

TRIAL COUNSEL'S DUTIES AS IT RELATES TO AN APPEAL



WHAT YOU NEED TO KNOW:

- Appellate Division and the types of cases we handle
- Appellate process & how to initiate a direct appeal
- Your responsibilities and ethical duties as it relates to an appeal

THE APPELLATE DIVISION

- Two offices
 - Madison
 - Intake handles all appellate appointments
 - Milwaukee
 - Handles appeals from Milwaukee, Walworth and a few other Southeastern counties

TYPES OF CASES WE HANDLE:

PERFECTING APPEALS IN PUBLIC DEFENDER CASES

- Direct appeals (§ 809.30)
- Interlocutory appeals (once accepted by COA)
- State's appeals
- Discretionary appointments

*No appeal can proceed until a written judgment or order has been entered.

DIRECT APPEALS (§ 809.30)

- Criminal convictions
- SAR (sentencing after revocation)
- Youth cases
- TPR/CHIPS (pilot counties)
- NGI
- Ch. 980
- Contempt, when brought by the state and client at risk of being incarcerated
- Ch. 51 involuntary commitment/involuntary medication and treatment order
- Ch. 55 protective placement/Watts Review
 - Can challenge Ch. 54 (Guardianship) as long as not solo
- Competency/forced meds under 971.14
 - New appeal procedure effective 7/1/24
 - Checklist and Materials available at <https://www.wisped.gov/competency>

INTERLOCUTORY APPEALS

INTERLOCUTORY APPEALS ON SPD WEBSITE

- **Trial counsel** decides whether filing a petition for leave to appeal a non-final order is warranted.
- Criteria looked at by COA in deciding whether to accept (809.50/809.52/808.03(2))
 - Materially advance the termination of the litigation or clarify further proceedings; or
 - Protect the petitioner from substantial or irreparable injury; or
 - Clarify an issue of general importance to the administration of justice
 - AND
 - Substantial likelihood of success on the merits.

EXAMPLES OF GOOD INTERLOCUTORY CLAIMS

- **Juvenile waiver/reverse waiver:** "Although an order waiving juvenile jurisdiction is not appealable as of right, the order may be reviewed by filing a petition for leave to appeal under Wis. Stat. § 808.03(2). See *State ex rel. A.E. v. Circuit Court for Green Lake County*, 94 Wis. 2d 98, 105a-d, 292 N.W.2d 114 (1980).
- **Double jeopardy claims:** will most often warrant interlocutory review, unless it is clear that they are frivolous. See *State v. Jenich*, 94 Wis. 2d 74, 97b, 292, N.W.2d 348 (1980) (per curiam) (on reconsideration).
- **Prelim bindovers:** Because an error at a preliminary hearing is cured by a fair trial, the only method for seeking review is by leave. See *Webb*, 160 Wis. 2d at 628.

INTERLOCUTORY APPEALS

- **Trial counsel** files a petition for leave to appeal a non-final order
- Due 14 days from **written order**
- COA does not have access to circuit court record- include relevant documents and transcripts with your filing as exhibits
- If you don't have the transcript yet:
 - File an extension motion before deadline expires OR
 - File petition timely and indicate you will supplement with transcript

INTERLOCUTORY APPEALS

- You may also file a stay pending the ruling on the petition/seek temporary relief while a petition is pending in the COA. *See* WIS. STAT. RULE 809.52.
- You are not required to seek temporary relief in the circuit court first, but it's consistent with 809.12 and is good practice.

INTERLOCUTORY APPEALS

- If review is accepted, contact Appellate ASAP and an appellate attorney will be appointed: madisonappintake@opd.wi.gov
- Forward copies of your petition, any response filed by the state, and the court of appeals order granting the petition.

