APPELLATE PRACTICE AND PROCEDURE
for SPD-Appointed Counsel

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Protecting Justice for all Since 1977

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To the Appellate Practitioner:

Thank you for signing on to take case appointments from the State Public Defender's Appellate Division.

Wisconsin's rules of appellate procedure for criminal cases and other cases where there is a statutory or constitutional right to counsel provide unique litigation opportunities. In other jurisdictions, criminal appellate attorneys are limited to reviewing a static record and writing appellate briefs which raise preserved issues and/or errors so clear that they fall within "plain error" or "structural error" doctrines.

In contrast, under Wisconsin rules, the right to a direct appeal includes a right, and in some cases an obligation, to first move for postconviction or postdisposition relief in the circuit court. Postconviction litigation may involve a contested hearing or even an evidentiary hearing. Common postconviction motion issues include, for example, whether a guilty plea was involuntarily entered, whether trial counsel was ineffective, or whether a sentence should be reduced based on information rebutting the judge's understanding of the defendant's prior history or circumstances of the crime. Appellate attorneys in Wisconsin thus have the opportunity, and the duty, to enhance or develop the record, and to resolve all of a client's claims in a single appeal.

This system makes Wisconsin appellate practice dynamic and interesting. Attorneys have more creative control over a case and get to employ a broader range of skills. But it also makes appellate practice in Wisconsin more challenging. In addition to reviewing the trial record, Wisconsin appellate attorneys must consider and evaluate issues that were not raised and evaluate or reevaluate witnesses who may or may not have been part of the underlying case. Consequently, in addition to traditional appellate skills, attorneys taking Wisconsin public defender appeal cases must also develop skills more typically associated with trial practice.

This handbook is intended as a general guide to this process. Of course, no guide is 100 percent comprehensive; this handbook is not intended to provide specific legal direction or advice. It is a starting point, a guide. In using this handbook, you should always verify citations, use your legal training and good judgment, and seek the advice of more experienced attorneys when needed. And no guide can substitute for intellectual curiosity and empathy, which we hope will inform every aspect of your practice.

Again, thank you! We hope you find this work – as we do – interesting and rewarding.

Very truly yours,

The Appellate Division Management Team

PLEASE NOTE

This handbook is distributed or posted as a general information guide for appellate practice in Wisconsin public defender cases. It is not 100% comprehensive and is not intended to constitute specific authoritative legal direction or advice. Attorneys should know, reference and follow all relevant statutes, court rules and case law when analyzing a matter or taking action in any given case. This publication was finalized on May 1, 2013. Subsequent changes to the law may not be included. If you find any errors or omissions, please let a manager in the SPD Appellate Division know.

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CHAPTER ONE:
INTRODUCTION TO APPELLATE PRACTICE

I. Overview of the appellate process

a. A snapshot of our cases

The State Public Defender (SPD) Appellate Division appoints attorneys to handle appeals in cases in which there is a constitutional or statutory right to counsel.[1] In addition, the SPD has limited authority to appoint counsel in some cases where there is no absolute right to counsel if it determines that the case should be pursued.[2] Discretionary appointments are rare.[3]

The vast majority of SPD appeals are governed by WIS. STAT. RULE 809.30, which sets forth appellate procedure for direct appeals in criminal, juvenile delinquency, civil commitment,[4] and CHIPS[5] cases. In addition, RULE 809.30 governs some, but not all, contempt cases – specifically, it governs appeals of remedial and punitive contempt proceedings that were prosecuted by the government.[6]

The SPD also appoints attorneys in termination-of-parental-rights (TPR) cases, which are governed by rules set forth in WIS. STAT. RULE 809.107.

In addition, the SPD appoints counsel to defend against appeals filed by the state and sometimes appoints counsel to represent clients involved in permissive (interlocutory) appeals.[7]

A small number of SPD-appointed appeal cases are governed by civil appeal rules.[8] Examples include appeal of a summary contempt order, appeal from denial of a sentence modification motion under WIS. STAT. § 973.19, appeal from denial of a writ of

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[1] *See* WIS. STAT. § 977.05(4) (2011-12). All subsequent references to the Wisconsin Statutes are to the 2011-12 version of that publication.
[2] WIS. STAT. § 977.05(4) & (6).
[3] As a matter of policy, the SPD Appellate Division generally makes discretionary appointments only where there is a reasonable chance of success and the issue presented is of statewide importance, is important to the development of the criminal law, and is so complex that representation by an attorney is necessary.
[4] This statute handles direct appeals from all kinds of civil commitments, whether they arise out of CHAPTER 51, CHAPTER 55, CHAPTER 980, or WIS. STAT. § 971.17. WIS. STAT. RULE 809.30(1)(a).
[5] CHIPS refers to Child in Need of Protection or Services, as defined in Chapter 48. The SPD may appoint counsel for children in CHIPS proceedings at both the trial and appellate level. WIS. STAT. § 977.05(4)(h)5.
[6] WIS. STAT. § 785.03(3).
[7] *See* WIS. STAT. RULES 809.50 & § 974.05.
[8] *See* WIS. STAT. §§ 808.04(1) & 785.03.

certiorari, appeal from denial of a postconviction motion under WIS. STAT. § 974.06, and appeal from denial of common law writs of habeas corpus or error coram nobis.[9]

b. Focus on RULE 809.30 and TPR Appeals

This handbook focuses on RULE 809.30 and TPR appeals.[10] These involve similar, though not identical, procedures. In both kinds of appeals:

- The appeal is initiated when the trial attorney files a Notice of Intent to Pursue Postconviction or Postdisposition Relief in the circuit court.[11]

- After the filing of the Notice of Intent, the clerk sends various case materials to the SPD, after which, if the SPD determines the person to be eligible, the SPD appoints counsel and requests the transcripts from the court reporters and the court record from the clerk.[12]

- Once the court reporters and clerk get the transcripts and court record to the appointed attorney, though the procedures are different, there are mechanisms for filing a postconviction or postdisposition ("post-judgment") motion in the circuit court to raise issues not preserved for appeal.[13] Alternatively, for some issues, the appellant can argue the case straight to the Wisconsin Court of Appeals.[14]

- If the circuit court denies the relief requested in the post-judgment motion, an appeal from the denial of that order can be taken to the court of appeals.[15]

- If the court of appeals does not grant relief, a petition for review can be filed with the Wisconsin Supreme Court.[16]

- If appointed counsel concludes that there are no issues of arguable merit that can be raised on appeal, either before or after litigating a

