



Revocation Hearings Best Practices

Vince Varone

Andrew S. Riedmaier

Wayne J. Wiedenhoeft

Division of Hearings and Appeals

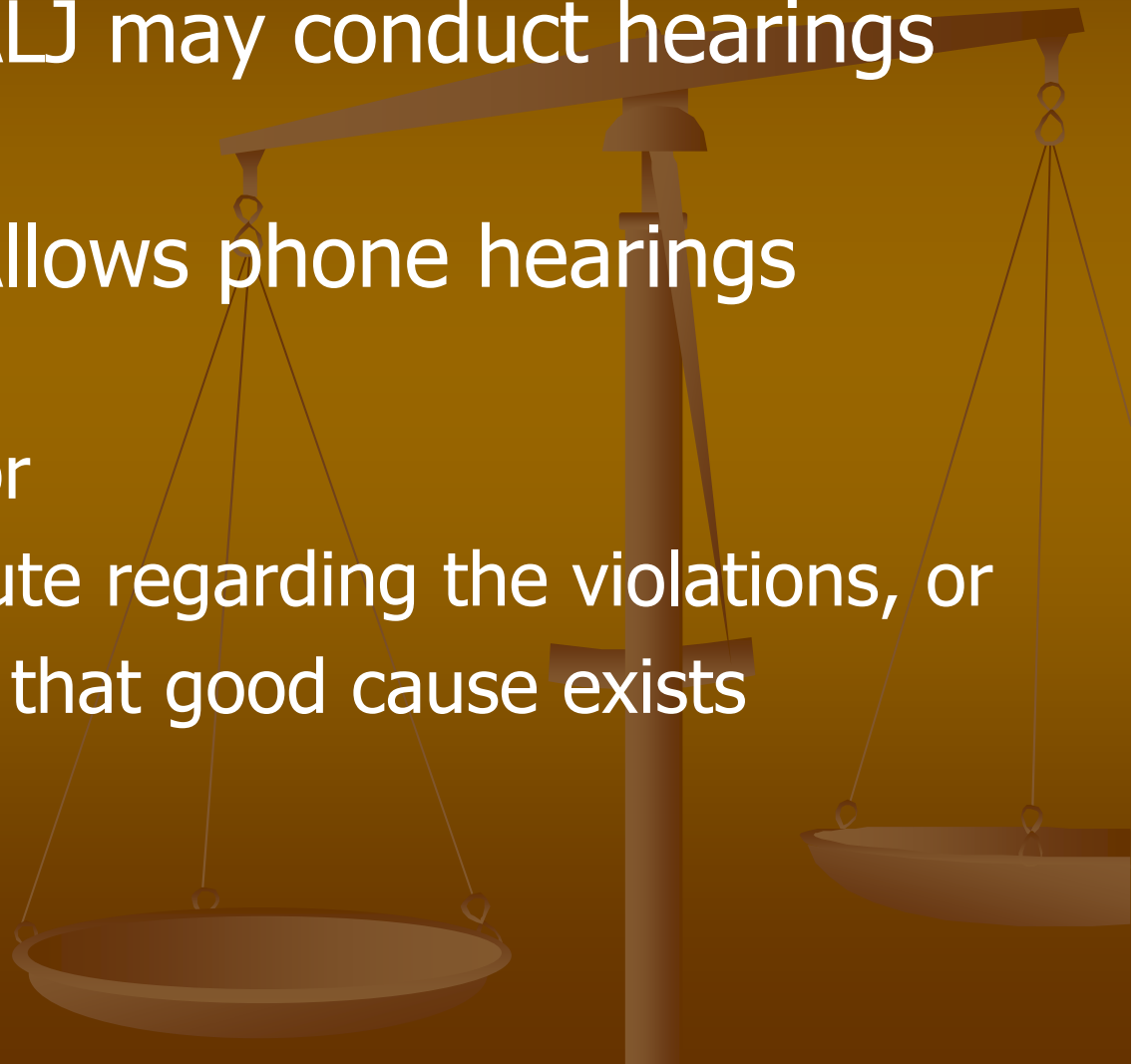
Recent Rule Changes



- Effective June 1, 2010
- HA 2.03(1) – allows DHA to issue documents by E-mail
- HA 2.03(2) – allows parties to submit documents to DHA by E-mail
- HA 2.03(3) – filing date for E-mail is date received by DHA, not date sent
- Our E-mail address:
DHAMail@wisconsin.gov

Phone and Video Hearings

- HA 2.05(6)(a) ALJ may conduct hearings by video.
- HA 2.05(6)(a) Allows phone hearings when:
 - Parties agree, or
 - No factual dispute regarding the violations, or
 - ALJ determines that good cause exists



