

## **Appellate Responsibilities for Trial Attorneys**

May/June 2009

### **I. Introduction**

- A. One of your responsibilities as trial counsel will be to shepherd your client from the trial stage to the appellate stage if that is what your client wants to do. A defendant has the right to a direct appeal from a judgment of conviction. The process of seeking review is governed chiefly by Wis. Stat. § 809.30, and the process begins at the time of sentencing in a criminal case (or at the time of final adjudication in other cases).

### **B. Different Stages of Postconviction/Appellate Process**

1. Postconviction counsel appointed after Notice of Intent is Filed (See below).
2. Postconviction counsel files either a Motion for Postconviction Relief or Notice of Appeal. Postconviction motions are decided by the trial court.
3. Appeals to Court of Appeals

The court of appeals is made up of four districts. Although there are four districts, the court of appeals is a single court, and each district is bound by the decisions of the other districts.

District I consists of the judicial circuit for Milwaukee County. Court chambers are located in Milwaukee.

District II consists of judicial circuits for the counties of Calumet, Fond du Lac, Green Lake, Kenosha, Manitowoc, Ozaukee, Racine, Sheboygan, Walworth, Washington, and Winnebago. Court chambers are located in Waukesha.

District III consists of judicial circuits for the counties of Ashland, Barron, Bayfield, Brown, Buffalo, Burnett, Chippewa, Door, Douglas, Dunn, Eau Claire, Florence, Forest, Iron, Kewaunee, Langlade, Lincoln, Marathon, Marinette, Menominee, Oconto, Oneida, Outagamie, Pepin, Pierce, Polk, Price, Rusk, Sawyer, Shawano, St. Croix, Taylor, Trempealeau, Vilas and Washburn. Court chambers are located in Wausau.

District IV consists of judicial circuits for the counties of Adams, Clark, Columbia, Crawford, Dane, Dodge, Grant, Green, Iowa, Jackson, Jefferson, Juneau, LaCrosse, Lafayette, Marquette, Monroe, Portage,

Richland, Rock, Sauk, Vernon, Waupaca, Waushara, and Wood. Court chambers are located in Madison.

Depending on the case type, the court of appeals judges sit in three-judge panels or as a single judge. In general, felonies are three-judge cases while other public defender cases (misdemeanors, juvenile cases, mental commitments, TPRs) are decided by a single judge.

#### 4. Supreme Court

7 Justices  
Discretionary Review

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#### II. The Decision to Appeal: Statutory [Wis. Stat. Rule 809.30(2)] and ethical [SCR 20:1.16] duty to advise client of postconviction or appeal rights

##### a) Advise client:

- i. Right to seek postconviction/appellate relief - CR-233 - Notice of Right to Seek Postconviction Relief.
- ii. Merits of appealing issue
- iii. Length of time (SPD has 30/50 days to appoint, court reporters have 60 days to prepare transcripts, appellate attorney have 60 days to file pcm/noa)
- iv. Fee
  1. No trial - \$480/\$60 prepay
  2. Trial - \$1200/\$120 prepay

##### b) \*\*\* ultimately client's decision whether to file NOI \*\*\*\*

#### III. Notice of Intent (NOI) – Rule 809.30(2)

- a. Notice of Intent to Pursue PostConviction Relief starts statutory process for postconviction or appeal process for criminal cases.

[Sample Notice of Intent](#)

- i. In Ch. 51 or 55 commitment or Ch. 938 juvenile commitments – notice of intent to pursue post**disposition** relief
- ii. In Ch. 48 (except TPR or parental consent to abortion case) – notice of intent to pursue post**disposition** relief
- iii. TPR – Notice of Intent to pursue postdisposition or appellate relief – Rule 809.107(2)(bm)
  1. Must be filed within 30 days after entry of order.
  2. This deadline is **non-extendable** unless the TPR resulted from a petition filed by a representative of the public. Rule 808.04(7m)

b. Mandatory NOI contents: Rule 809.30(2)(b) 1 through 6:

1. Case name and number
2. Identification and date of the judgment or order person intends to seek postconviction or postdisposition relief
3. The name and address of the person and trial counsel
4. Whether the person's trial counsel was appointed by the SPD and if so, whether the person's financial circumstances have materially changed since indigency was determined
5. Whether the person requests that the SPD appoint postconviction counsel
6. Whether a person who does not request SPD appointment will represent themselves or be represented by retained counsel (name and address should be included).

c. Deadline for filing NOI

- i. Within 20 days after date of sentencing. Wis. Stats. Rule 809.30(2)
- ii. Time limit may be enlarged upon showing of "good cause." Wis. Stat. Rule 809.82.
  1. Need to file motion to extend time to file NOI in court of appeals (COA)