[9] WIS. STAT. RULE 809.30(2)(L) (regarding WIS. STAT. § 974.06).
[10] The appendix to this section includes a time table for civil appeals and the book occasionally refers to provisions regarding civil appeals. But there is no need to be worried that you will get a case that is categorized as a civil appeal and not know what to do. Generally, we appoint procedurally unusual cases to experienced staff attorneys. When we appoint a case to a private bar attorney, we tell the attorney what sort of case it is before he agrees to take it.
[11] WIS. STAT. RULES 809.107(bm) & 809.30(2)(b).
[12] WIS. STAT. RULES 809.107(3)-(4) & 809.30(2)(c)-(e).
[13] WIS. STAT. RULES 809.107(6)(am) & 809.30(2)(h).
[14] WIS. STAT. RULES 809.107(6)(a) & 809.30(2)(h).
[15] WIS. STAT. RULES 809.107(6)(am) & 809.30(2)(j).
[16] WIS. STAT. RULES 809.107 & 809.62.

motion in the circuit court, there is a procedure for filing a no-merit report in the court of appeals.[17]

- If, after litigating an ordinary appeal in the court of appeals, counsel concludes that there is no non-frivolous basis for filing a petition for review, there is a procedure for filing a no-merit petition for review in the state supreme court.[18]

However, too, RULE 809.30 appeals and TPR appeals differ in many ways. Among other things, TPR deadlines are shorter – see the time tables in the appendix to this chapter – and the notice of appeal in a TPR case must be filed prior to the filing a post-judgment motion in the circuit court. These and other differences are discussed later in this handbook. However, the procedures are similar enough that they can be presented together.

c. The scope of an SPD appellate appointment

i. The proceedings that are part of the appeal

Representation in an SPD-appointed direct appeal case runs from the date of appointment through final resolution of the case in state court, which may involve review in the Wisconsin Supreme Court. Your appointment in a direct appeal case remains open and active until appellate review is exhausted by denial of relief or review in the Wisconsin Supreme Court, unless and until: (1) your client wins the relief requested; (2) your client explicitly directs you to close the case, with a full understanding of the ramifications of that decision; or (3) a court orders that you may withdraw from the case, either via a motion to withdraw or a no-merit appeal.

Your representation covers every aspect of the appellate process in the case for which you were appointed, including any and all of the following:

- Litigating post-judgment motion(s) in the circuit court,
- Prosecuting the appeal or no-merit appeal in the court of appeals,
- Representing your client at any hearing held in the circuit court on remand from an appellate court so long as the appeal remains pending, and

[17] WIS. STAT. RULES 809.107(5m) & 809.32.
[18] WIS. STAT. RULE 809.32(4).

- Filing a petition for review or a no-merit petition for review and litigating the case in the Wisconsin Supreme Court if review is granted.

As discussed later in this handbook, if you win relief vacating the judgment (e.g. re-sentencing, plea withdrawal or a new trial), you should refer the case to the SPD Trial Division for appointment of trial counsel to handle the new sentencing hearing or trial litigation.

ii. The issues that may be appealed

Generally, any issue related to the judgment or order that was the subject of the "notice of intent" is considered part of your case. This plays out in criminal cases as follows:

- For a notice of intent filed from an original judgment of conviction, your case includes the underlying conviction and sentence, as well as any matters (motions to suppress, other motions, etc.) related to the conviction and/or sentence.[19]

- For a notice of intent filed from a judgment of conviction following sentencing after revocation of probation (and filed more than 20 days after the original sentencing hearing), your case does not include the underlying conviction[20] or the underlying administrative revocation decision. It includes only the sentencing after revocation of probation and matters directly related to that.

- For a notice of intent filed from an order denying sentence credit or deciding restitution (and filed more than 20 days after the original sentencing hearing), your case includes only the credit or restitution decision and matters directly related to that.

- For a notice of intent filed from an amended judgment of conviction (and filed more than 20 days after the original sentencing hearing), your case includes only the matters changed by the amendment and matters directly related to that.

Other kinds of cases work similarly. If the notice of intent is filed from an original dispositional order, it would encompass all underlying decisions. If it is filed from a revision, modification or extension of a dispositional order, or from a sanction or

[19] This should not be read to imply all motions and other matters related to the conviction or judgment will have been preserved for appeal in any given case.

[20] *See State v. Scaccio*, 2000 WI App 265, ¶¶10-12, 240 Wis. 2d 95, 622 N.W.2d 449; *State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994).

contempt decision related to the original dispositional order, it would encompass only matters related to the new order, not the underlying judgment.

- Frequently asked question. *What if I notice a great issue for appeal in a matter outside of the scope of my representation?* If, for example, you are appointed on a judgment after revocation of probation and realize that there is a very strong basis for appealing the underlying conviction, which your client would like to pursue, you should contact the appropriate Appellate Division attorney manager to discuss the possibility of a discretionary appointment.

If you are ever unclear about the scope of your representation in any particular situation, please do not hesitate to contact an Appellate Division attorney manager.

iii. Post-judgment matters left to trial counsel

In a criminal case, after the notice of intent to pursue postconviction relief is entered, the only things that are generally left to trial counsel would be filing a motion to stay the sentence or judgment pending appeal, if there is a basis for doing so, and/or representing the client at a restitution or jail credit hearing. Once an appellate attorney is appointed, that attorney has concurrent authority to take care of these matters, but – at least where the client had SPD-appointed trial counsel – they are trial counsel's primary responsibility. In any kind of case, post-judgment matters involving sanctions, contempt, status reviews, and other things of a like nature are handled by trial counsel.

That said, never just assume that an upcoming hearing will be handled by trial counsel. If you ever have a question about who will (or should) handle a particular matter, you should communicate with trial counsel. You may also contact an Appellate Division attorney manager.

II. Managing your appellate cases

If you are new to appellate practice, now is the best time to consider how you will maintain a manageable caseload and how you will manage that caseload.

With an appellate caseload, a single case may, at one point, demand all of your attention for weeks and, at another point, require no action for many months. One case may be resolved with a few hours of work, while another may be open for a year or more and require hundreds of hours of work. While full-time SPD appellate staff attorneys must manage full-time appellate workloads, private bar attorneys certified to take SPD-appointed cases should not receive enough appointments to generate a full-time

workload. Private bar attorneys must take care to manage SPD-appointed appeal cases within the context of their other case work.

If you are new to appellate practice or if you do not already have a functioning case-management system – a system of charting expected deadlines and calendaring your time – creating one should be a top priority. You should develop a system that is easy to amend or revise and that includes some sort of feature to remind you when a deadline is approaching. But it need not be fancy; indeed, simple is often better. For most, this involves a combination of a spreadsheet and a computerized or paper calendar.

