

MOTION PRACTICE IN THE COURT OF APPEALS

Notes for Avoiding Common Mistakes

I. LOGISTICS OF MOTION PROCESSING

A. Motions filed in the clerk's office are file-stamped and entered into the electronic docket.

- All filing is done with the Clerk of the Court of Appeals. *See* WIS. STAT. RULE 809.80(1). Documents are not considered filed until the clerk receives them. *See* WIS. STAT. RULE 809.80(3)(a). Do not send your items for filing to court chambers.

B. Motions are sent with the correspondence file (the court's physical record) to central staff office once per day.

C. Motions attorney reviews motion, confers with motions judge or panel as appropriate, and prepares draft order.

- Most districts rotate motions duty among their judges and central staff attorneys. If subsequent motions depend on prior activity in the court of appeals, a summary of relevant past activity is generally helpful.

D. After draft order is approved by judge(s), order is released and mailed from staff office to parties. A copy of the order is sent to the clerk, along with the returned correspondence file, for filing and docket entry.

- Because of this process, even relatively simple or routine motion may need four days before you will hear back from the court. As a result, motions that seek extensions of less than five days can present logistical issues, with your requested deadline running before staff can address the motion. To help avoid this:

- In some instances, the clerk is authorized to grant very short extensions with form orders previously approved.
- In some instances, you may wish to file a given document at the same time you file the extension motion, assuming that the court will grant it. (For example, a notice of intent can be filed in the circuit court at the same time as your extension motion with this court; if the court of appeals can see an entry in the circuit court's electronic docket, that filing can be made timely.)
- In some instances, consider asking for slightly more time than you think you need—i.e., seven days instead of two.

II. MOTIONS PRACTICE GENERALLY

A. WISCONSIN STAT. RULE 809.14(1) requires a motion to “state the order or relief sought and the grounds on which the motion is based[.]” A memorandum may be included, although for most motions, this is probably not necessary. Affidavits, particularly those that simply repeat the information already in the motion, are also probably not necessary.

B. Extension requests must be supported by a showing of good cause. *See* WIS. STAT. RULE 809.82(2)(a).

- Be specific about the basis for your request. “I’m still researching” might be okay for your first motion to extend the time for filing a postconviction motion, but by your third or fourth request, you will need to provide more information about why the research is taking so long. The court does, however, recognize that there are certain ethical constraints that may limit your specificity.

- File extension requests *before* the expiration of the current deadline. This does not mean you can mail the motion on the deadline date. *See* WIS. STAT. RULE 809.80(3)(a). This is particularly relevant when you are seeking to extend the time for filing a postconviction motion or notice of appeal (*see State v. Evans*, 2004 WI 84, ¶58, 273 Wis.2d 192, 682 N.W.2d 784).

C. “Procedural” motions can be acted upon by the court without waiting for a response. *See* WIS. STAT. RULE 809.14(2). “Procedural” is not defined but generally refers to matters that do not go to the merits. The clerk’s office will hold more substantial motion types for a response before submitting to staff.

- Objections received after the court has already issued an order will generally be construed as reconsideration motions, though if you plan to object to a motion, consider contacting the clerk’s office to so advise.

- In some instances, the court will direct a response.

III. SPECIFIC MOTION TYPES

A. Motions to Compel Production of Transcript by Court Reporters.

- The court’s sanction power is limited to WIS. STAT. RULE 809.11(7)(d). It is a difficult sanction to implement. Therefore, before you move to compel, consider contacting the District Court Administrator for assistance.

- If you go ahead with your motion to compel, be sure to let us know when and how you have attempted to contact the reporter.
- Alternatively, you may wish to seek a filing extension on the court reporter's behalf.

B. Motions to Correct the Record under WIS. STAT. RULE 809.15(3).

- Correction/supplementation requests should be directed to the court that has the record.
- The contents of the record on appeal are specified in WIS. STAT. RULE 809.15(1); whenever possible, explain how your correction fits one of those categories. Also whenever possible, explain how the omission was overlooked in the record inspection period.
- The court of appeals is generally limited to the record that was in the circuit court. *See State v. Aderhold*, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979).

C. Motions to Withdraw as Counsel under WIS. STAT. RULE 809.30(4)(a).

- Withdrawal motions must also be directed to the correct court.
- If possible, help ensure the circuit court makes a record regarding your client's waiver of counsel.

D. Motions for Summary Disposition under WIS. STAT. RULE 809.21.

- As a general rule, the court prefers full briefing of issues.
- Certain issues like mootness or lack of jurisdiction are generally caught by the court's own jurisdiction check, which occurs once the record is transmitted. While the rule allows a party to move for summary disposition at any time, if you have one of those issues, you may wish to delay seeking summary disposition until after the record is filed—you may not need to file the motion at all.

E. Motions for Relief Pending Appeal under WIS. STAT. RULE 809.12.

- The rule requires you to ask the circuit court for relief first or, alternatively, explain to this court why it is "impractical" to do so. *See also State v. Gudenschwager*, 191 Wis. 2d 431, 442, 529 N.W.2d 225 (1995) for the criteria the court applies regarding requests for stays.

IV. OTHER GENERAL COMMENTS ON MOTIONS

A. Check to make sure you have the **correct case number** on your motions; it is faster for the clerk, and it helps avoid duplicate files. The current case number will be on all correspondence from the court; if you do not yet have a number assigned by the Court of Appeals, use the circuit court number (and county).

B. Double **check your motion title**. The clerk will generally make docket entries based on what you call your document; the motion type is noted for staff. It is distracting when the request for relief does not match the title.

C. Double **check your content**. A common error is failing to update the motion text for a subsequent extension motion; this makes it look like there are large gaps between the expiration of a prior deadline and the current extension request.

D. Note how you **calculate your deadline**. The time for filing a postconviction motion or notice of appeal generally runs from the date on which you received the last transcript. *See* WIS. STAT. RULE 809.30(2)(h). However, this court generally has no way to know when that was, other than by looking at the electronic circuit court docket.

E. **Consider requesting a date certain** as a new deadline rather than asking for a certain number of days for an extension. But do so while looking at a calendar, so you can avoid asking for a deadline on a Saturday.

F. **Include supplemental documents** with your motion if necessary; if the record has not yet been transmitted to the court, the court will not have access to any portion thereof.

G. **Do not include** a proposed order or self-addressed stamped envelope. Do not request a hearing date. Do not file motions electronically (yet).

H. Be sure to **read correspondence from the court**; do not assume your motion has been granted. On occasion, the order you expect to be granting your extension is actually requesting additional information or action.

I. If, for some reason, your appointment is discretionary, rather than for a case in WIS. STAT. RULE 809.30 posture, please **explain what the posture is**.

J. Keep your client informed. Generally, they are not provided with a copy of this court's orders. On occasion, defendants write to the court with their own extension or other requests, believing their postconviction/appellate attorney has abandoned them. You have a professional obligation to keep your client up to date on the case's status. *See* SCR 20:1.4(a)(3).

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