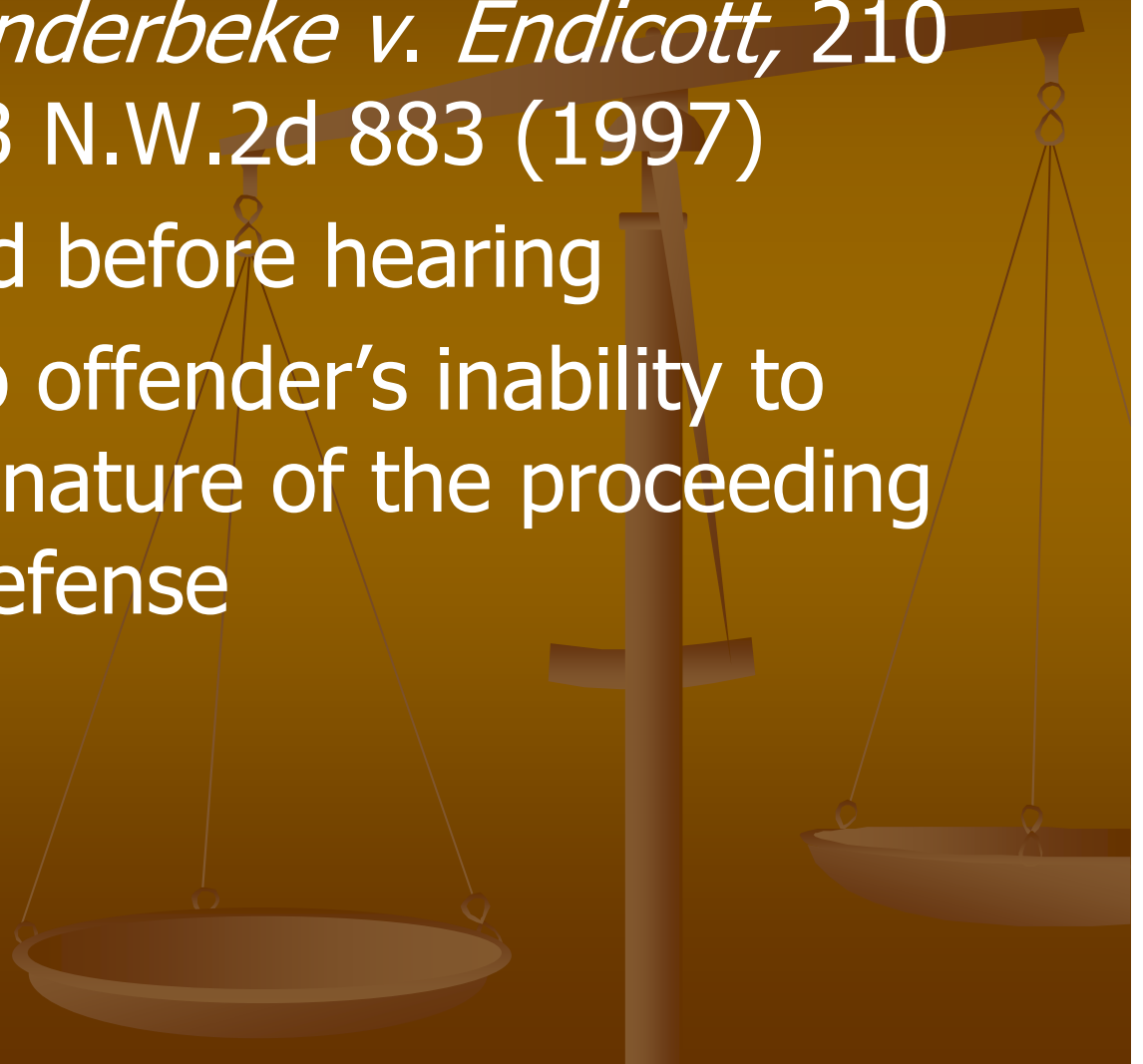
Hearing Preparation



- Immediately establish contact with the key people in the process: DOC agent; client.
- Investigate: DOC exhibits; DOC file; Police records; interview witnesses; internet and court searches; client's records.
- Negotiate: with the DOC agent and supervisor to the best outcome possible for your client.
- Strategize: prioritize outcomes with the client. Understand the key evidence needed to prove the allegations.
- Be prepared for everything, good and bad. Arrive before the scheduled hearing time to meet with client.