The appendix to this chapter contains one example of a very simple spreadsheet. The example is not intended to represent an "ideal," but – particularly if you are starting from scratch – you may find it helpful as a starting point. At a minimum, your spreadsheet (or other charting system) should have a place to track deadlines at every step of the case, from the court reporter's and clerk's deadlines for getting materials to you through the deadline for filing the petition for review. It should also have a place to make notes on tasks that you need to complete in each case.

In addition to a spreadsheet or other charting system, you need a calendaring system that can remind you of approaching deadlines. Most SPD staff attorneys copy each of their deadlines, or, minimally, the deadlines that they must personally meet, from their spreadsheets to electronic calendars with an automatic reminder function (e.g. Microsoft Outlook or the web-based Google calendar) or large wall calendars or both.[21] There are, obviously, endless calendaring options. What is critical is that you have one.

III. Calculating deadlines

At every point of an appellate case, unless the case is fully briefed and awaiting decision, there will be some outstanding deadline.[22] Unlike at the trial level, where the state in a criminal case generally is responsible for moving a case forward, on appeal that burden generally falls on the appellant. When prosecuting an appeal, you must know and monitor all relevant deadlines and meet them, or timely seek extensions, when they are your responsibility.

When calculating most deadlines, do not count the day that an action triggered the deadline but do count the last day.[23] Thus, if the opposing party files a response brief on May 5th and your reply brief is due fifteen days later – which, in the court of appeals, it usually is – you count May 6, 7, 8 . . . 20. Your reply brief is due on the 20th.

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[21] One benefit of a paper calendar is that you can display at least three months, starting with the current month, at once. Nearly all deadlines occur within sixty days of a triggering event, so this allows you to display all live deadlines at the same time.

[22] In TPR cases, there is an applicable deadline – for the court of appeals' decision – even when the case is fully briefed. WIS. STAT. RULE 809.107(6)(e).

[23] WIS. STAT. § 801.15(1)(b).

But wait! If you are served the triggering document by mail, where the triggering document is not a court decision, you add three days to the front of this calculation for mailed service.[24] Thus, here, start counting on the 8th. You would count May 9, 10, 11 . . . 23. So, if the state served you with its response brief by mail, your reply brief is actually due on the 23rd.[25]

- Frequently asked question. *What if the state served me by mail but I got it the next day?* Bonus! You still add 3 days for mailed service. *What if because of slow mail service I got it 6 days later?* Too bad! You still only get to add 3 days for mailed service.

Wait again! If the day that your brief is due falls on a weekend, holiday, or some other day when the relevant clerk's office is closed, then your reply brief is due on the next day that the clerk's office is open.[26]

There is one more important point that is not relevant to our hypothetical deadline of May 23rd. Generally, you do count weekends and holidays except, as noted, when the last day lands on one of these days.[27] However, if you are calculating a deadline that is 10 days or less from the triggering event – as with the filing of a reply brief in a TPR case[28] – you do not count those days.[29]

- Practice tip. You don't have to manually count your deadlines. There are plenty of online tools that calculate deadlines just as § 801.15 requires. You can find one such calculator at: http://cgi.cs.duke.edu/~des/datecalc/datecalc.cgi.

[24] WIS. STAT. § 801.15(5)(a). Note that deadlines calculated from the date of a court decision run from the date the decision is actually issued or filed, not from the date a copy of the decision is served or received. Thus, there is no mail service add-on for court decisions.
[25] Note that if the state served you personally, you do not get any additional time.
[26] WIS. STAT. § 801.15(1)(b).
[27] WIS. STAT. § 801.15(1)(b).
[28] WIS. STAT. RULE 809.107(6)(c).
[29] WIS. STAT. § 801.15(1)(b).

IV. Extending deadlines

With any deadline, there may occasionally be a need to extend that deadline.

Before discussing how to extend a deadline, though, you must know that there are a few absolutely, positively, no exception, non-extendable deadlines:

- The deadline for filing a notice of appeal under RULE 809.107(5) where the petitioning party was a private actor (in private TPR appeals)[30]
- The deadline for filing a notice of appeal under WIS. STAT. § 808.04(1) (in cases where civil appeal rules apply)[31]
- The deadline for filing a motion for reconsideration in the court of appeals (in any case)[32]
- The deadline for filing a petition for review in the Wisconsin Supreme Court (in any case)[33]

If you miss one of these deadlines in an SPD-appointed case, you must immediately notify an Appellate Division attorney manager. In some cases we may be able to help your client, but only if you promptly contact us to let us know what happened.

Most other appeal deadlines are extendable by means of motion to the court of appeals.[34]

- Practice tip. Some attorneys are concerned that filing a motion for enlargement of a time limit will reflect negatively on them. It is important to remember that your client only gets one direct appeal and it is your duty to ensure that it is as strong as possible. Thus, if meeting a deadline will make it difficult for you to adequately investigate or research an issue or produce a high quality motion or brief, you should ask for more time. On the other hand, if you need to ask for multiple extensions in most cases, that may be an indication that you should develop new case-management practices, reduce your caseload, or take other actions to remedy the situation – before it gets worse. And, you should be realistic about the

[30] WIS. STAT. RULE 809.82(2)(b).
[31] WIS. STAT. RULE 809.82(2)(b).
[32] WIS. STAT. RULE 809.82(2)(e).
[33] *First Wis. Nat'l Bank v. Nicholaou*, 87 Wis. 2d 360, 364-66, 274 N.W.2d 704 (1979).
[34] WIS. STAT. RULES 809.80(1) & 809.82(2)(a). Note that all motions regarding post-judgment and appellate deadlines are directed to the court of appeals, not the circuit court, even if they are filed before the filing of any notice of appeal.

time you will need; it is better to file a single motion requesting a longer period of time than it is to file multiple short extension motions.

As with any motion to the court of appeals, you must file five copies of your motion for time with the clerk of the court of appeals, or three copies if it is a one-judge appeal,[35] and send copies to the clerk of the relevant circuit court and all parties (including, if applicable, the guardian ad litem (GAL)).[36] Note that, when the state is the opposing party, the attorney general handles three-judge appeals (including felony and Chapter 980 appeals), while the relevant district attorney handles one-judge appeals (including misdemeanor and juvenile delinquency appeals).[37]

- Practice tip. You should *always* file a motion for enlargement of the time limit before the applicable deadline lapses. The court of appeals practice is not consistent in regard to its authority to retroactively extend deadlines. In the past the court routinely granted such motions without incident, but now it occasionally converts retroactive extension motions to habeas petitions (alleging or finding ineffective assistance of appellate counsel for allowing the deadline to lapse). This complicates and delays the process, and often leads to client discontent.

V. Maintaining a record of your work

Perhaps there is not enough material here to justify a whole handbook section. But the content of this statement is important enough to warrant a free-standing section: you must maintain a dated, legible, and understandable record of all of the work that you do for each case.