**Sample Extension Motion**

- a. COA – Need to identify correct District on top of Motion
- b. Original plus 4 copies to COA serve one copy on DA and one copy on clerk of circuit court

- c. COA address: P.O. Box 1688, Madison, WI 53701-1688.
- 2. File Notice of Intent (NOI) with clerk of court prior to or at same time as motion to extend.
- d. **NOI must be filed in the circuit court** and served on the prosecutor and any other party.
- e. Send to SPD Appellate Division Intake Unit, P.O. Box 7862, Madison, WI 53707.
  - i. Copy of file stamped NOI
  - ii. Completed [SPD Appellate Questionnaire](#)
  - iii. Copy of all transcripts obtained during the course of representation
  - iv. Motion for Release Pending appeal or Stay of sentence pending appeal (if applicable) (see below)

#### IV. Release pending appeal

- a. Trial counsel's responsibility
- b. No longer presumptive in misdemeanor cases
- c. The trial court has the discretion to grant release pending appeal in both misdemeanor and felony cases. The relevant statutory provisions are Wis. Stats. § [809.31](#), [969.01](#), [969.08](#) and [969.09](#).
  - i. Once motion is filed, court shall hold a prompt hearing. § 809.31(2)
  - ii. §809.31(3) outlines what a court must find to grant release
  - iii. §809.31 (4) list considerations for court in determining the motion
  - iv. Merits of appeal can be considered by circuit court in considering release pending appeal. *See State v. Salmon*, 163 Wis. 2d 369, 471 N.W. 2d 286 (Ct. App. 1991)
  - v. In probation case – consider motion to stay sentence pending appeal.
    - 1. If defendant has condition time – consider stay of condition time pending appeal

#### [Sample Motion for Release Pending Appeal](#)

- d. District Attorney must be served with copy of motion for release pending appeal.

- e. Copies of the motion and the order deciding the motion should be provided to the client and to Appellate Intake.
- f. If circuit court grants order and schedules review date – ask for review date to be scheduled in at minimum of 120 days (time needed to appoint counsel, order transcripts, receive and review transcripts)
  - i. **Notify Appellate Intake and/or Appellate Attorney and client of Court Review date**

## V. Sentence Credit

- a. Trial Counsel's responsibility
- b. Pursuant to Wis. Stats. § 973.155(1)(a) Credit should be given "for all days spent in custody in connection with the course of conduct for which sentence was imposed."
  - i. Research issue before sentencing – WI Jury Instructions SM-34 is a good starting point. [SPD Case Summaries](#) on SPD website is another good resource.
- c. Be prepared before sentencing
  - i. Talk to client
  - ii. Check file
  - iii. Verify dates of incarceration at all institutions/jails
- d. Need to correct after sentencing if defendant is entitled to additional credit not ordered by the court (check judgment of conviction)

## VI. Restitution

- a. Trial counsel's responsibility
- b. Important issue – probation can be extended for not making a good faith effort at paying restitution
- c. § 973.20 applicable statute
- d. Must be a causal nexus between crime and disputed damage.
- e. §973.20(13)(a) lists factors for court to consider in determining restitution, **including the defendant's financial resources, defendant's present and future earning ability and the needs and earning ability of the defendant's dependants.**
- f. If court does not determine restitution at sentencing, § 973.20(13)(c) lists four alternative procedures for determining restitution.
- g. Outline of issues, considerations and duties of counsel regarding restitution located at:
  - i. <http://www.wisspd.org/html/forprac/duties.asp>

- h. [SPD Case Summaries](#) (good starting point for issue identification/research):

**VII. Other post verdict motions**

- a. **CAUTION: § 973.19 sentence modification motion** – the filing a motion under this statute waives a defendant’s right to file an appeal or postconviction motion. Rule 973.19(5)
- b. Must consult with client about potential for waiving appellate rights before filing such a motion

**VIII. Revocation cases**

- a. Trial attorney is responsible for administrative appeal & writ of certiorari.
- b. Hand-off to Appellate Division occurs after certiorari. Civil appeal rules apply [NOI does not perfect the appeal]. **Do not file a notice of appeal unless directed by the Appellate Division to do so.** There is no right to counsel in certiorari appeals. For details of procedure, *see* “Perfecting Appeals in WI Public Defender Cases” document on the SPD website.

**IX. Contact SPD Appellate Division**

- a. Milwaukee County Cases – Milwaukee Office: 414-227-4805
- b. All other counties – Madison Office: 608-266-3440

**X. Other resources on SPD Website (hyperlinks below):**

[Appellate Practice Outline \(Rule 809.30-809.32\)](#)

[Appeal information for trial attorney](#)

[What Trial Lawyers Should Know about Appellate Law](#)

[How Trial and Appellate Lawyers Can Work Together to Improve Client Representation](#)