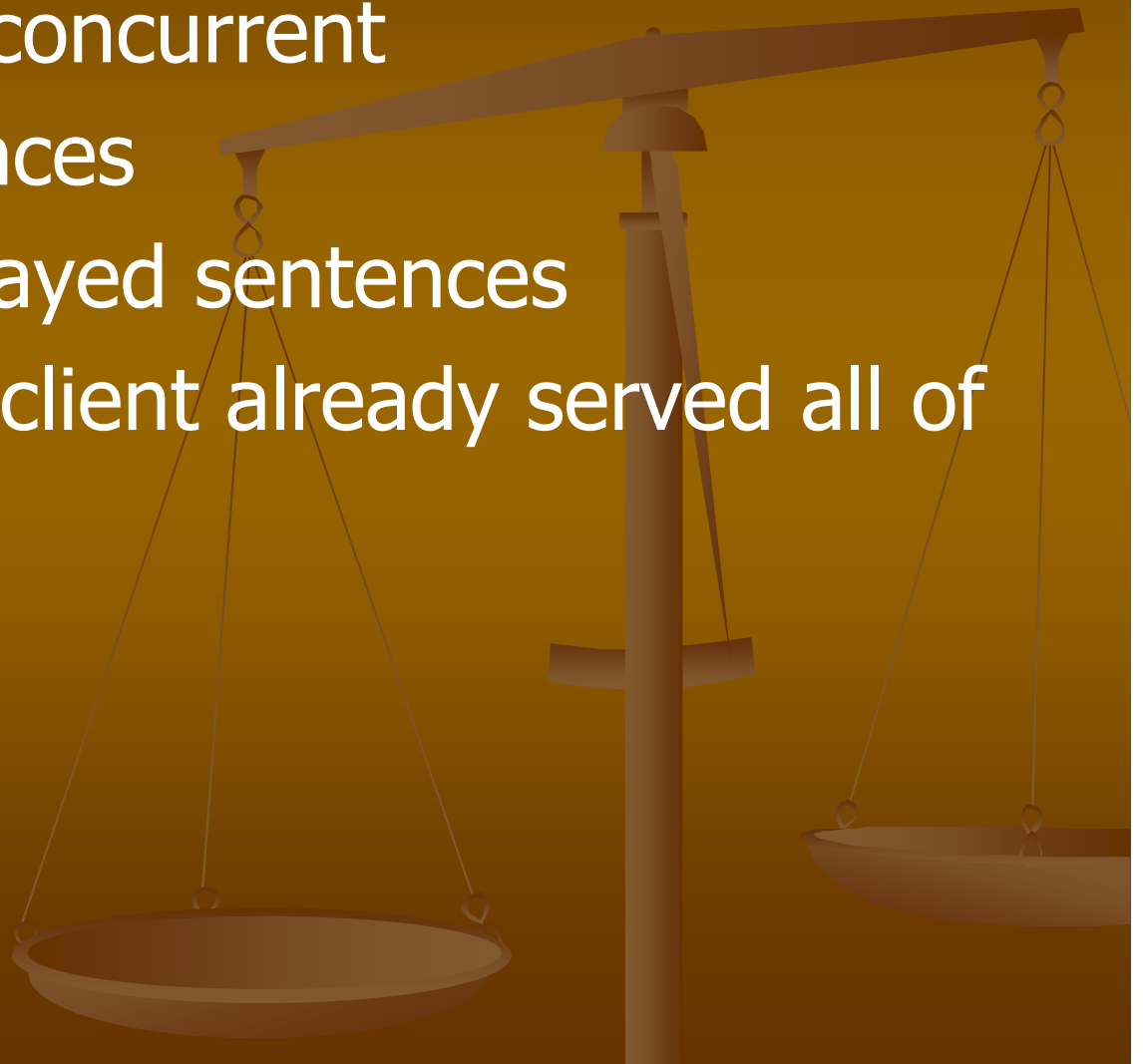
Competency

- *State ex rel. Vanderbeke v. Endicott*, 210 Wis.2d 502, 563 N.W.2d 883 (1997)
- Should be raised before hearing
- Be specific as to offender's inability to understand the nature of the proceeding or to assist in defense



Know Your Client's Sentence Structure

- Consecutive or concurrent
- Withheld sentences
- Imposed and stayed sentences
- Jail credit - has client already served all of his time?



Reincarceration/Confinement



- “In order to remain a neutral and detached hearing officer, the DHA retains the right to exercise its discretion in revocation hearings free from the guidelines found in the operations manual.” ***George v. Schwarz***, 2001 WI App 72 ¶ 30, 242 Wis. 2d 450, 626 N.W.2d 57.
- Wis. Admin. Code §§ HA 2.05(7)(f) and HA 2.06(6)(b): (a) the nature and severity of the original offense, (b) the institutional conduct record, (c) the conduct and behavior while on parole, and (d) the period of reincarceration needed to protect the public from the risk of further criminal activity, to prevent depreciation of the seriousness of the violation or to provide confined correctional treatment.