Minimum performance standards for attorneys representing public defender appeal clients, which are included in the appendix to this chapter, require that a complete up-to-date file be kept for every case. The file shall contain, at a minimum, proof of service for all transcripts, court records or other papers that trigger a time limit; notations in summary form as to all action taken, advice given, and phone or in-person communications; notes taken while reviewing the transcripts and record; notes about potential issues considered, research conducted, and factual issues investigated; copies of all correspondence relating to the case; copies of all documents received or filed; a record of all documents provided to the client; a case activity log that accurately documents all time spent working on the case; and a case closing letter or memo.[38]

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[35] WIS. STAT. RULE 809.81(2). See generally RULE 809.81 for information on other technical requirements for the motion (e.g., it must be printed on 8 ½- by 11-inch paper).

[36] WIS. STAT. RULES 809.80(2)(b) & 809.82(2)(d).

[37] WIS. STAT. RULE 809.80(2)(b). Notwithstanding this rule, any petition for review filed in a misdemeanor case must be served on the attorney general. *Id.*

[38] The importance of sending a case closing letter (or writing a case closing memo if the client can't be found) cannot be overstated, as some clients later question or dispute how their case ended.

Maintaining a complete, well-organized file is critical for handling an appeal case efficiently and effectively. There often are long periods of time between litigation events on appeal and having a complete well-organized file is the only reliable way to get back up to speed for whatever litigation event is coming next. A complete file is invaluable if a case must for some reason be re-assigned to another attorney. It may also be useful to successor counsel if you win the appeal and send the case back to a trial attorney. And, it may be useful to you if the client calls you at some point and asks you about a particular conversation or issue.

And, yes, having a complete well-organized file will also protect you if your client contacts the Appellate Division (or the Office of Lawyer Regulation) to complain about your representation or, for private bar attorneys, if the Assigned Counsel Division is reviewing or questioning a voucher you submitted.

VI. Ethical note

You have an ethical duty to competently and diligently represent your client.[39] This includes zealously advocating for the client's strongest non-frivolous legal positions within the bounds of the ethical rules.[40] The SPD's performance standards for appellate attorneys are guided by this ethical obligation, which should guide every step of your representation.

With the sort of practice that we do, representing often unpopular clients who have already been convicted of crimes or adjudicated delinquent, unfit, or dangerous, and with the odds seemingly stacked against you, it is easy to become pessimistic about the possibility of obtaining relief. But a defeatist view is a self-fulfilling prophesy. The Appellate Division consistently finds, not surprisingly, that attorneys who litigate more win more. And attorneys who litigate more, and work to find new and novel issues, often are happier in their work and practice.

Approach each case with an open and curious mind and an enthusiastic willingness to investigate and pursue the case wherever it may take you. Be creative! Litigate!

[39] WIS. SCR 20:1.1 & 1.3.
[40] WIS. SCR Preamble.

VII. Appendix to Chapter One

a. RULE 809.30 Appellate Time Table

b. TPR Appellate Time Table

c. Civil Appeal Time Table

d. Sample – Case Management Spreadsheet

e. Form – Motion for Extension of Time *(to file the postconviction motion or notice of appeal in a criminal case)*

f. SPD Appellate Performance Standards

Rule 809.30 Appellate Time Table

For criminal appeals and those under ch. 48 (except TPR), 51, 55, 938, and 980 (among others).		
BETWEEN	**AND**	**TIME**
Sentencing or final adjudication	Filing of Notice of Intent to Seek Postconviction or Postdisposition Relief	**20 days** 809.30(2)(b)
Filing of Notice of Intent	Clerk of Court transmission of the Notice, judgment, and court reporter list to SPD Intake, or to unrepresented person or retained counsel	**5 days** 809.30(2)(c)
SPD's Receipt of materials from Clerk of Court	SPD's appointment of counsel and request for transcripts and court record	**30 days** (if indigency does not need to be determined) **or 50 days** (if indigency must be determined or re-determined) 809.30(2)(e)
Filing of Notice of Intent	Retained counsel or unrepresented person's request for transcripts and court record	**30 days** **or 90 days** (if denied SPD representation) 809.30(2)(f)
Request for transcripts and court record	Service of transcripts and court record on appellant or counsel	**60 days** **or 20 days** (for service of transcript of post-judgment hearing, after hearing on post-judgment motion) 809.30(2)(g)
Service of later of: last transcript or court record	Filing of Notice of Appeal (and, in ch. 48, 51, 55 & 938 cases, a docketing statement) *OR* Filing of post-judgment motion (PCM)	**60 days** (plus 3 days for mailed service) 809.30(2)(h)&(j); 801.15(5); 809.10(1)
Filing of PCM	Entry of order determining PCM	**60 days** 809.30(2)(i)
Entry of order determining PCM	Filing of Notice of Appeal (and, in ch. 48, 51, 55 & 938 cases, a Docketing Statement)	**20 days** 809.30(2)(j)

Service of later of: last transcript or court record	Filing of No Merit Notice of Appeal and No Merit Report	**180 days** **or 60 days** after entry of order determining PCM, whichever is later 809.32(2)
Filing of Notice of Appeal	Filing of Statement on Transcript and arranging for service of transcripts	**14 days** 809.11(4)
Filing of Notice of Appeal	Transmission of record from circuit court to court of appeals (COA)	**40 days** 809.30(2)(k)
Filing of record in COA	Filing of appellant's brief	**40 days** 809.19(1)
Filing of appellant's brief	Filing of respondent's brief	**30 days** after the later of: service of appellant's brief (including 3 days for mailed service), filing of appellant's brief, or filing of record in COA 809.19(3)(a); 801.15(5)
Filing of respondent's brief	Filing of reply brief	**15 days** after the later of: service of respondent's brief (including 3 days for mailed service) or filing of that brief 809.19(4); 801.15(5)
Filing of reply brief	COA decision	**Varies depending on court's schedule**
COA decision	Filing of motion to reconsider * Note that no extensions of this deadline are permitted *	**20 days** 809.24(1)
COA decision	Filing of petition for review or no-merit petition for review * Note that no extensions of this deadline are permitted *	**30 days** (if a motion to reconsider was timely filed, the 30-day deadline runs from the date the COA denies the motion or issues an amended decision) 809.62(1m); 808.10(2)
Filing of petition for review	Filing of response to petition for review	**14 days** (plus 3 days for mailed service) 809.62(3); 801.15(5)
Filing of response to petition for review	Decision of Supreme Court on granting review	**Varies depending on court's schedule**

