not condition treatment or payment for treatment based on a patient's decision not to sign this form, except for research-related treatment and provision of health care solely for the purpose of creating PHI for disclosure to a third party.

Right to Withdraw This Authorization. Patients have the right to revoke this Authorization at any time by completing a Revocation of Authorization for Use/Disclosure of PHI (DOC-1163R), or equivalent. Revocation is effective when DOC, or other individual/agency authorized to disclose PHI, receives the form, and is not effective regarding the uses/disclosures of PHI made prior to receipt of the DOC-1163R, or equivalent.

Re-disclosure. If a patient authorizes disclosure to an individual/agency not covered by laws that prohibit re-disclosure, the PHI may be re-disclosed by that individual/agency. If Substance Use Disorder (SUD/AODA) records have been disclosed:

- The record that has been disclosed is protected by federal confidentiality rules (42 CFR Part 2). The federal rules prohibit you from making any further disclosure of this record unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed in this record or, is otherwise permitted by 42 CFR Part 2. A general authorization for the release of medical or other information is not sufficient for this purpose (see § 2.31). The federal rules restrict any use of the information to investigate or prosecute with regard to a crime any patient with a substance use disorder, except provided under §§ 2.12(c)(5) and 2.65.

Right to Inspect and/or Copy PHI. Patients have the right to inspect, and obtain copies of PHI for a reasonable fee used/disclosed based upon this form.

Authority to Sign DOC-1163A. A **minor** is a person under the age of 18 years. An **adult** is a person 18 years or older.

- Adults can sign the form regarding all types of PHI about themselves.
- A court appointed guardian of the person or an agent under an activated Power of Attorney for Health Care (POAHC) can sign the form for the incompetent adult or principal regarding all types of PHI, unless restricted by the Letters of Guardianship or POAHC document.
- A parent/guardian can sign the form for a minor child regarding medical/ physical health, mental health and developmental disability information.
- Minors 12-17 years can sign the form for AODA / SUD information about themselves. A parent/guardian can **not** access or authorize disclosure of AODA / SUD information about a minor child 12-17 years without consent of the minor.
- Minors 14 -17 years old can sign the form regarding mental health and developmental disability information about themselves from a community provider whose records are covered by s. 51.30, Wis. Stats.
- Minors 14 -17 years can sign the form regarding HIV test results about themselves. A parent/guardian can **not** access or authorize disclosure of HIV information about a minor child 14-17 years without consent of the minor.

**AUTHORIZATION EXPIRATION: DATE/EVENT**

**This Authorization is in effect until the following date or event:**

**If no date/event is entered, this Authorization expires one year from the date of signing.**

**I have read or had read to me this Authorization form. I have had an opportunity to ask questions. By signing this Authorization, I am confirming that it accurately reflects my wishes regarding use and disclosure of my Protected Health Information. I understand that there may be a charge for copies.**

| SIGNATURE OF PATIENT: | | DATE SIGNED[1] |
|---|---|---|
| | | |
| SIGNATURE OF OTHER PERSON LEGALLY AUTHORIZED TO CONSENT TO DISCLOSURE (If Applicable): | RELATIONSHIP TO PATIENT<br>☐ Legal Guardian ☐ Parent of Minor<br>☐ Next of Kin ☐ Health Care Agent<br>☐ Personal Representative<br>☐ Other: | DATE SIGNED[2] |

**FOR CENTRAL MEDICAL RECORDS AND INACTIVE WOMEN'S MEDICAL RECORD USE ONLY:**

**LIST OF DOCUMENTS / INFORMATION DISCLOSED, BASED ON THIS AUTHORIZATION (Write on back side of form or attach additional sheet(s), if needed. Include name and DOC on each sheet.)**

Initials of Person disclosing PHI _____ Date Disclosed _____ Time Disclosed _____

FACSIMILE OR PHOTOCOPY CAN BE TREATED AS ORIGINAL

**DISTRIBUTION:** Original-HIM Forms/Documents-Authorization Documents: HSU scan to PR Medical Authorization, PSU scan to PR Psychological Authorization, SUD scan to PR SUD Authorization; or DCC Client Case File; or Social Services File, Release of Information Authorizations Section when applicable. Copy – Patient/Other Person signing form. Copy – Individual/Agency authorized to disclose PHI when other than DOC.

# CONFIDENTIAL INFORMATION RELEASE AUTHORIZATION

**Date: _____**

| Name of Individual Who is Subject of Record: | Date of Birth: |
|---|---|
| | |

***I Authorize:*** ***To Release Information to:***

***Specific Records Authorized for Release (Include dates of records, if applicable):***

Entire File including:
Health and mental health records
Emergency room visits
Surgery and follow up records
All other records for this client for the dates of:

***Purpose or Need for Release of Information:*** _Legal assistance_____

**This authorization is voluntary. I understand that any treatment, payment, enrollment or eligibility for benefits is not conditioned upon me signing this authorization.**

**I understand that my personal health information disclosed pursuant to this authorization may be re-disclosed and may no longer be protected by federal law. My personal health information may be released to any of the following, but not limited to, experts, other parties and/or attorneys involved in my case, and the court hearing this matter.**

**I understand that I may revoke this authorization, in writing, at anytime. I understand that my revocation will not apply to information that has already been released pursuant to this authorization. Unless revoked, this authorization will remain in effect until the expiration time indicated below.**

**I understand that my records are protected under State and Federal regulations governing confidentiality:**

- **Mental Health—Sec. 51.30, Wis. Stats.; & HSS 92, Wis. Admin. Code**
- **Alcohol & Other Drug Abuse—42 CFR, Part 2; Sec. 51.30, Wis. Stats.; & HSS 92, Wis. Admin. Code**

**Authorization expires as of:** End of legal representation_____

***As evidenced by my signature below, I hereby authorize disclosure of records to the person(s) or agency(s) as specified above. I intend that a photocopy of this authorization shall be as effective as the original.***

_____ _____

***Signature of individual who is subject of record*** ***Date***

| **STATE OF WISCONSIN** **CIRCUIT COURT** **DANE COUNTY** | *For Official Use* |
|---|---|
| STATE OF WISCONSIN,<br>Plaintiff,<br>v. Case No. 24-CF-000<br>JOHN DOE,<br>Defendant. | |

**DEFENDANT'S MOTION FOR COMPETENCY EVALUATION**

The defendant, John Doe, by undersigned counsel, moves the court for a determination of his competency to seek postconviction relief pursuant to *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994). The following is alleged in support of this motion:

1. On January 12, 2024, the defendant was convicted of disorderly conduct. The Dane County Circuit Court, the Honorable John Public, presiding, sentenced the defendant to 90 days in the county jail.