STATE'S APPEALS



- Appeal as of right (974.05(1)(d))
 - Any "order or judgment the substantive effect of which results in 1. Quashing an arrest warrant; 2. Suppressing evidence; 3. Suppressing a confession or admission."
 - State must file an NOA within 45 days after entry of written order
- Petition for leave to appeal (interlocutory) (809.50(2))
 - 14 days to file petition (same as for defense)
 - **Opposing party (YOU)** shall file a response to the state's petition within 14 days after service of the petition
 - Appellate attorney will not be appointed until a petition is granted

STATE'S APPEALS

- **Keep file open until deadlines for filing a state's appeal have passed.**
- **Contact Appellate Intake immediately:** madisonappintake@opd.wi.gov
- Email to Appellate:
 - order from which the appeal is being taken
 - notice of appeal
 - any motions relevant to the State's appeal

DISCRETIONARY APPOINTMENTS

DISCRETIONARY APPOINTMENTS IN NON-DIRECT APPEAL CASES

- Requests reviewed on a case-by-case basis
- Criteria:
 - Reasonable chance of success on appeal
 - The issue presented is of statewide importance
 - Issue is important to the development of the law
 - Issue is so complex that representation by an attorney is necessary

DISCRETIONARY APPOINTMENTS

- **Scenario:** Someone calls the local trial office stating they were convicted of crimes several years ago and the alleged victim has recently admitted to a friend that they lied in court.
- **What to Do:** Refer the individual to Appellate!
- **Scenario:** An attorney in your office receives a letter from a former client who was sentenced 6 months ago. At the time of sentencing, the client did not wish to appeal. Since that time, the client has changed their mind.
- **What to Do:** Refer the letter to Appellate!

APPELLATE DOES NOT HANDLE:

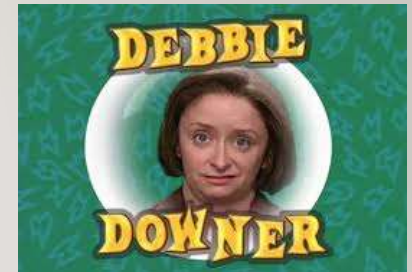
- Probation revocation administrative appeals
- Writs of cert from a revocation appeal
 - **Do not** file a notice of appeal from the order denying a revocation cert petition unless you are directed by the Appellate Division to do so, or you will be responsible for litigating the appeal yourself

HOW DO I SET MY CASE UP FOR APPEAL?

- OBJECT!
- FILE MOTIONS!
- MAKE AN OFFER OF PROOF!



GUILTY-PLEA-WAIVER-RULE



- Guilty/no contest/*Alford* plea waives ALL nonjurisdictional defects, including constitutional claims. *State v. Aniton*, 183 Wis. 2d 125, 515 N.W.2d 302 (Ct. App. 1994).
- Exception - suppression issues per Wis. Stat. § 971.31(10)
 - A denial of a motion to suppress evidence or
 - A denial of a motion challenging the admissibility of defendant's statement

DUTIES OF TRIAL COUNSEL – EVEN AFTER SENTENCING

- Sentence credit
- Restitution
- Bail/Stay Pending Appeal
- Extending lapsed appeal deadlines (prior to appointment of appellate counsel) in circumstances where the trial attorney can explain the reason for the late filing and show “good cause” for an extension

MOTION TO STAY SENTENCE AND SET BOND PENDING APPEAL

SAMPLE MOTION TO STAY SENTENCE AND SET BOND PENDING APPEAL

- Release may be granted if the court finds that:
 - There is no substantial risk the appellant will not appear to answer the judgment following the conclusion of postconviction proceedings;
 - The defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice;
 - The defendant will promptly prosecute postconviction proceedings; and
 - The postconviction proceedings are not taken for purposes of delay.
- §809.31

IF CIRCUIT COURT DENIES RELEASE PENDING APPEAL

- In appropriate cases, seek review of order in the COA
- File a motion and supporting memo within 21 days of the order. Rule 809.14
- A detailed list of filing requirements is found in Rule 809.31 (5).
- A stay pending appeal is appropriate when the moving party: 1) makes a strong showing that it is likely to prevail on the appeal; 2) shows that unless the stay is granted it will suffer irreparable harm; 3) shows that there will be no substantial harm to the other parties; and 4) shows that there will be no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431 (1995).

DOES YOUR CLIENT WANT TO SEEK POSTCONVICTION RELIEF?

- Fill out the Notice of **Right** to Seek Postconviction (NOR) form and e-file it in every case
- If your client is undecided, make sure to **follow up with them**
- It's not your decision whether to appeal- it is the client's decision.
- If they want to seek postconviction relief, file a timely and accurate Notice of **Intent** to Pursue Postconviction Relief (NOI).