At the Hearing



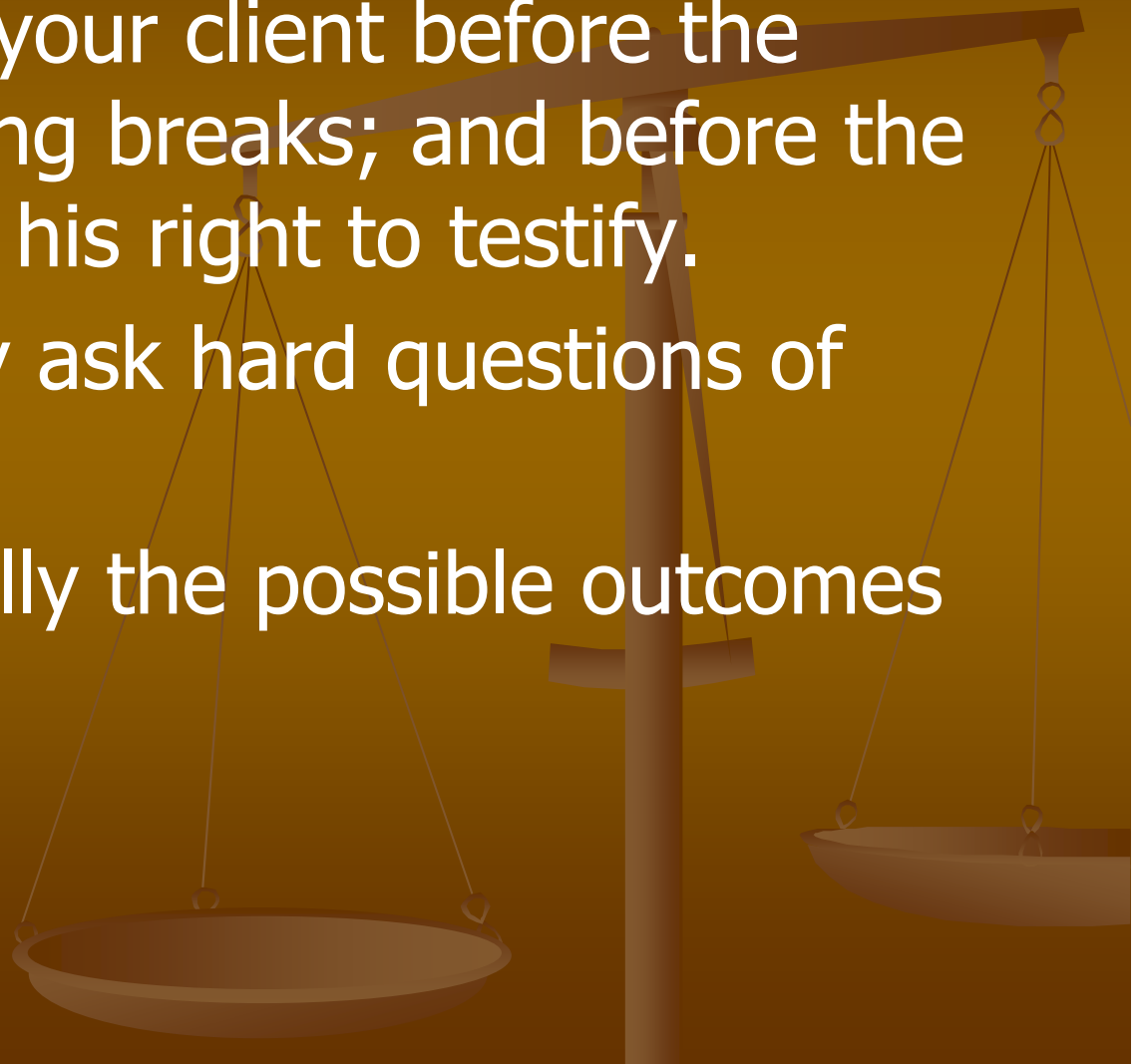
- Concede issues you will lose. Explain to the ALJ what you believe the issues are for the hearing from your client's perspective.
- Know how to treat witnesses. It is generally a poor strategy to attack agent even if your client wants you to. Know the difference between questioning the reliability of testimony and attacking the credibility of a witness.
- Understand that hearsay will be admitted. Standing objections are permissible. Save your reliability arguments, if necessary, for closing.
- Generally, letters from employers, family, etc. will be admitted, but not testimony on character.

What we don't want to hear

- NGI defenses See *State ex rel. Lyons v. H&SS Dept.*, 105 Wis. 2d 146, 312 N.W.2d 868 (Ct. App. 1981).
- Character evidence regarding offender
- Appropriateness of rules – see DOC 328.11
- Complaints about agent