2. The defendant filed a timely notice of intent to pursue postconviction relief, after which undersigned counsel was appointed to represent them on appeal. Counsel has reviewed the court file and transcripts and has spoken with the defendant. As a result of counsel's contacts with the defendant, counsel has a good faith doubt regarding the defendant's ability to assist counsel in postconviction maters and make postconviction-related "decisions committed by law to the defendant with a reasonable degree of rational understanding." *Debra A.E.*, 188 Wis. 2d at 126.

3. Under *Debra A.E.*, if the circuit court "determines that a reason to doubt a defendant's competency exists, it shall, as an exercise of discretion, determine the method for evaluating a defendant's competency, considering the facts before it and the goals of a competency ruling." 188 Wis. 2d at 131-32. The court "may order an examination of the defendant by a person with specialized knowledge." Id.at 132. An examination would be appropriate in this case.

FOR THESE REASONS, counsel asks this court to order an examination of the defendant. Counsel further asks that the order require the examiner to specifically address the defendant's ability to assist postconviction counsel and to make postconviction decisions committed by law to the defendant with a reasonable degree of rational understanding.

Dated this 23rd day of April, 2024.

Respectfully submitted,

*Electronically signed by Jane Smith*
JANE SMITH
Attorney at Law
State Bar No. 123456

123 Main Street
Madison, WI 53703

Attorney for John Doe

cc: Jeff Okazaki
Clerk of Circuit Court

Ismael Ozanne
District Attorney

John Doe
Defendant

# CRIMINAL APPEALS UNDER RULES 809.30 & 809.32[1]

## *a procedural guide in checklist form*

I. FROM APPOINTMENT TO RECEIPT OF CASE MATERIALS

a. Within (about) one week of receiving the appointment:

- □ Secure the case materials in a file folder, and/or scan them for an electronic file, and create a time log;
- □ Opt in to the case via the Wisconsin Circuit Court e-filing website, indicating that you are you appointed by a government agency and/or were appointed by the State Public Defender Office.
- □ Calculate the first deadline and add the case and deadline into your calendaring and case-management system;
- □ Send your client an introductory letter;
- □ Verify that all transcripts and records were requested;
- □ Skim the case materials to see if anything requires immediate attention; and
- □ Ask the trial attorney for the file, including all discovery.

b. Upon receipt of the last transcript or the court record:

- □ Place a copy of the e-mail granting electronic access to the last transcript in your file so you can prove your deadline, if necessary;
- □ Check that the transcripts and (especially) the court record are complete; and
- □ Note your deadline for filing a postconviction motion or notice of appeal in your calendaring and case-management system.

c. Throughout this period:

- □ As you receive each transcript and the court record, note the date of receipt.
- □ If a transcript or the court record is late, contact the relevant court reporter or clerk; if that does not solve the problem, consider seeking sanctions.

[1] This guide is intended to compliment *Appellate Practice and Procedure for SPD-Appointed Counsel*. Please refer to that more comprehensive handbook for explanations of and references for the procedure outlined herein.

II. FROM RECEIPT OF TRANSCRIPTS/RECORD TO FILING AN ARGUABLY MERITORIOUS POSTCONVICTION MOTION OR NOTICE OF APPEAL

a. Within (about) 30 days of receiving the last case material:

□ Review all court record documents and transcripts;

□ Review trial counsel's file materials; and

□ Note potential issues and, as to each, the factual investigation and legal research you'll need to do to determine whether it is arguable.

b. Within (about) 45 days of receiving the last case material:

□ Speak with the trial attorney about the case, including (but not limited to) any potential issues involving matters outside the record;

□ Meet with your client about the case, covering all matters potentially relevant to your representation and any appeal, including (but not limited to) any potential issues involving matters outside the record;

□ Complete any other factual investigation, as well as legal research, necessary to determine your client's options for appeal; and

□ Once you have determined your client's options, consult with him regarding the options.

[Note: Where you have determined that there is no arguable issue that can be raised on appeal, see Section VI, below.]

c. Within 60 days of service of the last item:

□ Obtain your client's informed decision on how to proceed on appeal and:

*If your client wishes to go forward with any appeal*, initiate the appeal (via a postconviction motion or notice of appeal, whichever is appropriate) or, if necessary, file a motion (to the court of appeals) for additional time; then serve copies of filed documents on opposing counsel and your client.

*If your client wishes to forgo any appeal*, send him a closing letter describing the conversation(s) that led to his final decision, his decision, and the fact that you are closing the case; then close the case file and, if applicable, submit billing information to the SPD.

If your client asks you to withdraw so he can proceed pro se or with retained counsel, see Section VI.d., below, for the relevant checklist.

## III. FROM FILING A POSTCONVICTION MOTION TO FILING A NOTICE OF APPEAL

a. Within (about) one week of filing the postconviction motion:

- □ Contact the judge's clerk and get a time for a hearing on the motion (unless a hearing is unnecessary and not desired).

If the hearing is scheduled for a date that is beyond the circuit court's 60-day deadline for deciding the motion, file a motion with the court of appeals for an extension of the circuit court's deadline.

If you have raised a claim of ineffective assistance of trial counsel and you have not already notified trial counsel of this and sent him a copy of the motion, do so; also, ask trial counsel and/or any other necessary witness about any scheduling conflicts for the hearing.

b. (About) two weeks – or more – before the hearing on the postconviction motion:

- □ Arrange for your client's appearance at the hearing;

[Note: If your client is incarcerated, in most counties, you will need to prepare an order to produce for the court.]

- □ Subpoena – or obtain an admission of service by mail from – any witness that you may need for the hearing, including from the trial attorney if you have raised a claim of ineffective assistance, making sure to require the witness(es) to bring to the hearing any documents in their possession that are relevant to the appeal; and

- □ Consider whether the prosecutor may agree to settle the appeal; if so, and your client consents, contact the prosecutor.

c. (About) one week before the hearing on the postconviction motion:

- □ Prepare your argument to the court; and

- □ Review the rules of evidence.

If your client may need to testify at the hearing, prepare him for this.

If you will be calling any other witness, and/or, if you think the prosecutor will call any witness, contact the witness(es).