This is NOT the Notice of Intent

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY	
State of Wisconsin, Plaintiff, -VS- Defendant's Name _____	Notice of Right to Seek Postconviction Relief Case No. _____

TO THE DEFENDANT:

You have the right to seek postconviction relief from the judgment in this case. If you were represented by a lawyer at your sentencing, it is that lawyer's responsibility to assist you in deciding whether to seek postconviction relief.

If you decide to seek postconviction relief, you or your lawyer must file a Notice of Intent to Seek Postconviction Relief. The Notice of Intent must be filed in the trial court within 20 days. If you had a lawyer at sentencing, and if you give your lawyer timely notice that you have decided to seek postconviction relief, it is your lawyer's duty to see that your Notice of Intent is properly filed in this court and served on the District Attorney.

After filing the Notice of Intent, your lawyer does not have to represent you further unless you hire him or her to do so. If you intend to seek postconviction relief but cannot afford a lawyer, you have the right to request that a lawyer be appointed to assist you by the State Public Defender.

DEFENDANT'S ACKNOWLEDGEMENT:

I have discussed my right to seek postconviction relief with the lawyer who represented me at sentencing, if any. I understand that if I intend to seek postconviction relief, I must file a Notice of Intent in the trial court within 20 days after sentencing and send a copy to the District Attorney. If I want my lawyer to file the Notice of Intent for me, I must timely inform my lawyer of my decision to seek postconviction relief. I have received a copy of this Notice.

- ☐ I plan to seek postconviction relief.
☐ I do not plan to seek postconviction relief.
☐ I am undecided about seeking postconviction relief and I know I need to decide and tell my lawyer within 20 days.

Defendant's Signature _____	
Name Printed or Typed _____	
Address _____	
Email Address _____	_____
Telephone Number _____	Date _____

ATTORNEY CERTIFICATION:

I have counseled the defendant about the decision to seek postconviction relief. I have informed the defendant that this decision must be made and communicated to me within 20 days of sentencing. I believe the defendant understands the right to postconviction relief and the 20 day time limit. I understand that it is my duty to file the Notice of Intent to Pursue Postconviction Relief on behalf of the defendant if that intent is timely communicated to me.

Defense Attorney's Signature _____	
Name Printed or Typed _____	
Address _____	
Email Address _____	Telephone Number _____
Date _____	State Bar No. _____

DISTRIBUTION:

1. Court
2. Defendant
3. Defense Attorney

This is the Notice of Intent

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY	
_____ _____ Plaintiff(s) -VS- _____ _____ Defendant(s)	Notice of Intent to Pursue Postconviction or Postdisposition Relief Case No. _____

Notice is hereby given that (Name of party filing appeal) _____
(Address) _____
intends to pursue postconviction or postdisposition relief from the final judgment or order entered on (Date) _____
in the circuit court for _____ County, the
Honorable (Name of Judge) _____, presiding, case no. _____
wherein the court (Describe judgment or order) _____

The name and address of the appellant's trial counsel, if any, is: _____
The appellant's trial counsel: [Choose one] ☐ was OR ☐ was not appointed by the state public defender. If
trial counsel was appointed, my financial circumstances: [Choose one] ☐ have improved OR ☐ have not
improved since the date on which my indigency was determined.

The appellant: [Choose one] ☐ does or ☐ does not request representation by the state public
defender for purposes of postconviction or postdisposition relief.

If the appellant does not request representation by the state public defender, the appellant:
[Choose one] ☐ will represent him/herself OR ☐ will be represented by retained counsel. If appellant has
retained counsel, the name and address of retained counsel is: _____

Date: _____

Signature of Filing Attorney or Party _____	Telephone Number _____	State Bar Number (if applicable) _____
Name Printed or Typed _____	Email Address (if any) _____	
Address _____		

This completed form must be filed with the clerk of the circuit court in which the judgment or order appealed from was entered. In addition, copies of this completed form must be served upon the following:

1. the prosecutor;
2. opposing counsel; and
3. any other party.