TPR Appellate Time Table

Termination of parental rights cases are appealed under 809.107.		
BETWEEN	**AND**	**TIME**
Filing of the dispositional order or other final, appealable order	Filing of the Notice of Intent to Pursue Postdisposition or Appellate Relief	**30 days** 809.107(2)(bm)
Filing of Notice of Intent	Clerk of Court transmission of the Notice, judgment, and court reporter list to SPD Intake, or to unrepresented person or retained counsel	**5 days** 809.107(3)
SPD's receipt of materials from Clerk of Court	SPD's appointment of counsel and request for transcripts and court record	**15 days** 809.107(4)(a)
Filing of Notice of Intent	Retained counsel or unrepresented person's request for transcripts and court record	**15 days** **or 30 days** (if denied SPD representation) 809.107(4)(b)
Request for transcripts and court record	Service of transcripts and court record on appellant or counsel	**30 days** 809.107(4m)
Service of later of: last transcript or court record	Filing the Notice of Appeal * Note that where the petitioner was a private party, no extensions of this deadline are permitted. *	**30 days** (plus 3 days for mailed service) 809.107(5)(a); 801.15(5)
Service of later of: last transcript or court record	Service of notice of abandonment of appeal on other parties	**30 days** (plus 3 days for mailed service) 809.107(5)(am); 801.15(5)
Filing of Notice of Appeal	Filing of statement on transcript and arranging for service of transcripts on other parties	**5 days** 809.107(5)(c); 809.107(5)(d)
Filing of Notice of Appeal	Transmission of record from circuit court to court of appeals (COA)	**15 days** 809.107
Filing of record in COA	Filing of motion for remand for post-judgment fact finding	**15 days** 809.107(6)(a); 809.107(6)(am)
Entry of circuit court order determining motion upon remand	Return of record from circuit court to COA	**Varies** – set by court of appeals in order remanding the case.
Filing of record or return of record to COA	Filing of appellant's brief	**15 days** 809.107(6)(a)

Filing of appellant's brief	Filing of respondent's brief	**10 days** after service of the appellant's brief (including 3 days for mailed service) 809.107(6)(b); 801.15(5)
Filing of respondent's brief	Filing of reply brief	**10 days** after service of the respondent's brief (including 3 days for mailed service) 809.107(6)(c); 801.15(5)
Filing of reply brief	COA decision	**30 days** 809.107(6)(e)
COA decision	Filing of petition for review * Note that no motion for reconsideration is permitted * * Also note that no extensions of this deadline are permitted *	**30 days** 809.107(6)(f)
Filing of petition for review	Filing of response to petition for review	**14 days** (plus 3 days for mailed service) 809.62(3) 801.15(5)

Civil Appeal Time Table

For final orders that must be appealed under civil rules, including those arising out of habeas corpus, certiorari, § 974.06, and summary contempt proceedings		
BETWEEN	**AND**	**TIME**
Entry of judgment or other final, appealable order	Filing of Notice of Appeal and docketing statement * Note that no extensions of this deadline are permitted *	**90 days** **or 45 days** (if written notice of entry of judgment filed under 808.06) 808.04(1); 809.10
Filing of Notice of Appeal and docketing statement	Filing of Statement on Transcript (SOT) and ordering of transcripts	**10 days** 809.11(4); 809.16(1)
Ordering of transcripts	Filing of transcripts	**60 days** 809.16(3)
Filing of transcripts or, if the SOT noted that no transcripts were necessary for the appeal, filing of the SOT	Transmission of record from circuit court to court of appeals (COA)	**20 days** (but no more than 90 days after notice of appeal unless enlarged) 809.15(4)
Filing of record in COA	Filing of appellant's brief	**40 days** 809.19(1)
Filing of appellant's brief	Filing of respondent's brief	**30 days** after the later of: service of appellant's brief (including 3 days for mailed service), filing of appellant's brief, or filing of record in COA 809.19(3)(a); 801.15(5)
Filing of respondent's brief	Filing of reply brief	**15 days** after the later of: service of respondent's brief (including 3 days for mailed service) or filing of respondent's brief 809.19(4); 801.15(5)
Filing of reply brief	Decision of Court of Appeals	**Varies depending on court's schedule**
Decision of Court of Appeals	Filing motion to reconsider * Note that no extensions of this deadline are permitted *	**20 days** 809.24(1)

Decision of Court of Appeals	Filing of petition for review * Note that no extensions of this deadline are permitted *	**30 days** (unless a motion to reconsider was timely filed, in which case the 30-day deadline begins to run on the date the COA denies the motion or issues an amended decision) 809.62(1m); 808.10(2).
Filing of petition for review	Filing of response to petition for review	**14 days** (plus 3 days for mailed service) 809.62(3); 801.15(5)

SAMPLE (CRIMINAL) CASE MANAGEMENT SPREADSHEET

Dates may be added as deadlines arise; boxes may be X'ed as deadlines are met

NAME	PRISON	TRANS'T	PCM	PCM DEC'N	NOA	RECORD	BRIEF	REPLY	PFR	NOTES

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT __

STATE OF WISCONSIN,

Plaintiff,

v. _____ County
Case No. _____

_____,

Defendant.

MOTION TO EXTEND THE TIME FOR FILING A
POSTCONVICTION MOTION OR NOTICE OF APPEAL

The defendant, _____, by undersigned counsel, moves the court pursuant to Wis. Stat. Rule 809.82(2)(a) to extend the time for filing a postconviction motion or notice of appeal under Wis. Stat. Rule 809.30(2)(h) by __ days, until _____, 20___. The grounds for this motion are as follows:

1. On _____, the defendant was convicted of _____. The _____ County Circuit Court, the Honorable _____ presiding, sentenced the defendant to _____.

2. The defendant filed a timely notice of intent to pursue postconviction relief, after which undersigned counsel was appointed to represent *(him) (her)* on appeal. On _____, 20___, the *(last of the transcripts) (court record, which was served on counsel after the transcripts)* was postmarked

for delivery to counsel. Therefore, counsel has calculated the present deadline for filing a postconviction motion or notice of appeal as _____. *See* Wis. Stat. Rule 809.30(2) & § 801.15(5).

3. Undersigned counsel is unable to meet this deadline because:

[Here, describe with particularity why you need more time, taking care to avoid revealing confidential information that is not necessary to the motion. Common reasons include needing additional time to investigate matters outside of the record or consult with your client regarding appellate options, or your client needing additional time to decide how to proceed on appeal.]

FOR THE REASONS STATED, undersigned counsel, on behalf of _____, respectfully requests that this court find that good cause exists to extend the time for filing a postconviction motion or notice of appeal for days beyond the present deadline, until _____, 20___.

Dated this ____ day of _____, 20___.

