

Spotting Meritorious Appellate Issues
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I. Introduction

- a. Involves three processes:
 - i. Review
 - ii. Resources
 - iii. Research

- b. Mindset:
 - i. Engaged/Detailed
 - ii. Open/Not boxed in
 - iii. Curious/Questioning
 - iv. Think like a trial attorney
 - v. Listen to your gut reaction
 - 1. "Something is not right"

II. Review

- a. Active/Analytical
- b. My method:
 - i. Notes:
 - 1. Record digest (page citations)
 - 2. Ideas/questions
 - 3. Lists:
 - a. Potential issues
 - b. Questions for client
 - c. Questions for trial counsel
 - d. Investigation/items needed

 - ii. Checklists:
 - 1. Helpful guide/brainstorming tool
 - 2. Samples – Appendix to Chapter 2 of SPD's Appellate Practice and Procedure:
<http://www.wisspd.org/htm/ATPracGuides/App/HANDBOOK.pdf>

 - iii. Start with Judgment of Conviction
 - 1. Statute:
 - a. Note maximum sentence/sentence imposed
 - b. Elements of offense

 - 2. Other items:
 - a. Sentence credit

- b. Fines/surcharges/ fees
 - c. Consecutive/Concurrent
- iv. Court record
 - 1. Note potential issues
 - a. Complaint – Suppression issues
 - b. Plea questionnaire – elements/maximum penalty issues
 - c. PSI – Sentencing and/or Plea issues.
- v. Trial Counsel’s file:
 - 1. Discovery
 - 2. Witness statements
 - 3. Exculpatory evidence
 - 4. Suppression issues
 - 5. Investigation reports
 - 6. Notes, including client discussions
- vi. Client letters
- vii. Trial Counsel
 - 1. Any issues noted in SPD Appellate Questionnaire
 - 2. Any issues noted in any initial conversation
- viii. Transcripts
 - 1. Chronological order
 - a. Exception – jury trial start with closing argument
 - 2. Use checklists
 - 3. Take note of potential issues/refrain from in depth research/analysis
 - 4. Examples of potential issues:
 - a. Suppression
 - b. Guilty/No Contest Plea:
 - i. Client’s understanding:
 - 1. elements, maximums, constitutional rights, etc.
 - 2. how facts applied to elements of offense
 - 3. All defenses
 - ii. Factual basis
 - 1. meets elements of offense
 - 2. does client dispute factual basis on record?

- c. Trial:
 - i. General concept – looking for something that mattered in the case
 - ii. Any evidence that came in that should not have?
 - iii. Any evidence that did not come in that should have?
 - 1. Discovery
 - 2. Witnesses identified by client/family
 - iv. Witnesses
 - 1. All impeachment evidence that mattered introduced? (Especially in sexual assault cases)
 - v. Jury instructions
 - vi. Jury questions
- d. Sentencing:
 - i. Any inaccurate information relied upon by court?
 - 1. Prior Record
 - 2. Corrections/Supervision History
 - ii. Any relevant sentencing information that should have come in?
 - iii. Any inappropriate statements by judge?
 - iv. Does the Judgment of Conviction accurately reflect sentence imposed by court?
 - v. Any post-sentencing amendments to sentence?

III. Resources:

- a. Client
 - i. Guilty/No Contest Plea
 - 1. How did plea come about?
 - 2. Open ended questions re: plea bargain, elements of offense, factual basis, effects of no contest plea, etc.
 - 3. Is there something that the client misunderstood or was misinformed about?
 - a. In some circumstances (depending on information), if client had not misunderstood or been misinformed, would he/she continued with guilty/no contest plea or had a jury trial?
 - ii. Trial:
 - 1. Why did you decide to have a jury trial?

- 2. Any witnesses/evidence should have been introduced that were not?
 - iii. Review sentencing transcript
 - 1. Any inaccurate information?
 - 2. Any information that the judge should have known about?
 - iv. Evaluate any change in circumstances
 - b. Discovery
 - i. Suppression
 - ii. Witness statements
 - iii. Any evidence that should have been introduced at trial/sentencing
 - c. Trial counsel
 - i. Talk to trial counsel
 - ii. Trial counsel's file:
 - 1. Investigation reports
 - 2. Notes, including client discussions
 - a. Advice
 - b. Client's understanding
 - c. Identification of potential witnesses
 - d. Relevant sentencing information
 - d. Family member
 - e. Prosecutor
 - f. Client Records:
 - i. Prior Criminal Record
 - ii. Supervision
 - 1. WI Division of Community Corrections
 - 2. Juvenile Records/Supervision
 - iii. Prison
 - iv. Medical
 - v. School
 - g. Open Records request
 - h. Witnesses
 - i. Investigation
- IV. Research
 - a. Legal
 - i. Case law
 - 1. Read cases closely
 - a. Cite check

2. Read seminal cases
 - a. Does the case stand for proposition that subsequent cases say it does? Are the facts in your case distinguishable/analogous to the facts in the seminal case?
 - b. Has any of the case law it relied upon changed?
 - c. Have any subsequent cases affected substantive law such that the seminal case law should be revised?
 - d. Have circumstances changed which warrant amending seminal case law?
 3. Read defense arguments, even ones that have been unsuccessful
 4. Read unpublished cases
 - a. Possibility of finding citable case
 - b. Meritorious defense arguments, even if unsuccessful
- ii. Treatises
1. Ex: LaFave - Suppression/Procedure
 - a. Read section closely
 - b. Review all cases in text/footnotes
 - i. Note how law applied in other jurisdiction
 - ii. If case law more developed than Wisconsin – use case law to your advantage and to develop your arguments
- iii. Judicial Benchbook/Jury Instructions
1. Brainstorming tool
 2. Check underlying research
- iv. A factual allegation, even if you do not believe that a court will find it credible, that constitutes an arguable meritorious post conviction/appellate issue is a meritorious issue.
- b. Briefs
- i. Online
 - ii. Note arguments, even losing ones
- c. Talk with other attorneys
- i. Brainstorming group
 1. Ideal size – 3 people
 - a. Questioners
 - b. Include someone that thinks differently than you

2. Know your record and the case law
 3. Open mind/not defensive
- ii. Attorneys with knowledge of specific issues
 1. Counsel in published/unpublished cases
 2. Conduct training sessions
 3. Written Articles in Publications
 4. Commented on listservs
 5. Referrals from other attorneys
 6. Prepared for conversation – know the case law and your record
- d. On-going
 - i. Read new cases
 1. On Point – SPD
 2. Caselaw Express – Wisconsin State Bar
 - ii. Attend trainings
 - iii. Blogs/Listservs