If your client is incarcerated, confirm with the sheriff's department and/or the prison that your client will be transported to the hearing.

d. On the date of the hearing, take with you to the hearing:

- □ At least three copies of your postconviction motion – for you, and, if needed, the prosecutor and judge;
- □ At least three copies of any authority that you are heavily relying on;
- □ At least four copies of any document that you may reference in questioning – for you, the prosecutor, the judge, and the witness;
- □ Your entire file, with relevant documents handy for reference; and
- □ Proposed orders granting and denying the motion.

e. If the circuit court grants your motion and there is no further issue to appeal, upon entry of the written order:

- □ Ensure that your client has received the relief granted; and
- □ Once it is clear the state will not appeal, close the file and, if applicable, submit billing information to the SPD.

If the court has granted any new trial proceeding, tell the appropriate SPD trial office of your client's need for a new trial attorney.

If the court has granted any relief that would affect custody status, ensure that the clerk of circuit court sends a certified copy of the order or amended judgment to the institution's records department.

f. If the circuit court denies your motion and/or there may be additional issues to appeal, upon entry of the written order:

- □ Request a copy of the postconviction motion hearing transcript unless your client does not want to appeal further; and
- □ Determine whether there would be any arguable merit to an appeal of the court's postconviction decision and/or whether there is any issue that is otherwise preserved for appeal.

If you determine that any further appeal would have no arguable merit, refer to the no-merit procedures outlined in Section VI., below

If you determine that there would be arguable merit to further appeal, ascertain whether your client intends to pursue the appeal.

g. Within 20 days of entry of the circuit court's order deciding the postconviction motion, where there is still an issue with arguable merit for appeal and your client wants to pursue it:

□ File with the clerk of circuit court a notice of appeal and the order appointing counsel; and

□ Send copies to your client.

[Note: Upon filing the notice of appeal, private bar attorneys may submit billing information to the SPD for work up to this point.]

If your client has decided *not* to appeal further, send him a closing letter describing the conversation(s) that led to his final decision, his decision, and the fact that you are closing the case; then close the file and, if applicable, submit billing information.

## IV. FROM FILING A NOTICE OF APPEAL TO FILING A PETITION FOR REVIEW

a. Within 14 days of filing the notice of appeal:

□ Obtain a court reporter certification regarding any as-yet-unproduced transcript, if necessary;
□ Arrange for service of transcripts;

□ File the statement on transcript with the circuit court; and

□ Serve copies of the statement on transcript on your client.

b. Upon receipt of the clerk of circuit court's notice that he has prepared the record for the court of appeals, containing the record index:

□ Ensure that every document that you may need to cite in the court of appeals is listed, and complete, in the record index.

□ If any document that you may cite is not listed or incomplete, promptly take action to correct the record and index.

• Opt in to the case via the Wisconsin Appellate Court e-filing website, indicating that you are you appointed by a government agency and/or were appointed by the State Public Defender Office.

c. Within 40 days of the filing of the court record on appeal:

□ E-file the brief-in-chief and the appendix in conformity with the technical rules discussed in this handbook; and

□ Send copies to your client.

d. Within 15 days of the filing of the state's responsive brief in the court of appeals:

□ E-file the reply brief; and

□ Send a copy to your client.

e. If the court of appeals denies any claim, within 30 days of the decision:

[NOTE: THE DEADLINE FOR FILING A PETITION FOR REVIEW IS NOT EXTENDABLE.]

□ E-file the petition for review; and

□ Send copies to your client.

□ If the court of appeals' decision is appropriate for a motion for reconsideration, you may file such a motion within 20 days of the decision. Then, the petition for review would be due within 30 days of the order denying reconsideration or issuing an amended decision.

□ If your client has decided *not* to appeal further, send him a closing letter, then close the file and, if applicable, submit billing information.

f. If the court of appeals grants your claims, and there is no further issue to appeal, upon issuance of the remittitur:

□ Use the checklist provided in Section III.e., above.

V. FROM FILING A PETITION FOR REVIEW TO CLOSING THE CASE

If the state supreme court accepts the petition for review:

□ Immediately contact the SPD's Appellate Division and notify us of whether you would like to litigate the case in the supreme court.

[Note: The Appellate Division has discretion whether to reassign a case that the supreme court has accepted for review.]

If your appointment is continued in the supreme court:

□ If desired, you may submit billing information to the SPD for your work up to this point.

□ Follow all of the supreme court's orders and the applicable statutes and have fun!

If your appointment is not continued in the supreme court:

□ Send your entire case file to SPD's appellate intake or to successor counsel, depending on your instructions from the Appellate Division.

□ Close the file and, if applicable, submit billing information.

If the state supreme court denies the petition for review:

□ Send your client a copy of the supreme court's decision and explain that there is nothing left to be done on his direct appeal in state court and that you no longer represent him; and

[Note: If appropriate, advise your client of his right to file a petition for a writ of certiorari in the United States Supreme Court and the fact that there is no right to counsel to assist him in doing so. If you believe that his is an exceptional case that merits a discretionary appointment of counsel for the purpose of filing a petition for a writ of certiorari or a petition for a federal writ of habeas corpus, contact the SPD's appellate division immediately to discuss the matter.]

□ Close the file and, if applicable, submit billing information.

## VI. FROM REVIEW OF THE CASE TO THE END OF REPRESENTATION WHERE APPOINTED COUNSEL HAS FOUND NO ARGUABLE ISSUES

a. Soon after determining that the case presents no arguable issue for appeal (after taking the steps outlined in Section II.a. & II.b., above), and prior to the deadline for filing a postconviction motion or notice of appeal:

□ Explain to your client that he has three options: (1) take no appeal and ask you to close his case without further action, (2) proceed on appeal pro se or with the help of retained counsel, or (3) proceed with a no-merit appeal;

□ Explain to your client how each of these options would operate and how he could request copies of his case materials under each option; and

□ Explain to your client that if he does not make a choice regarding how to proceed, you will be required to proceed with a no-merit appeal.

b. If your client tells you that he has decided not to appeal and asks you to close his case without further action, then, at your earliest convenience:

   □ Send your client a closing letter describing the conversation(s) that led to his final decision, his decision, and the fact that you are closing the case; and

   □ Close the file and, if applicable, submit billing information.

c. If your client tells you that he has decided to proceed pro se or with the help of retained counsel:

   i. Within 60 days of receipt of the last transcript or the court record:

      □ File a motion to withdraw as postconviction counsel in the circuit court based on your client's decision to proceed pro se or with the help of retained counsel – *without divulging confidential information regarding your opinion that any appeal would lack arguable merit*;

      □ File a motion in the court of appeals to extend the time for your client to file a postconviction motion or notice of appeal, perhaps requesting a new deadline that runs from the date of the circuit court's entry of an order determining your motion to withdraw; and

      □ Serve both motions on opposing counsel, the SPD's appellate intake unit, and your client.

   ii. Upon entry of the circuit court's order granting your motion to withdraw:

      □ Inform your former client of the decision and his new deadline for filing a postconviction motion or notice of appeal;

      □ Send all of the case materials to your former client or, if he is represented, to successor counsel; and

      □ Close the file and, if applicable, submit billing information.

   iii. Upon entry of the circuit court's order denying your motion to withdraw:

      □ Consider whether the court arguably erred in denying the motion.

