

# **CRIMINAL APPEALS UNDER RULES 809.30 & 809.32<sup>1</sup>**

## *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;
- 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 the envelope that contained the last transcript (or record) 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 postmark and 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.

---

<sup>1</sup> 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
- Serve copies of these documents on the clerk of the court of appeals (COA) and opposing 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:

- Arrange for service of transcripts on opposing counsel;
- Obtain a court reporter certification regarding any as-yet-unproduced transcript, if necessary;
- File the statement on transcript with the clerk of the COA; and
- Serve copies of the statement on transcript on the clerk of circuit court and opposing counsel, and send a copy to 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.

c. Within 40 days of the filing of the court record on appeal:

- File 10 copies of the brief-in-chief and appendix, with the required certifications, with the clerk of the court of appeals;

- E-file the brief-in-chief and, if you want, also the appendix; and
  - Serve 3 copies of the brief and appendix on opposing counsel and send copies to your client.
- d. Within 15 days of the filing of the state's responsive brief in the court of appeals:
- File 10 copies of the reply brief and any supplemental appendix, with the required certification(s), with the court of appeals;
  - E-file the reply brief; and
  - Serve 3 copies of the reply brief on opposing counsel 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.]

- Unless your client does not want to appeal further, file 10 copies of the petition for review and appendix, with the required certifications, with the clerk of the state supreme court;

[Note: If there would be no arguable merit to a petition for review, this may be filed as a modified petition under Rule 809.32(4).]

- E-file the petition for review; and
- Serve copies of the petition for review and appendix on opposing counsel and send them 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

### a. *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.

### b. *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 of choice.
  - 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 done so;
- Within (about) 60 days of receipt of the last transcript or the court record or within (about) 20 days after entry of an order denying a postconviction motion, file a no-merit notice of appeal and statement on transcript;

[Note: Although the no-merit notice of appeal and statement on transcript are due at the same time as the report, filing them around the time of the merit deadline is the better practice because it provides time for the circuit court to transmit the record so that you can properly cite to it.]

- Within 180 days of receipt of the last transcript or the court record or 60 days after the order denying a postconviction motion, whichever is later:
  - File 3 copies of the no-merit report with the court of appeals, along with the required certification;
  - Serve the report on opposing counsel and 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.