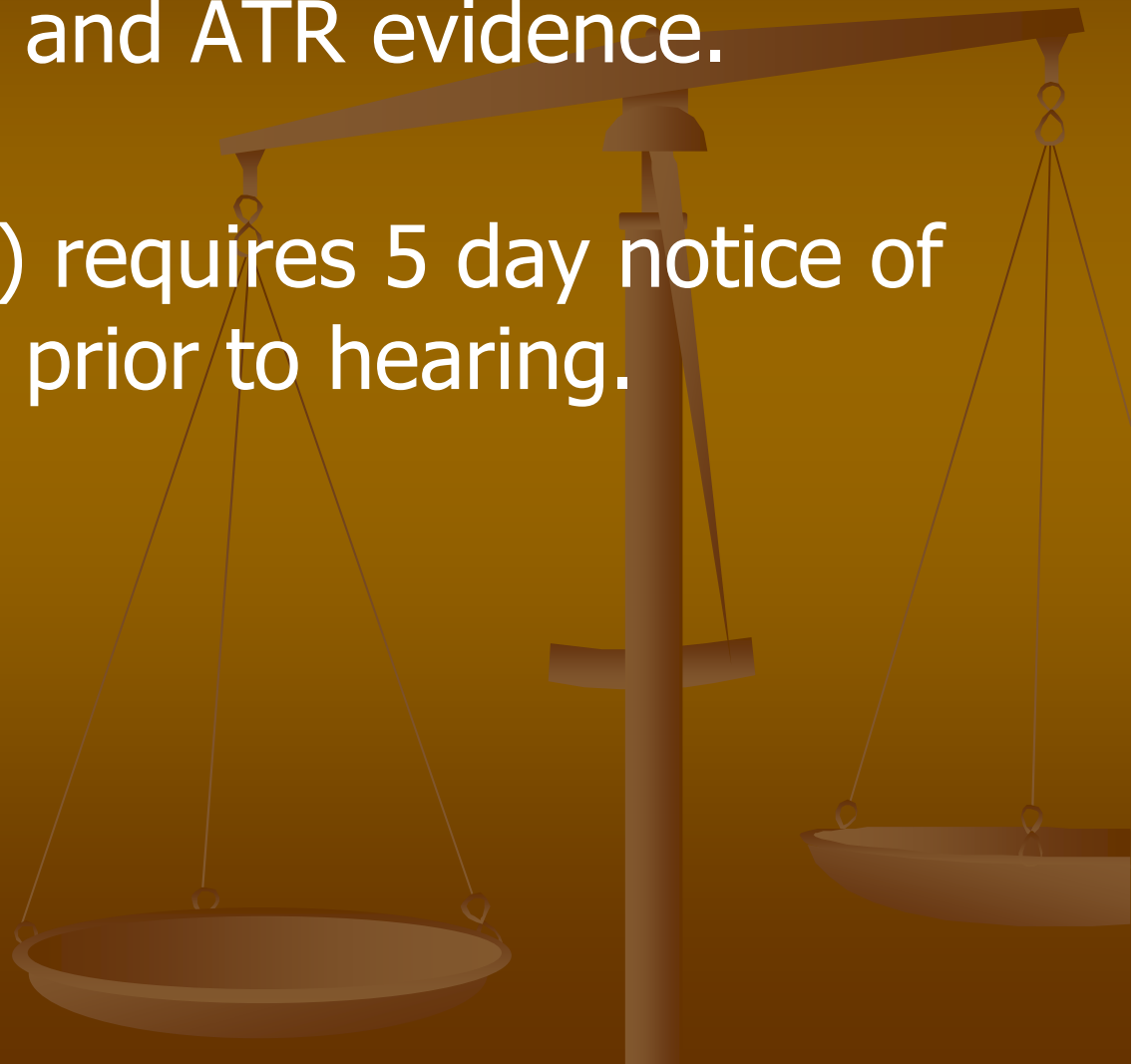
Should Your Client Testify?

- Discuss with your client before the hearing; during breaks; and before the defense case his right to testify.
- The ALJ may ask hard questions of your client.
- Weigh carefully the possible outcomes of testimony.