If so, discuss with your client whether he wants to appeal the court's denial of his right to appeal pro se or with counsel ofchoice.

If not, feel free to contact an Appellate Division attorney manager to discuss how to proceed.

d. If your client tells you that he has decided to proceed with a no-merit appeal or if he has refused to make any decision on his options for appeal, then:

- □ Within 5 days of your client's request for the transcripts and the court record, serve your client with copies of these materials (except for the PSI, if any) and notify the clerk of the court of appeals that you have doneso;
- □ Within 180 days of service of the last transcript or the court record or within 60 days after entry of an order denying a postconviction motion, file a no-merit notice of appeal and statement on transcript;
- □ Within 14 days of the record being filed in the court of appeals:
  - □ E-file the no-merit report with the court of appeals, along with the required certification;
  - □ Serve the report on your client; and
  - □ Notify the clerk of the court of appeals that you have served your client with the report.

Upon the court of appeals' notification to you that your client has filed a response to the no-merit report, determine whether you need to file a supplemental no-merit report to rebut allegations in your client's response.

If you need to file a supplemental no-merit report, do so, revealing only as much confidential information as is necessary.

If you do not need to file a supplemental report, file a letter with the clerk of the court of appeals informing the court that you will not file a supplemental report, or take no action.

If the court of appeals accepts the no-merit report:

- □ Inform your client of the court of appeals' decision, the fact that you no longer represent him, and his right to file a petition for review with the state supreme court; and
- □ Close the file and, if applicable, submit billing information.

If the court of appeals rejects the no-merit report:

- □ Take whatever action is appropriate based on the court of appeals' decision.

If your client requests new counsel, contact the SPD's Appellate Division for a determination of whether that would be appropriate

**STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY**

Caption:

_____
Name

_____
Date of Birth

**Order to**
☐ **Produce**
☐ **Transport**

Case No. _____

**THE COURT FINDS:**

1. The above entitled action is scheduled for a hearing and the above-named person, ☐ or [Name] _____, [Date of birth] _____ is currently being held at _____, and must be transported for said hearing.

☐ 2. The person subject to this order has allegations or convictions for:

| **Charge(s)** | **Wis. Statute(s) Violated** |
|---|---|
| | |
| | |

**THE COURT ORDERS:**

☐ 1a. The warden/superintendent with physical custody of the person subject to this order at the time of its execution shall make that person available to the sheriff of _____ County. The sheriff shall convey that person to _____ for proceedings in Branch _____ of the Circuit Court of _____ County on _____ 20_____at _____ ☐ a.m. ☐ p.m.

☐ 1b. The sheriff shall transport the person subject to this order from _____
To: _____
_____
_____

☐ 2. Special transport needed: _____

**IT IS FURTHER ORDERED,** at the conclusion of the hearing/proceeding/appointment/event, the sheriff shall either:

☐ 1. Return the person subject to this order to the institution/center of pick-up,
**OR**
☐ 2. Release the person subject to this order if the institution from which has been conveyed no longer may confine him,
**OR**
☐ 3. Other: (Will follow order of the court) _____

| **STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY** | *For Official Use* |
|---|---|
| STATE OF WISCONSIN,<br>Plaintiff,<br>v. Case No. 24-CF-000<br>JOHN DOE,<br>Defendant. | |

**ADMISSION OF SERVICE**

I, Jane Doe, hereby admit service that on the 23rd day of April, 2024, I received a subpoena to appear at the hearing on the May 8, 2024, at 10 a.m. before the Honorable John Public, in the above case.

Dated this 23rd day of April, 2024.

JANE DOE
000 Main Street
Madison, WI 53703

**STATE OF WISCONSIN** **CIRCUIT COURT** **DANE COUNTY**

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 24-CF-000

JOHN DOE,

Defendant.

**ORDER**

For the reasons stated on the record at the hearing held on April 23, 2024, it is ordered that the defendant's motion for postconviction relief is hereby **GRANTED**.

It is further ordered that the judgment of conviction is hereby vacated.

**OR**

For the reasons stated on the record at the hearing held on April 23, 2024, it is ordered that the defendant's motion for postconviction relief is hereby **DENIED**.

| **STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY** | *For Official Use* |
|---|---|
| STATE OF WISCONSIN,<br>Plaintiff,<br>v.<br>Case No. 24-CF-000<br>JOHN DOE,<br>Defendant. | |

**NOTICE OF APPEAL**

TO:

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
215 South Hamilton Street
Madison, WI 53703

Ismael Ozanne
District Attorney
Dane County Courthouse
215 South Hamilton Street
Madison, WI 53703

NOTICE IS HEREBY GIVEN that the defendant in the above-captioned case appeals to the Court of Appeals, District IV, from the Judgment of Conviction entered on April 10, 2023, in the Circuit Court for Dane County, the Honorable John Public, presiding, in which the defendant was convicted of Disorderly Conduct, contrary to Wis. Stat. § 947.01, and from the order denying postconviction relief entered on April 23, 2024.

This is not an appeal within Wis. Stat. § 752.31(2).

This is not an appeal to be given preference pursuant to statute.

The order determining postconviction relief was entered on April 23, 2024.

Dated this 13th day of May, 2024.

*Electronically signed by Jane Smith*
JANE SMITH
State Bar No. 123456

123 Main Street
Madison, WI 53703
000-000-000
janesmith@email.com

Attorney for John Doe

cc: Samuel Christensen
Clerk of Court of Appeals

Criminal Appeals Unit
Assistant Attorney General

| **STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY** | *For Official Use* |
|---|---|
| *In re the termination of parental rights to: J.D. Jr., a person under the age of 18,*<br>DANE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,<br>Petitioner,<br>v.<br>Case No. 24-TP-00<br>J.D.,<br>Respondent. | |

## NOTICE OF APPEAL

TO:

Jeff Okazaki
Register in Probate
215 South Hamilton Street
Madison, WI 53703

Carlos Pabellón
Corporation Counsel
210 Martin Luther King Jr. Blvd
Madison, WI 53703

Mary Major
Guardian ad Litem
123 Main Street
Madison, WI 53703

Samuel Christensen
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

NOTICE IS HEREBY GIVEN that the respondent in the above-captioned case appeals to the Court of Appeals, District IV, from the order terminating parental rights entered on March 13, 2024, in the Circuit Court for Dane County, the Honorable John Public, presiding, in which the respondent's parental rights were terminated pursuant to Chapter 48.