Respectfully submitted,

_____
[Attorney's name]
State Bar No. _____

[Attorney's address]
[Attorney's phone number]

cc: *[Opposing counsel]*

[Clerk of Circuit Court]

[Defendant]

APPELLATE PERFORMANCE STANDARDS
For the Attorney Taking SPD-Appointed Cases

Public Defender staff and appointed private bar attorneys are expected to meet the following minimum performance standards in postconviction and appellate cases.

Counsel shall:

1. Provide zealous, effective and high-quality representation to the client at all stages of the appointed case.
2. Know to a reasonably proficient standard all relevant Wisconsin substantive law and procedure, be familiar with federal law and procedure, and keep abreast of developments in substantive and procedural law.
3. Comply in all respects with Rules of Appellate Procedure; Administrative Rules, other rules, laws, and statutes relevant to the case; Rules of Professional Conduct for Attorneys and State Public Defender Policies & Procedures.
4. Interview the client to determine the client's position or goals in the appeal and to detect and explore issues or concerns not reflected in the record. Counsel is expected to speak personally with the client. Counsel shall be available for written and telephonic consultation with the client.
5. Provide the client with general information regarding the process and procedures which will be undertaken. Keep the client informed as to all significant developments in the client's case. Provide the client with a copy of each substantive document filed in the case by both the prosecutor and the defense, except when not permitted by confidentiality or court rules.
6. Address issues of bail or release pending appeal, jail credit and restitution, referring such matters to trial counsel when appropriate.
7. Thoroughly review the complete circuit court record, all relevant transcripts and the presentence report to identify issues of arguable merit. When warranted, counsel shall also thoroughly review exhibits, discovery materials or other records; consult with trial counsel; and investigate facts or issues alleged outside the record.
8. Request and, if approved, utilize experts, investigators and interpreters when appropriate.
9. Discuss with the client the merits and the strategy considerations - which include both the potential risks and benefits - of pursuing all identified issues. While it is the client's decision to decide whether to appeal and what remedy to seek, it is counsel's obligation to determine which issues have merit and the manner in which they will be pursued. Counsel, consistent with *Jones v. Barnes*, 463 U.S. 745 (1983), need not raise every non-frivolous argument and may sift and winnow out weaker issues for strategic advocacy purposes. Counsel must also consider that counsel's failure to raise an issue on direct appeal may prevent the client from raising the issue in a subsequent s. 974.06 collateral review proceeding, absent sufficient reason, consistent with *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). If the client insists on pursuing a meritless issue or one counsel has winnowed out consistent with *Jones v. Barnes*, counsel shall fully inform the client of the options (to proceed as counsel recommends, pro se, or with privately retained counsel) and the consequences of each option.
10. If counsel is of the opinion that a case contains no issue of arguable merit, communicate that decision to the client before filing a no-merit notice of appeal or no-merit brief. Counsel must inform the client of any right to a no merit report under the statutes and laws of this state. Counsel must inform the client of the client's rights and counsel's obligations under Wis. Stat. Rules 809.107 (5m) or 809.32. Counsel must inform the client, consistent with *State ex rel. Flores v. State*, 183 Wis. 2d 587, 516 N.W.2d 362 (1994), of the client's options (to have counsel file the no-merit report, to discharge counsel and proceed pro se

or with privately retained counsel, or to have counsel close the case with no court action) and the possible consequences of each option, including the disadvantages of proceeding without counsel. Counsel must document this exchange and send a letter to the client confirming the client's choice.

11. When filing any motion, conform to the applicable local court rules and practice procedures. Postconviction or postjudgment motions should contain carefully drafted nonconclusory factual allegations and appropriate citations to the record and law warranting relief. It is counsel's responsibility to seek extensions for the circuit court to decide motions where appropriate. Counsel shall ensure entry of a written order disposing of the motion.
12. When filing a brief, conform to the applicable rules of the court in which the brief is being filed. All briefs shall have a professional, neat appearance free of typographical errors or misspellings. Briefs must adequately and accurately state the facts of the case and contain complete and accurate record citations. Briefs shall make appropriate use of legal authority referenced by a consistent method of citation that conforms to court rules or, where no rule exists, the Harvard Citator. Briefs shall utilize federal and foreign jurisdiction cases and non-case reference materials such as law reviews, treatises, and scientific works where appropriate.
13. Inform the client of his or her rights and counsel's obligations in regard to proceeding to the next appellate court level and take steps to ensure that such rights as fall within the scope of counsel's appointment are not procedurally defaulted.
14. Respond in a prompt and forthright manner to all inquiries and requests for information from the client, the parties, opposing counsel, the State Public Defender, the court, the clerk of court, and successor counsel.
15. Maintain a complete up-to-date case file for every case. The file shall contain, at minimum, all correspondence, including a closing letter or memo; copies of all documents filed; proof of service for all transcripts, court records or other papers that trigger a time limit; copies of all court orders or decisions; notations in summary form as to all action taken, advice given, and phone and in-person communications; a record of documents provided to the client; and a case activity log or voucher that documents time spent on the case.
16. At the conclusion of representation, inform the client in writing of the reason for closing the file and any options for further action the client may have on direct appeal. If counsel cannot reach the client via mail, the closing information and reason why the closing letter was not sent should be recorded in a memo to the file.
17. At the conclusion of representation or when a no-merit report is filed, upon request, promptly send the client or successor counsel the transcripts, court record, and any other documents or other property to which the client is entitled.
18. Promptly close the file upon completion of representation and submit case closing documents. Retain the client file consistent with the Rules of Professional Conduct for Attorneys and State Public Defender Policy.
19. Cooperate with any successor counsel in the case.

October 2002
Revised October 2006

CHAPTER TWO
REVIEWING THE CASE

I. Introduction

The most critical period for any appeal occurs long before the filing of a notice of appeal. It takes place in the first few months of your appointment, as you review the record, talk to your client and the trial attorney about the case, investigate factual allegations, and research potential legal issues.

On the basis of what you find in these early months, you will decide whether you have a "merit" case or a "no-merit" case – in other words, whether the case presents any non-frivolous issue for appeal. If it is a merit case, you will determine the strongest issues for appeal and figure out what sorts of risks they might present to your client. Then, after you counsel your client, the client will decide whether to seek appellate relief or no-merit review or to forever waive his right to a direct appeal.

Thus, at this early stage, each case is placed on one of several possible appellate tracks—merit appeal, no-merit report, close without court action, or withdrawal so client can proceed without appointed counsel. If you miss a meritorious issue and place the case on a no-merit or waiver track or raise a weaker issue, or if you initiate a risky appeal without your client's full understanding, it may be difficult or impossible to set the case right later. But by giving each case your full and careful attention from the start, you can get the case on the right track and give your client the best chance for a good outcome.