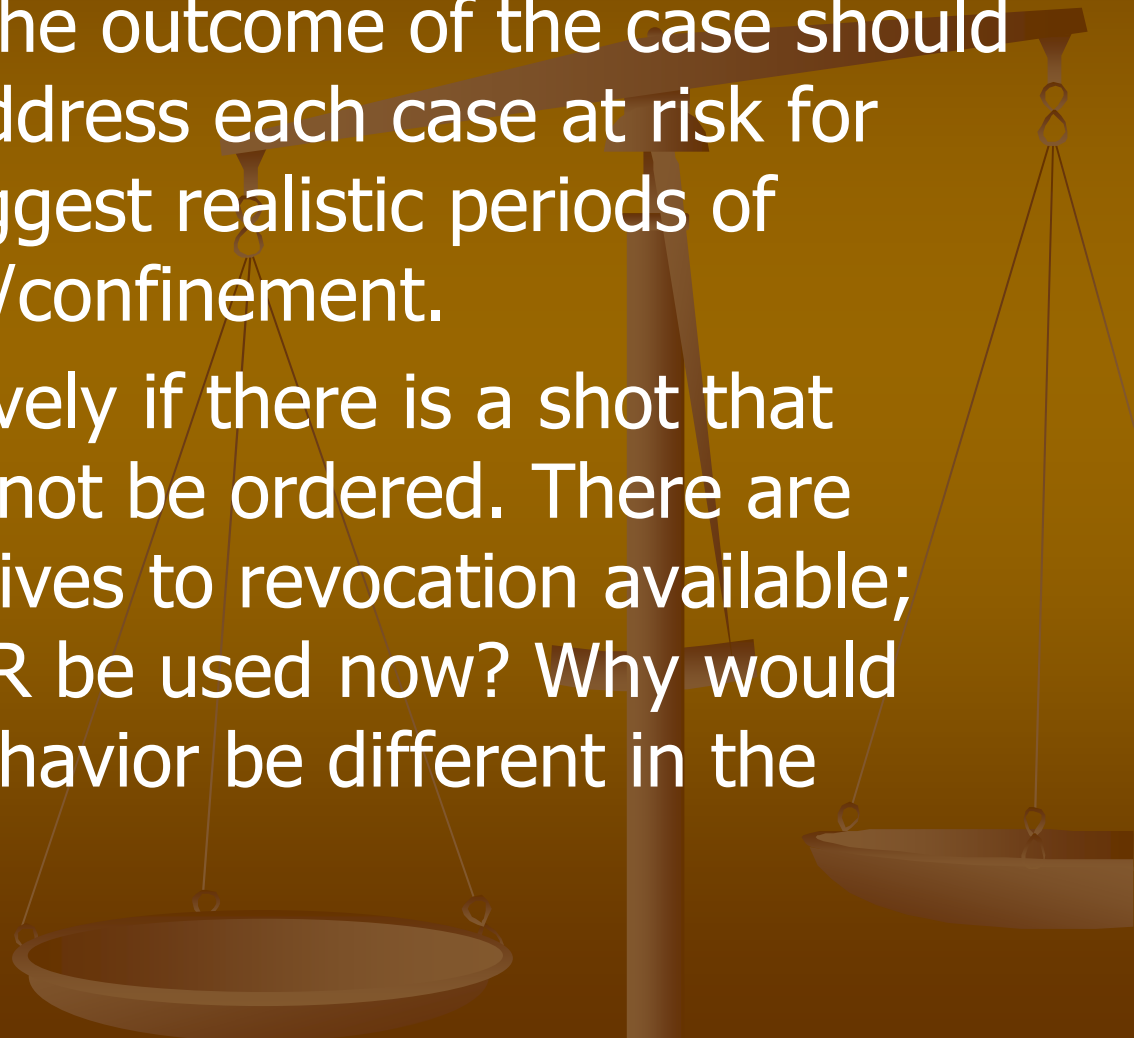
Alibis and ATRs

- Evaluate alibi and ATR evidence.
- HA 2.05(6)(h) requires 5 day notice of alibi and ATR prior to hearing.