This is an appeal within Wis. Stat. § 752.31(2)(e).

This is an appeal to be given preference pursuant to Wis. Stat. § 809.107.

The final transcript was served on the undersigned on April 12, 2024.

Dated this 13th day of May, 2024.

*Electronically signed by Jane Smith*
JANE SMITH
State Bar No. 123456

123 Main Street
Madison, WI 53703
000-000-000
janesmith@email.com

Attorney for J.D.

cc: [*If applicable, the name of the other parent or the attorney for the other parent.*]

**SIGNATURE OF APPELLANT**

**IN SUPPORT OF NOTICE OF APPEAL [1]**

_____

[1] The parent's signature has been redacted in order to comply with the confidentiality requirements of cases involving children.

| **STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY** | *For Official Use* |
|---|---|
| *In re the termination of parental rights to: J.D. Jr., a person under the age of 18,*<br>DANE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,<br>Petitioner,<br>v.<br>Case No. 24-TP-00<br>J.D.,<br>Respondent. | |

**STATEMENT ON TRANSCRIPT**

TO:

Jeff Okazaki
Register in Probate
215 South Hamilton Street
Madison, WI 53703

Carlos Pabellón
Corporation Counsel
210 Martin Luther King Jr. Blvd
Madison, WI 53703

Mary Major
Guardian ad Litem
123 Main Street
Madison, WI 53703

Samuel Christensen
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Pursuant to Wis. Stat. Rule 809.11(4)(a), the following transcripts which the appellant believes are necessary for prosecution of this appeal are already on file with the clerk of the circuit court:

| Date of Proceeding | Type of Proceeding |
|---|---|
| February 7, 2024 | Hearing on Petition |
| February 28, 2024 | Final Pre-Trial |
| March 4, 2024 | Status Conference |
| March 8, 2024 | Motion Hearing |
| March 13, 2024 | Disposition Hearing |

Pursuant to Rule 809.107(5)(c), Stats., arrangements have been made with the court reporters for service of transcript copies on opposing counsel and guardian ad litem. The State Public Defender is responsible for transcript costs, pursuant to Wis. Stat. § 967.06.

Dated this 13th day of May, 2024.

*Electronically signed by Jane Smith*
JANE SMITH
State Bar No. 123456

123 Main Street
Madison, WI 53703
000-000-000
janesmith@email.com

Attorney for J.D.

**STATE OF WISCONSIN, CIRCUIT COURT, _____, COUNTY**

Case Caption (Case Name)

# DOCKETING STATEMENT

Circuit Court Case No. _____

Case Number Issued by Court of Appeals

| Appellant(s) (Cross-Applicant) | Attorney's Name and Address |
|---|---|
| | Attorney's Telephone Number |
| Respondent(s) (Cross-Respondent) | Attorney's Name and Address |
| | Attorney's Telephone Number |

**CRITERIA FOR EXPEDITED APPEALS**

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
  1. no more than 3 issues are raised;
  2. the parties' briefs will not exceed 15 pages in length; and
  3. the briefs can be filed in a shorter time than normally allowed.

  These requirements can be modified somewhat in appropriate cases.
- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

**JURISDICTION**

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?

☐ Yes ☐ No If yes, date of entry _____.

Is appeal timely? *(See §808.04, Wisconsin Statutes)*

☐ Yes ☐ No

Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?

☐ Yes ☐ No *(If "no", explain jurisdiction basis for appeal on separate sheet.)*

**NATURE OF ACTION** – Briefly describe the nature of action and the result in circuit court:

**ISSUES** – Specify the issues to be raised on appeal: *(Attach separate sheet if necessary.)*

(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal. The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

**STANDARD OF REVIEW –** Specify the proper standard of review for each issue to be raised, citing relevant authority:

Do you wish to have this appeal placed on the expedited appeals calendar? *(See Criteria For Expedited Appeals.)*

☐ Yes ☐ No If "no", explain :

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?

☐ Yes ☐ No

Will you request oral argument?

☐ Yes ☐ No

List all parties in trial court action who will not participate in this appeal:

| Party | Attorney's Name and Telephone Number | Reason for not Participating |
|---|---|---|

Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?

☐ Yes ☐ No Name of Case _____

Appeal Number _____

_____
Signature of Person Preparing Docketing Statement

_____
Name Printed or Typed

_____
Email Address (if any)

_____
Date

**Appellant Note:**

**You MUST** file this form and attachments with the Clerk of the Circuit Court.

**You MUST** attach a copy of the following trial court documents to this form:

1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

**You MUST** also serve all parties with a copy of this completed Docketing Statement and attached trial court documents.

The clerk of circuit court shall forward this form to the Court of Appeals.

State of Wisconsin
Office of the State Public Defender
FIS 501 – April 2024

# STATE PUBLIC DEFENDER
# REQUEST FOR TRANSCRIPTS OF IN-COURT PROCEEDINGS

Case Caption:

**Court Reporter:**
Name:
Street Address:
City, State, Zip:
Phone:

Court Case #:

SPD File #:
Additional SPD File #:

**Send transcripts to:**
☐ Requesting counsel
☐ Opposing counsel

**Requesting Counsel**:
☐ SPD Staff ☐ Private Bar
Name:
Street Address:
City, State, Zip:
Phone:

**Case type:**
☐ Pending circuit court case
☐ Appellate case

**Opposing Counsel**:
Name:
Street Address:
City, State, Zip:
Phone:

**I request that you prepare and transmit transcripts of the following proceedings (provide dates of proceedings requested). In addition to access to the electronic transcript, please provide a single paper copy of the transcript. *See* Wis. Stat. § 801.18(15)(b); *see also* SCR 71.04(8).**

**Signed:** _____ **Date:** _____

**To the court reporter:** Pursuant to s. 967.06, Stats., the named attorney requests that you prepare the transcript(s) of the proceeding(s) indicated above, provide a copy to the attorney, and file the original in the court record. Any filing of the original constitutes certification that you have already served the requesting attorney with a copy. S. 801.14(4). If the original transcript was previously prepared, please consider this to be a request for a copy. S. 967.06 has been amended to provide that the State Public Defender will pay for the original and the client's counsel's copy in all cases where the State Public Defender has appointed counsel. Any mailing or delivery fee over $5 requires a receipt be attached to the transcript invoice.