IT'S YOUR AFFIRMATIVE DUTY TO DETERMINE WHETHER OR NOT YOUR CLIENT WANTS TO APPEAL:

- We do not require a trial judge to personally read [appeal] instructions to the defendant. Trial counsel has an affirmative duty to ascertain whether client wants an appeal. ***State v. Argiz***, 101 Wis. 2d 546, 562 (1981):
- The defendant retains “ultimate authority” to decide “whether to plead guilty, waive a jury, testify in his or her own behalf or take on an appeal. ***State v. Suriano***, 2017 WI 42, ¶ 10 n.5:

INITIATING A DIRECT APPEAL

- E-File the Notice of Intent to Pursue Postconviction or Postdisposition Relief (CA-110) in the **circuit court**
 - **NOI** is *not* the Notice of Right Form (CR-233)
 - **Must file NOI within 20 days** of sentencing or disposition (809.30(2)(b))
 - **Except for TPRs: must file NOI within 30 days** after TPR order entered (809.107(2)(bm)) AND the NOI must contain your **client's written** (not electronic) **signature**. Rule 809.107 (2) (bm)(6).
 - Email (e-file date stamped) copy to: madisonappintake@opd.wi.gov

I MISSED THE DEADLINE

- COA may extend NOI deadline for “good cause”
 - What might COA consider “good cause”?
 - ✓ “obstacles to communication”
 - ✓ innocent mistake/miscalculation of the deadline
 - ✓ “a more thorough discussion occurred”

NOT: “client changed his mind”



WHAT TO DO IF I MISS THE NOI DEADLINE?

- E-File an extension motion in the **court of appeals** asking for a new deadline
 - How to file a “pre-appeal motion”
 - <https://efilinghelp.zendesk.com/hc/en-us/articles/25560920866061-Appellate-court-eFiling-File-a-pre-appeal-motion-with-the-Court-of-Appeals-or-Supreme-Court>
 - Sample extension motions on SPD website [here](#)
- E-File NOI in the **circuit court** on the same date
- When court grants motion, email order to madisonappintake@opd.wi.gov

WHAT HAPPENS AFTER THE NOI IS FILED?



- Clerk sends materials to SPD (5 days)
- SPD appoints counsel & requests transcript/court record (30 or 50 days)
- Court reporters prepare & file transcripts and clerk files court record (60 days)
- Appellate attorney files postconviction motion or notice of appeal (60 days)

WHAT TO PROVIDE TO APPELLATE IN ADDITION TO THE NOI

- Trial Attorney Questionnaire
 - Current contact info for client
 - Issues you've identified and/or why client wants to appeal
 - Send to madisonappintake@opd.wi.gov

*You do not need to order transcripts, but if you have any already, you can send them as well.

WHAT TO PROVIDE TO APPELLATE COUNSEL

- Your [the client's*] File
 - ✓ Discovery
 - ✓ Correspondence
 - ✓ Investigation memos
 - ✓ Notes
 - ✓ Research
- *It is the *client's* file (SCR:20:1.16(d); Agency Policy; Wisconsin Ethics Opinion EF-16-03)



IT'S THE *CLIENT'S* FILE

- **SCR 20:1.16(d):** Upon termination of representation, upon request counsel “shall surrender...papers and property to which the client is entitled”
- **WI Ethics Opinion EF-16-03:** “Through maintained in the lawyers office, the client’s file is the client’s property and SCR 20:1.16(d) requires the lawyer to surrender the file at the request of the client or successor counsel upon termination of the representation.”

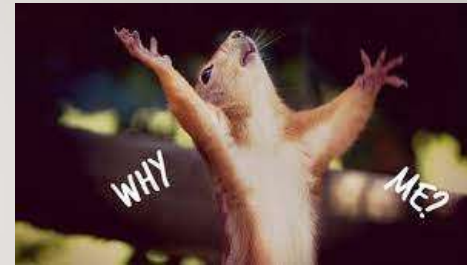
POST-JUDGMENT MOTIONS

- Don't file a sentence modification motion under Wis. Stat. § 973.19 if your client wants to appeal – that waives a defendant's right to a direct appeal of the conviction.
- Do not label anything a “postconviction” motion – this could be construed as part of appeal and result in a waiver of your client's appeal rights.
- If you have a post-verdict situation that you think requires a motion, call us if you are concerned your motion might impact an appeal or are wondering if you should leave it to the appellate lawyer to file the motion.