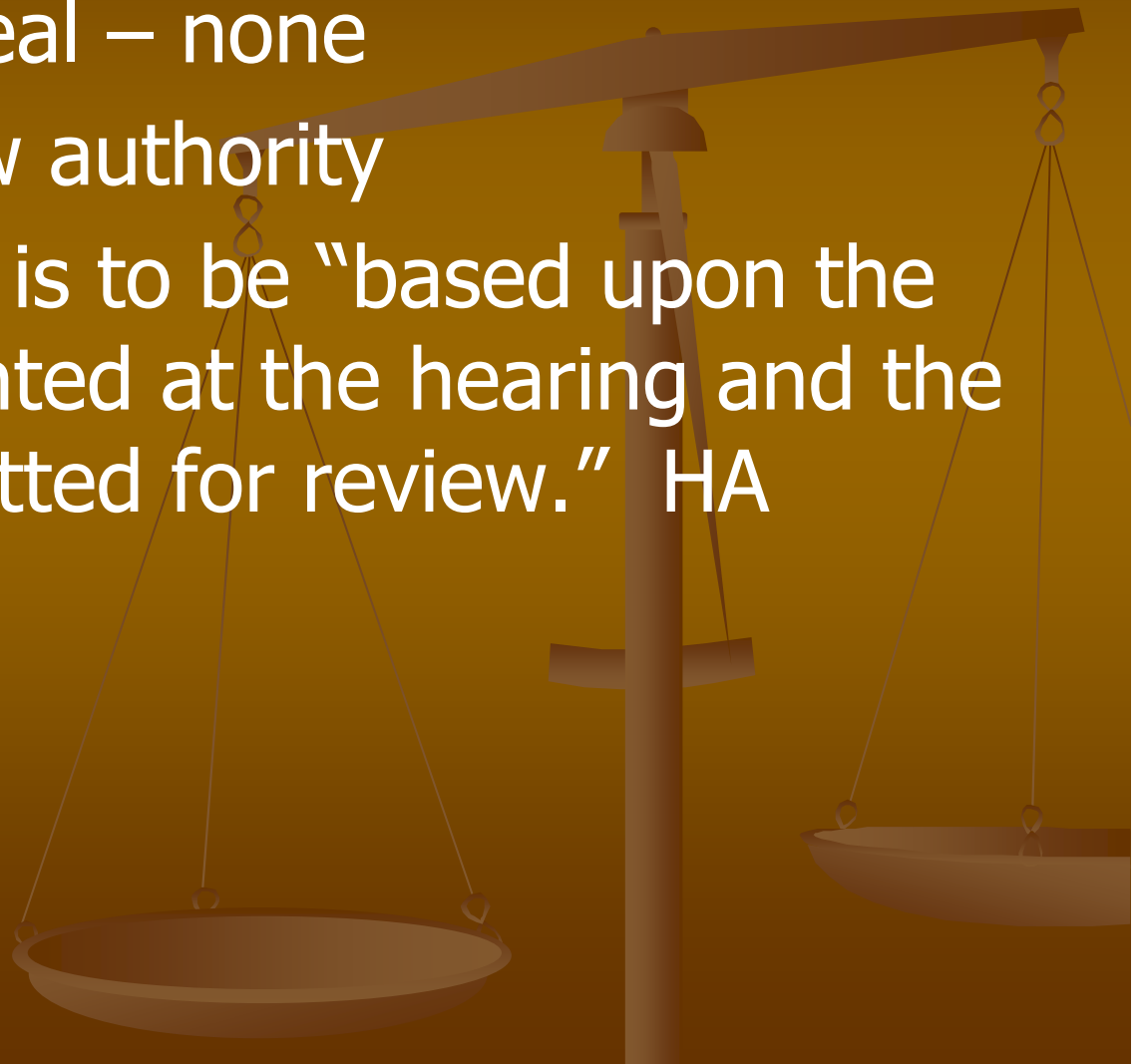
Final Argument

- Suggest what the outcome of the case should be and why. Address each case at risk for revocation. Suggest realistic periods of reincarceration/confinement.
- Argue alternatively if there is a shot that revocation will not be ordered. There are always alternatives to revocation available; why should ATR be used now? Why would your client's behavior be different in the future?



Administrative Appeal Practice

- Format for Appeal – none
- ***De novo*** review authority
- Appeal decision is to be “based upon the evidence presented at the hearing and the materials submitted for review.” HA 2.05(9)(a)

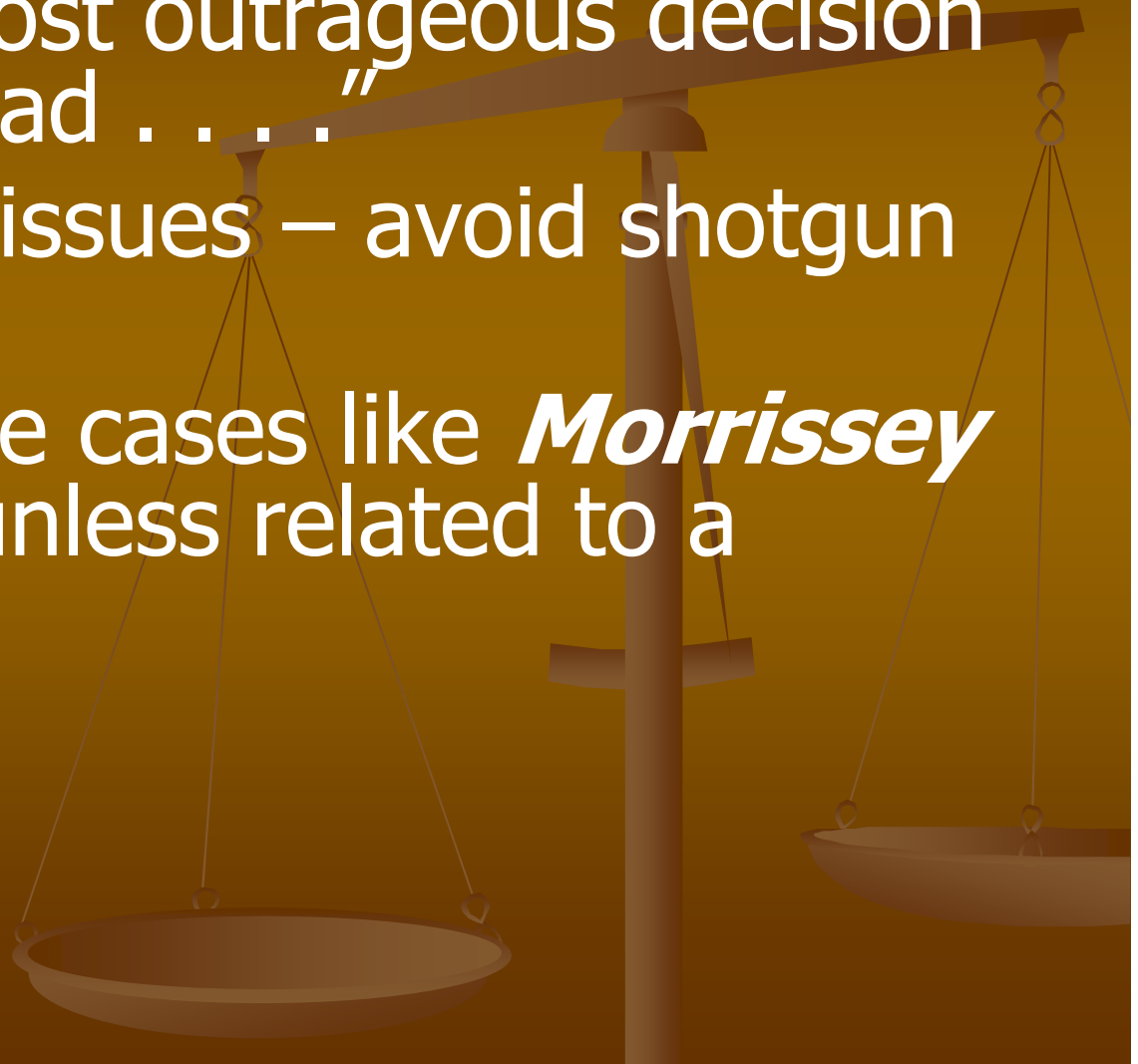


Appeal Due Dates

- HA 2.05(8)(a) - appeals due no later than 10 business days after date of decision
- Administrator considers this a firm date
- Occasionally, extensions are granted for cause provided notice of appeal is filed by due date
- HA 2.05(8) – requires copy to be sent to other party in a timely manner