**Effective April 1, 2024 transcript invoices** for pending circuit court cases and appellate cases, where the requesting counsel is either an SPD staff attorney or SPD private bar, must be submitted electronically. An electronic copy or this request will be a required attachment. ***Do not mail hard copies.***

- State-employed court reporters must submit invoices electronically at http://link.wispd.gov/transcriptsub.
- Retired and Freelance court reports must email invoices to SPDFiscal@opd.wi.gov.

I certify that the attached invoice requests payment for the transcripts requested and no others, and that the transcript complies with SCR 71.04 (8).

Signed: _____ Date: _____
*Court Reporter*

**A digital copy of this request form must accompany your invoice.**

## CERTIFICATION BY COURT REPORTER

**Re:** ***State of Wisconsin v. John Doe***
**Dane County Case No.: 24-CF-0000**

I certify that the defendant, by letter dated May 13, 2024 made satisfactory arrangements with me for the preparation of the transcripts of the proceedings held on May 12, 2024, and that, pursuant to Rule 809.30(2)(g)2., Stats., the original transcript will be filed with the clerk of the trial court and copies of the transcript will be served upon the defendant and opposing counsel.

Dated this 15th day of May, 2024.

Mary Jo

MARY JO
Court Reporter
215 South Hamilton Street
Madison, WI 53703

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2024AP0000000

---

*In re to the Termination of Parental Rights to J.D., Jr.,*
*A person under the age of 18:*

DANE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner-Respondent,

v. Dane County
Case No. 24-TP-000

J.D.,

Respondent-Appellant.

---

**MOTION FOR REMAND THIS CASE TO THE CIRCUIT COURT FOR POSTDISPOSITION FACT-FINDING**

---

The respondent-appellant, J.D., by undersigned counsel, moves this court for an order retaining jurisdiction over this appeal and remanding the case to the circuit court for fact finding pursuant to Wis. Stat. Rule 809.107(6)(am). The grounds for this motion are as follows:

On March 13, 2024, after a plea of no contest to the grounds for termination, the circuit court terminated J.D.'s parental rights to their child, J.D., Jr. J.D. filed a timely notice of intent to pursue postdisposition relief and a timely notice of appeal.

The circuit court filed the court record with the court of appeals on May 24, 2024; thus, this motion for remand is timely under Rule 809.107(6)(am).

Undersigned counsel has identified meritorious issues for appeal that first require fact finding in the circuit court.

*[Here,* either *provide a detailed summary of the claims that you propose to raise in a postdisposition motion to the circuit court and describe the fact finding necessary for the circuit court to resolve those claims – in as many paragraphs as appropriate –* or *refer the court to a thorough proposed postdisposition motion that is attached to this motion.]*

FOR THESE REASONS, J.D., by undersigned counsel, respectfully asks this court to enter an order in accordance with Rule 809.107(6)(am) retaining jurisdiction of this appeal and remanding the case to the circuit court to hear and decide the issues set forth above.

Dated this 25th day of May, 2024.

*Electronically signed by Jane Smith*
JANE SMITH
State Bar No. 123456

123 Main Street
Madison, WI 53703
000-000-000
janesmith@email.com

Attorney for J.D.

cc: Carlos Pabellón
Opposing Counsel

Mary Major
Guardian ad litem

*[If applicable, other parent or other parent's attorney]*

Jeff Okazaki
Register in Probate

J.D.
Respondent-Appellant

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2024AP0000000

---

*In re to the Termination of Parental Rights to J.D. Jr.,*
*A person under the age of 18:*

DANE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner-Respondent,

v. Dane County
Case No. 24-TP-000

J.D.,

Respondent-Appellant.

---

**AFFIDAVIT IN SUPPORT OF MOTION FOR REMAND**

---

STATE OF WISCONSIN )
) ss
COUNTY OF DANE )

I, Jane Smith, being duly sworn on oath, deposes and states as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin.

2. I represent the Respondent-Appellant, J.D., for purposes of seeking postdisposition or appellate relief pursuant to Wis. Stat. § 809.107.

3. I make this affidavit based on my own personal knowledge and based on the documents described herein.

4. Based on my review of this case, I have concluded that a remand for post-judgment fact-finding is necessary.

5. This affidavit is being filed pursuant to §809.107(6)(am) in support of J.D.'s motion for remand to the circuit court.

6. Pursuant to Wis. Stat. §802.05(2), to the best of my knowledge, information and belief, remand is warranted for the reasons set forth in the motion and is not being sought to cause unnecessary delay.

7. *[Here, provide a detailed summary of the claims that you propose to raise in a postdisposition motion to the circuit court and describe the fact finding necessary for the circuit court to resolve those claims – in as many paragraphs as appropriate*. This can be similar to what was alleged in the motion for remand].

Dated this 25th day of May, 2024.

_____
JANE SMITH

Subscribed and sworn to before me
this _____ day of _____, _____.

_____

Notary Public, State of Wisconsin
My commission expires: _____

**Appendix 4.n.**

## SIGNATURE OF PETITIONER

## IN SUPPORT OF PETITION FOR REVIEW[1]

_____

[1] The parent's signature has been redacted in order to comply with the confidentiality requirements of cases involving children.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP0000000 – CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN DOE,

Defendant-Appellant.

---

On Appeal from a Judgment of Conviction,
Entered in the Dane County Circuit Court,
the Honorable John Public, Presiding

---

# BRIEF OF DEFENDANT-APPELLANT

---

JANE SMITH
Attorney at Law
State Bar No. 123456

Smith Law Office, LLC
123 Main Street
Madison, WI 53703
(000) 000-0000
janesmith@email.com

Attorney for John Doe

## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,468 words.

## CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of May, 2024.

Signed:
*Electronically signed by*
*Jane Smith*
JANE SMITH
Attorney at Law

## SAMPLE – CASE OPENING LETTER

January 1, 2024

Mr. John Doe #01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

***RE:*** **State v. John Doe**
**Adams County Case No. 14-CF-1497**

Dear Mr. Doe:

I am a private attorney and the State Public Defender has appointed me to represent you in your appeal of the above-referenced case(s). If you do not want an appeal you should let me know right away.

At this point, I have requested copies of the court records and transcripts of your case, and I expect to receive them within the next 60 days. Once I get all of the records and transcripts, I will have 60 days to read them, speak with you, and determine your options for appeal. Therefore, you should expect to hear from me in a few months.

In the meantime, you may contact me if you have questions or concerns about your case. Feel free to write me a letter explaining any specific concerns that you have that may be relevant to your appeal. However, please be aware that I may not be able to give you any legal advice regarding those concerns until after I receive and review the records and transcripts.