A NOTE ABOUT SENTENCE CREDIT/RESTITUTION

- If addressed before the JOC is entered, issues can be raised on direct appeal by filing NOI within 20 days after sentencing.
- If determined after an NOI has been filed/after sentencing, and amended JOC, file another NOI.
- This ensures appellate will order additional transcripts and those issues can be addressed by Appellate counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) CLAIMS



- “In applying this standard, judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise.” Bazelon, *The Realities of Gideon and Argersinger*, 64 *Georgetown Law J.* 811, 822-23 (1976).
- “[E]ven experienced counsel may be ineffective. Accordingly, we judge not the attorney's general competency, but rather we focus upon whether the representation given in this case to [the defendant] was effective.” *State v. Felton*, 110 Wis. 2d 485, 500, 329 N.W.2d 161 (1983).

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: A NECESSARY EVIL

- Unpreserved issues generally must be raised as IAC
- Plain error has been eviscerated by appellate courts
- With factual disputes, credibility is for the court, not appellate counsel, to resolve.

WHAT DO I DO IF AN IAC CLAIM IS BROUGHT AGAINST ME?

- Take a breath, it sucks but it can happen to any of us.
- **EF-16-03:** You DO NOT need a waiver to talk to counsel—
 - new counsel is acting as an agent of the former client
- **SPD Minimum Performance Standards under “General” 1.(g):** An appointed attorney shall cooperate fully with successor counsel. This includes answering questions about earlier representation
- Talk to your manager



YOUR ETHICAL OBLIGATIONS TO YOUR CLIENT REMAIN, EVEN IN AN IAC CLAIM

- Remember your ethical obligations to the client
 - Duty of loyalty to client remains (SCR 20:1.9(c))
 - Attorney-client privilege
 - Not waived until the hearing
 - Waived only to extent necessary to address issue raised in motion
 - Do not talk to, or provide your file to the D.A.

ETHICAL GUIDANCE

- *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 the former client's file'
- *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. Attorney-client privilege is not waived until the hearing and is waived only to extent necessary to address issue raised in motion.
- **SCR:20:1.16(c)(4)**: Confidentiality: any 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 proceedings concerning the lawyers representation of the client.

SPD WEBSITE: APPELLATE DIVISION

Appeal Information for Trial Attorneys

[Perfecting Appeals in WI Public Defender Cases](#)

[Trial Attorney Questionnaire](#)

[Initiating a Direct Appeal: What to File, What to Do When It's Too Late](#)

- Form NOIs:
 - [Criminal - By SPD Appointed Counsel](#)
 - [TPR - By SPD Appointed Counsel](#)
- Form MTEs:
 - [Criminal - by SPD Appointed Counsel](#)
 - [Criminal - Pro Se](#)

[Sample Motion to Stay Sentence and Set Bond Pending Appeal](#)

[Permissive or Interlocutory Appeals in SPD Cases](#)

[Sample Petition for Leave to Appeal a Non-Final Order- BLANK TEMPLATE](#)

[Sample Petition for Leave to Appeal a Non-Final Order- TEMPLATE with criteria](#)

[Sample Petition for Leave to Appeal a Non-Final Order - bindover](#)

[Sample Motion to Stay Trial Court Proceedings Pending Appeal \(in circuit court\)](#)

[Sample Motion to Stay Trial Court Proceedings Pending Appeal \(in court of appeals\)](#)



- Provides case summaries and analysis of cases.
- Bookmark this link: <https://www.wisconsinappeals.net/>
- And subscribe so you get case updates.

REACH OUT IF YOU HAVE QUESTIONS

- Madison Office (608-266-3440) (Includes Intake Unit and responsible for assigning cases)
 - Intake Unit, madisonappintake@opd.wi.gov
 - Kelsey Loshaw, RAM, loshawk@opd.wi.gov, 608- 267-2879
 - Jeremy Newman, LAM, newmanj@opd.wi.gov, 608-264-8566
 - Kathilynne Grotelueschen, LAM, grotelueschenk@opd.wi.gov, 608-267-1770
- Milwaukee Office (414-227-4805)
 - Andrea Cornwall, RAM, cornwallc@opd.wi.gov, 414-227-1844
 - Dustin Haskell, LAM, haskelld@opd.wi.gov, 414-227-4807
- Appellate Division Director
 - Faun Moses, mosesf@opd.wi.gov, 608-267-8374