II. Actions from appointment to receipt of the case materials

a. Applicable deadlines

In a RULE 809.30 appeal, from the date they receive the SPD's request for transcripts and the court record, the clerk of circuit court and court reporters have sixty (60) days to get these materials to you. [41]

In a TPR appeal, the clerk of circuit court and court reporters have thirty (30) days to get these materials to you.[42]

[41] WIS. STAT. RULE 809.30(2)(g).
[42] WIS. STAT. RULE 809.107(4m).

b. Getting the appointment

If you are a staff attorney, your cases will be assigned. If you are a private bar attorney, the Appellate Division Intake Unit will contact you on a rotating basis with other attorneys certified to receive SPD appellate appointments and offer a case or cases to you, and you will choose whether to accept the appointment(s).

As noted in Chapter One, Section I.c.i., above, once you are appointed, your appointment continues through review, or denial of a petition for review, in the Wisconsin Supreme Court, unless and until your client asks you to close the case – with a full understanding of the ramifications of that decision – or a court permits you to withdraw from the case.

Soon after making an appointment, the Appellate Division will provide you with confirmation of the appointment along with:

- The order appointing counsel;
- The notice of intent to pursue postconviction or postdisposition relief filed by the trial attorney;
- The judgment of conviction or dispositional order;
- Copies of requests – already made – to the court reporters and clerk of circuit court for the court record and transcripts; and
- Any other correspondence or documents that preceded, or that were related to, the appointment.

At this early stage of the case, the applicable deadline is the court reporter's and the clerk's deadline.

c. First steps

There are several things that we strongly advise you to do immediately after your appointment:

- Secure the case materials in a file folder and add a time log to the file so you can track your work on the case.
- Calculate the first deadline and enter the case and deadline information into your case-management system.

- Send your client a letter (a form letter is fine) introducing yourself, explaining the posture of the case and estimating when you will be ready to talk about the case. Remind your client that he must notify you of any change of address or phone number, and invite the client to contact you with questions or concerns. Set reasonable expectations for your client about when and how communication between you will occur.

- Compare the requests for the record and transcripts against CCAP to make sure that nothing was overlooked by our intake staff.[43]

- Skim the notice of intent and the judgment of conviction or dispositional order to make sure that there is nothing that requires immediate attention.

- Ask the trial attorney for his case file, including all discovery.

- Frequently asked question. *What if I find that there is a transcript that was not requested, and I request it well into my appointment; does that affect my deadlines?* The SPD has a deadline to meet even before the clerk and court reporter do – a deadline for requesting the record and transcripts. If you (or we) order a transcript late, you should file a motion in the court of appeals pursuant to WIS. STAT. RULE 809.82(2) to extend the time for ordering transcripts under WIS. STAT. RULES 809.30(2)(e) or 809.107(4)(a). If you do not file such a motion, there could be uncertainty regarding your deadline for filing the postconviction or postdisposition motion of notice of appeal. If you do file such a motion and it is granted, there would be no question that your deadline would run from service of the late-requested transcript.

The final two suggestions require some explanation. At this early stage of the case, no one would expect you to jump-start the appeal. However, occasionally, you will find something that requires prompt attention. For example, a notice of intent may have mistakenly omitted a circuit court case number that was intended to be appealed with those properly listed. As to the judgment, if your client was given a four-month jail sentence (not stayed pending appeal) with no sentence credit, it would be worthwhile to check CCAP to see if your client may have credit that was not accounted for and applied at sentencing. If you find such an issue at this early stage, at a minimum, you could contact the trial attorney for more information and/or see if he plans to ask for the credit or for a stay of the sentence. If you do nothing, the issue may become moot.

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[43] CCAP (Consolidated Court Automation Programs) is found at http://wcca.wicourts.gov/index.xsl. If you have not already bookmarked that website on your computer, do so now. The state courts also maintain a lesser known database of appellate cases, which you should consider bookmarking, at http://wscca.wicourts.gov/caseSearch.xsl;jsessionid=E16259F18D98ABFB6C3745EF3DC14062?.

In addition, at this very early stage, you may find an error that you would not notice later. For example, you may notice that your client's sentence exceeds the maximum. There may be no need to act on it now; however, by noting the error now, you avoid missing it once you become wrapped up in the interesting issues revealed in the transcripts.

As to discovery, there is some disagreement among appellate attorneys as to whether it is truly necessary to obtain the trial attorney's entire file in every single case. We believe the best practice is to obtain the entire file. Certain categories of cases, such as trial cases and TPR cases, can almost never be fully assessed without reviewing the trial attorney's file. Other cases often require review of the file, but you may not be able to assess this until after you have read the transcripts and talked to the client – and there is a deadline looming. Therefore, it makes sense to request the file immediately after appointment in every case in order to simplify your practice and avoid needless delay.

If the trial attorney resists your attempts to obtain his file, if the attorney was appointed by the SPD, as noted in Chapter Two, Section III.b.ii.3., below, you may contact an Appellate Division attorney manager who will work with you to get you what you need. Sometimes trial attorneys are more responsive when a manager calls; the manager also may be able to communicate the problem to an appropriate person with the SPD's Assigned Counsel Division (ACD) or Trial Division, which can motivate the trial attorney to work with you.

d. Further steps

As case materials come in, there are several additional things that we strongly advise you to do:

- As each transcript or the court record arrives, note that you have received it in your case file, so you can be sure to know when the final document arrives, which triggers your filing deadline.

- Soon after receiving the court record, skim through it. In the past, clerks' offices have erroneously thought that our request for the "entire court record" did not encompass such potentially important items as warrants, trial exhibits, juror information, and correspondence. If it appears that something may be missing, call the clerk's office to determine whether anything was omitted and, if so, to ask for it.

- When the final transcript or the court record, whichever is later, arrives, save the envelope so you can prove the postmark and/or receipt dates if a court or a party ever questions your timeliness.

- When the final transcript or the court record, whichever is later, arrives, promptly calculate your deadline for filing the post-judgment motion or notice of appeal.

- Frequently asked question. *If a transcript arrives late, does my deadline for filing a postconviction or postdisposition motion or notice of appeal run from the date I should have received it or the date I actually received it?* The deadline runs from the actual date of service, which – as you know from Chapter One, Section III., above – is calculated by adding three days to the postmark date for mailed service.

It is not uncommon for a court reporter to miss the deadline for serving transcripts. When this happens, it is the reporter's responsibility to file a motion for an extension of time;[44] however, often they do not. While you may think this is good news for you, because it delays the triggering of your own deadline, it is bad news for your client and therefore you must act to remedy the situation.