Finally, if your address or contact information changes, please let me know right away. I will not be able to file a postconviction motion or an appeal until I have consulted with you. If I am unable to reach you because I do not know where you are you may lose your right to appeal.

I look forward to speaking with you about your case in the future.

Sincerely,

Jane Smith
JANE SMITH
Attorney at Law

**SAMPLE – LETTER RE CLOSING FILE WITHOUT ACTION**

January 1, 2024

Mr. John Doe #01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

***RE:*** **State v. John Doe**
**Adams County Case No. 14-CF-1497**

Dear Mr. Doe:

I am writing to confirm that I have closed your file. When we spoke yesterday, I told you that, unfortunately, there is no arguable basis for appeal. As I explained, I researched your idea of a motion for sentence modification based on the recent reduction in the maximum sentence for your crime, which we discussed when we met last month, but found that this very issue has previously been rejected by the court of appeals and therefore we cannot raise it in your case.

We further discussed that you had four options for how to proceed: (1) you could ask me to close your file without further action, waiving your right to appeal; (2) you could ask me to withdraw from your case so you could hire a private lawyer; (3) you could ask me to withdraw from your case so you can appeal on your own ("pro se"); or (4) you could ask me to proceed with a "no merit" appeal, in which I would file a report with the court of appeals describing your case and my conclusion that there are no arguable issues for appeal. I explained that the "default" option is a no-merit appeal; in other words, if you did not choose another option, I would have to initiate a no-merit appeal.

After I explained these options, you told me to close your file. You said that you understood that there was nothing to appeal and want to move on with your life. Therefore, I have closed your file.

If I misunderstood your intentions, please contact me right away – by letter or by collect call to (555) 555-5555. I am sorry that I was not able to take any other action on your behalf, and I want to wish you the best in all your future endeavors.

Sincerely,

*Jane Smith*

JANE SMITH

Attorney at Law

## SAMPLE – LETTER ADVISING CLIENT OF NO-MERIT OPTIONS

January 1, 2024

John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

***RE:*** **State v. John Doe**
**Adams County Case No. 14-CF-1497**

Dear John Doe:

I am writing to explain your appellate options. As I previously explained during our conversation, I did not find any arguable issues in reviewing your case.

Accordingly, I told you that you had the following four options:

1. You could agree with my assessment and tell me to close your file and take no further action. By taking this option, your direct appeal would be over and absent extraordinary circumstances, you would not be able to appeal from your plea and sentencing in this case. Please be aware by choosing to close your file without further action, this results in a waiver of your direct appeal and the right to counsel on appeal.

2. You could tell me that you wanted me to withdraw from your case so that you could hire a private lawyer. Please be aware that if you choose this option, the State Public Defender ("SPD") will not again appoint counsel for you.

3. You could tell me that you wanted me to withdraw from your case so that you could represent yourself. Please be aware that if you choose this option, the SPD will not again appoint counsel for you.

4. You could have the Court of Appeals look at the reasons I think you do not have any further issues for appeal by asking me to file a no-merit report. In a no-merit report, I would be limited to the information in the court record, and I would tell the court why I think that there is no legal merit to a further appeal in your case. You would get a copy of the no-merit report. If you request copies of the transcripts and the court record, I will forward them to you within 5 days of your request.

You could file a response if you wanted to. You could write to the Court of Appeals directly and tell the court why you think I am wrong. This would be your opportunity to tell the court what issues you believe exist in the case. If you file a response to the no-merit report, I may file a supplemental no-merit report. This reply could contain affidavits containing facts outside the record that support the position that there are no legal issues

for appeal. Please be warned that any supplemental no-merit report and affidavits filed in reply to any response you file might include confidential information. This means that I can include the contents of any privileged information including our correspondence and our conversations and any other information that I learn during my representation of you.

After the no-merit report is filed, the Court of Appeals will look at the court record, the no-merit report, your response (if you filed one) and the supplemental report or affidavits (if I filed them). The Court of Appeals would decide independently either that I am correct or that I am wrong about whether there are any meritorious issues. If the Court decided that I am correct, the Court of Appeals would affirm your conviction and sentence and would say that I do not have to be your attorney any longer. If the Court decided that I am wrong, the Court of Appeals would ask me to bring either a regular appeal or a regular postconviction motion for you.

Please be aware that if you fail to choose one of the four options presented, the default is that I will file a no-merit report. I will set up another call with soon you in order to determine what option you have chosen.

Sincerely,

*Jane Smith*
JANE Smith
Attorney at Law

| **STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY** | *For Official Use* |
|---|---|
| STATE OF WISCONSIN,<br>Plaintiff,<br>v.<br>Case No. 24-CF-000<br>JOHN DOE,<br>Defendant. | |

**MOTION TO WITHDRAW AS APPELLATE COUNSEL**

Undersigned counsel hereby moves to withdraw as postconviction/appellate counsel in the above-captioned case pursuant to Wis. Stat. Rule 809.30(4). The grounds for the motion are as follows.

On March 13, 2024, the defendant was convicted of disorderly conduct. The Dane County Circuit Court, the Honorable John Public presiding, sentenced the defendant to 90 days in jail.

The defendant filed a timely notice of intent to pursue postconviction relief, after which undersigned counsel was appointed to represent him on appeal. Counsel has spoken with John Doe regarding their case and options for appeal. On May 7, 2024,

John Doe informed counsel that they wish to proceed on appeal pro se or with retained counsel, and asked counsel to withdraw from the case.

Undersigned counsel has informed Mr. Doe that, if this motion is granted, the State Public Defender will not appoint another attorney to represent them in this matter.

On the same date of the filing of this motion, undersigned counsel has filed with the court appeals a motion for an extension of Mr. Doe's deadline for filing a postconviction motion or notice of appeal under Rule 809.30(2)(h).

A copy of this motion is being served on the defendant, the State Public Defender's Appellate Division and opposing counsel.

THEREFORE, counsel respectfully asks this court to enter an order permitting counsel to withdraw in accord with Mr. Doe's request.

Dated this 8th day of May, 2024.