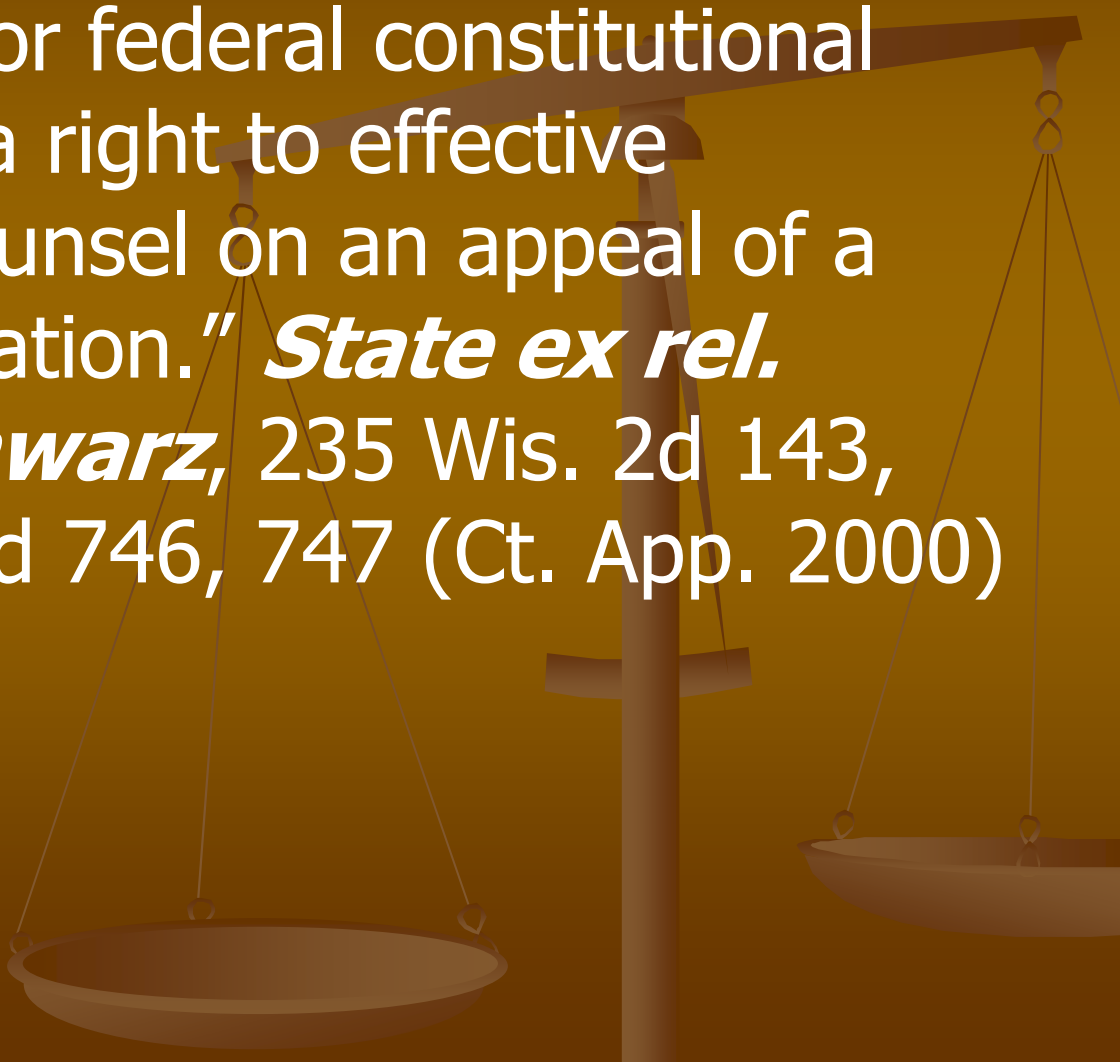
Appeal Do's and Don'ts

- “This is the most outrageous decision I have ever read”
- Focus on real issues – avoid shotgun approach
- No need to cite cases like *Morrissey* and *Plotkin* unless related to a specific issue



No Right to Counsel on Administrative Appeal

“[N]either state nor federal constitutional law recognizes a right to effective assistance of counsel on an appeal of a probation revocation.” *State ex rel. Mentek v. Schwarz*, 235 Wis. 2d 143, 146, 612 N.W.2d 746, 747 (Ct. App. 2000)



Administrative Appeals - By the Numbers – 2009

- 10,233 revocation hearing requests
- 3689 decisions issued
- 1313 administrative appeals filed with DHA
- 73 appealed to circuit court by writ of certiorari



Resources

- Resources available on our website:
<http://dha.state.wi.us>
- State Public Defender:
<http://www.wisspd.org/html/training/ProgMaterials/>