Respectfully submitted,

*Electronically signed by Jane Smith*
JANE SMITH
State Bar No. 123456

123 Main Street
Madison, WI 53703
000-000-000
janesmith@email.com

Attorney for John Doe

cc: SPD—Appellate Division

District Attorney/Opposing Counsel

| **STATE OF WISCONSIN** | **CIRCUIT COURT** | **DANE COUNTY** | |
|---|---|---|---|
| STATE OF WISCONSIN<br>Plaintiff,<br>v.<br>JOHN DOE,<br>Defendant. | | Case No. 24-CF-000 | *For Official Use* |

## NO MERIT NOTICE OF APPEAL

TO:

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton Street
Madison, WI 53703

Ismael Ozanne
District Attorney
Dane County Courthouse
215 S. Hamilton Street
Madison, WI 53703

NOTICE IS HEREBY GIVEN that the defendant in the above-captioned case appeals to the Court of Appeals, District IV, from the Judgment of Conviction entered on April 10, 2023, in the Circuit Court for Dane County, the Honorable John Public, presiding, in which the defendant was convicted of Disorderly Conduct, contrary to Wis. Stat. § 947.01, and from the order denying postconviction relief dated April 23, 2024.

This is not an appeal under Wis. Stat. § 752.31(2).

The final transcript was served on the undersigned on November 10, 2023. Therefore, pursuant to Wis. Stat. § 809.32(2)(a)1., this no merit notice of appeal is due on May 8, 2024.

Dated this 8th day of May, 2024.

*Electronically signed by Jane Smith*
JANE SMITH
Attorney at Law
State Bar # 123456

123 Main Street
Madison, WI 53703
000-000-000
janesmith@email.com

Attorney for John Doe

cc: Samuel Christensen
Clerk of Court of Appeals

Criminal Appeals Unit
Assistant Attorney General

| **STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY** | *For Official Use* |
|---|---|
| STATE OF WISCONSIN,<br>Plaintiff,<br>v. Case No. 24-CF-000<br>JOHN DOE,<br>Defendant. | |

**NO-MERIT STATEMENT ON TRANSCRIPT**

TO: Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
215 South Main Street
Madison, WI 53703

Samuel Christensen
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

This statement is to satisfy Rules 809.11(4)(a) and (b).

All transcripts which the defendant believes are necessary for prosecution of this appeal have already been prepared by the appropriate court reporters and have been filed with the clerk of the trial court. Since counsel will be filing a no-merit report in this case, no provision has been made for service of transcripts on opposing counsel.

Dated this 8th day of May, 2024.

*Electronically signed by Jane Smith*
JANE SMITH
Attorney at Law
State Bar # 123456

123 Main Street
Madison, WI 53703
000-000-000
janesmith@email.com

Attorney for John Doe

cc: Criminal Appeals Unit
Assistant Attorney General

## SAMPLE – LETTER TO CLIENT ACCOMPANYING NM REPORT

January 1, 2024

Mr. John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

***RE:*** **State v. John Doe**
**Adams County Case No. 14-CF-1497**

Dear Mr. Doe:

Enclosed is a copy of the no-merit report that I am filing in the Wisconsin Court of Appeals. I have previously discussed with you the fact that I saw no arguable legal grounds to further challenge your case.

Please read the report carefully. You have the right to comment about it and to bring anything to the attention of the Wisconsin Court of Appeals that you would like. If you wish to respond to the report, please write within thirty days of this date to Samuel Christensen, Clerk of Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

In addition, please note that I may file a supplemental no-merit report and affidavits containing facts outside the court record, possibly including confidential information, in order to rebut allegations in your response to the no-merit report.

**(A)** If you would like a copy of your court record and transcripts in your case, please let me know and I will send the material to you. **(B)** I am enclosing your transcripts and the court record, with the exception of the presentence investigation which remains confidential under Wis. Stat. 972.15(4) unless the circuit court orders otherwise. Our office is not keeping any copies, as these are the original documents.

The court will now independently review your case to determine if there is any arguable merit. If the court agrees with my conclusion that there is no such issue, the court will relieve this office of any further representation on your behalf.

I am sorry that I was unable to take any other action in your behalf.

Sincerely,

Jane Smith
JANE Smith
Attorney at Law

Enclosures

## SAMPLE – LETTER TO COA ACCOMPANYING NM REPORT

January 1, 2024

Samuel A. Christensen
Clerk of Court of Appeals
P.O. Box 1688
Madison, Wisconsin 53701-1688

**Re: *State of Wisconsin v. John Doe***
**Court of Appeals Case No. 2024AP0000 – CRNM**

Dear Mr. Christensen:

Attached for filing is a no-merit report pursuant to Rule 809.32(1), Stats. in the above case. On today's date a copy of the no-merit report has been mailed to John Doe. For the court's information their address is:

John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

A copy of the no-merit report has been served on opposing counsel.

Sincerely,

*Electronically signed by Jane Smith*
JANE SMITH
Attorney at Law

Attachments

**SAMPLE – LETTER TO CLIENT ACCOMPANYING COA DECISION ACCEPTING THE NO-MERIT REPORT**

January 1, 2024

Mr. John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

**Re: *State of Wisconsin v. John Doe***
**Court of Appeals Case No. 2024AP0000 CRNM**

Dear Mr. Doe:

The Wisconsin Court of Appeals has issued the enclosed opinion accepting the no-merit report I filed and denying you relief.

You have the right to petition the Wisconsin Supreme Court to further review your case. You may do that by filing a petition for review within 30 days from January 1, 2024. You should send 10 copies of the petition to the Clerk of the Wisconsin Supreme Court, Post Office Box 1688, Madison, Wisconsin 53701-1688. (If you can't afford to provide 10 copies, you will have to write the court to explain why you can't afford to send 10 copies and ask the court for permission to file fewer copies.) A copy of that petition should also be sent to the Attorney General, Post Office Box 7857, Madison, Wisconsin 53707. The rules governing a petition for review are enclosed.

This office will not represent you in filing this petition. If you have any questions regarding the procedure to be followed in this matter, please let me know.

Sincerely,

Jane Smith
JANE SMITH
Attorney at Law

Enclosures
1. Opinion
2. Copy of Rule 809.62

**SAMPLE – E-FILING NOTICE OF COMPLETION OF REPRESENTATION**

January 1, 2024

Lori Banovec
Clerk of Circuit Court
401 Adams Street – Suite 6
Friendship, WI 53934

**Re: *State of Wisconsin v. John Doe***
**Adams County Case No. 14-CF-1497**

Dear Clerk:

I was appointed by the Office of the State Public Defender to represent John Doe in the postconviction/appellate proceedings in the case cited above. At this time, my representation has ended and I have closed my case.

If future activity occurs in this case that might require the appointment of counsel through the SPD, please have the defendant contact the Office of the State Public Defender—Appellate Division.

Thank you for your attention to this matter

Sincerely,

*Electronically signed by Jane Smith*
JANE SMITH
Attorney at Law