Ultimately, the legal solution to this problem is a motion with the court of appeals for sanctions against the court reporter.[45] Specifically, the sanction that the court of appeals may impose against a court reporter is a prohibition against "performing any private reporting work until the overdue transcript is filed."[46] But because we rely on court reporters' cooperation generally to get what we need for our appeal cases, moving for sanctions is best utilized as a last resort rather than an opening salvo.

Before filing a motion for sanctions, most appellate attorneys call or write to the court reporter – sometimes more than once – to remind the reporter of the pending obligation, in case the reporter forgot, or to learn of any impediment to producing the transcript (e.g. a serious illness) requiring you to work out an alternative arrangement for production of the transcript. However, if a transcript becomes unacceptably late and the court of appeals has not granted the court reporter an extension, you should file a motion for sanctions to protect your client's interest in a speedy appeal. If too much time goes by without the reporter having filed an extension or you filing a motion for sanctions, the court may later fault you for not properly monitoring the progress of the appeal.

[44] WIS. STAT. RULE 809.11(7)(c).
[45] WIS. STAT. RULE 809.11(7)(d).
[46] WIS. STAT. RULE 809.11(7)(d).

III. Actions from service of the case materials to your filing date

a. Applicable deadlines

In a RULE 809.30 appeal, from the service of the record or the last transcript, whichever is later, you have sixty (60) days to file a post-judgment motion or a notice of appeal.[47]

In a TPR appeal, from the service of the record or the last transcript, whichever is later, you have thirty (30) days to file the notice of appeal.[48]

b. Finding appellate issues

Spotting issues is a skill that improves with experience. With each appeal litigated, you become an expert on a different legal issue. Over years of practice, your understanding of the applicable law will broaden and deepen, and you will get better at quickly identifying potential appellate issues.

That said, attorneys regardless of experience should be able to spot all potential issues in a case if they are careful and thorough in their review of the case and take the time necessary to conduct research, listen carefully to the client and other potential witnesses, and consult with more experienced attorneys when necessary. And new attorneys should take heart in the fact that their fresh eyes and viewpoints may enable them to find and formulate novel issues that more experienced attorneys might not have considered or have overlooked.

The following section provides tips for improving your ability to spot arguable issues as a general matter and improving the likelihood that you will spot every arguable issue in any particular case.

[47] WIS. STAT. RULE 809.30(2)(h).
[48] WIS. STAT. RULE 809.107(5)(a).

i. Cultivating competence generally

1. Internet resources

If you don't already subscribe to SPD's blog, "On Point," do so. Just visit On Point at http://www.wisconsinappeals.net and "subscribe" so that you receive regular updates via email or RSS. The blog describes and briefly analyzes each new appellate case that is potentially relevant to SPD practice.

Other blogs can be useful, particularly for introducing you to novel issues that have succeeded in other jurisdictions and may be worth raising in our own. Some potentially useful blogs include (but are not limited to):

- SCOTUSblog, http://www.scotusblog.com/wp/
- Confrontation Blog, http://confrontationright.blogspot.com/
- Life Sentences Blog, http://www.lifesentencesblog.com/
- U.S. Court of Appeals for the Seventh Circuit Updates, http://www.seventhcircuitcases.com/
- Evidence Prof Blog, http://lawprofessors.typepad.com/evidenceprof/
- Crim Prof Blog, http://lawprofessors.typepad.com/crimprof_blog/

If you are a SPD-certified private bar attorney, you should already be signed up for the "defendernet" email listserv, which gives you access to a community of other defense attorneys doing this work. If not, contact the SPD's Assigned Counsel Division to join the discussion.

Many professional organizations also maintain helpful listservs for advocates, including the Wisconsin Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, and the National Juvenile Defense Center.

2. Treatises and other secondary sources

You should be aware of, if not intimately familiar with, the most commonly used and cited secondary sources. If you are brand new to criminal law, or to appellate law, you may want to skim the tables of contents of these books, just to get a sense of what's out there. As you work on cases, you will want to reference them.

Treatises and other similar secondary sources that our staff attorneys generally find helpful include (but are not limited to):

- David D. Blinka, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE (3d ed. 2007).
- Ralph Adam Fine, FINE'S WISCONSIN EVIDENCE (2d ed. 2008).
- Michael Heffernan, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN (5th ed. 2012).
- Wayne R. LaFave et al., CRIMINAL PROCEDURE (3d ed. 2007).
- Wayne R. LaFave, SEARCH AND SEIZURE (4th ed. 2004).
- Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW (2d ed. 2003).
- Gina M. Pruski et al., WISCONSIN JUVENILE LAW HANDBOOK (3d ed. 2010).
- L. Michael Tobin, WISCONSIN CRIMINAL DEFENSE MANUAL (5th ed. 2011).
- WISCONSIN BENCHBOOKS (3d ed. 2012).
- Christine M. Wiseman & L. Michael Tobin, WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE (2d ed. 2008).

3. Training and networking events

The SPD hosts many training events throughout the year, including a two-day conference each fall and a multi-day appellate skills training each spring. The Wisconsin Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, and the National Juvenile Defender Center also host conferences each year. The National Legal Aid and Defenders Association hosts a training program each year dedicated to appellate law. All of these present great opportunities to learn more about substantive and procedural law, network with other attorneys who may have good ideas for appellate litigation, and get CLE credits.

In addition, the SPD's Training Division has a number of on-demand training videos that can provide you with valuable information about areas of law that may be new to you. Check the SPD website: wispd.org.

ii. Finding issues in each individual case

1. Reviewing case materials

Reviewing all of the transcripts and court documents is the most basic duty of every appellate attorney. We assume that every attorney does this in every case, yet attorneys often miss good issues.

We recommend a few ways to improve your review of the record in every case:

- *Take detailed notes that you can read, understand, and use as a reference.* If you do not take detailed notes, you may miss issues and will not be able to efficiently or effectively brief your case. It is a good idea to highlight or star notes about objections, contested motions, and other events that could prove to be an issue, and jot down each potential issue (with page references) on a separate list. Don't be stingy – add any potential issue to the list, even if you think it will probably amount to nothing. You can consider or reconsider all the issues later, rather than interrupting your review to evaluate the strength of each issue as it arises.

- *Use checklists.* Use checklists in every case, and use them even if you've been practicing law for years. Checklists may not help you find new and novel issues, but they can guide your reading and ensure that you do not miss common issues. The appendix to this chapter includes several checklists that SPD appellate staff attorneys have developed over the years. Be mindful to update your checklists as laws or rules change.

- *Review the trial attorney's entire file, including the discovery, in every case.* The need to request these materials is addressed in Chapter Two, Section II.c., above. If you do not know the investigative facts that led to the case against your client, it is much, much more difficult to recognize unpreserved issues and evaluate risks. With the trial attorney's entire file, you can also note unpreserved but arguable issues related to plea bargaining, trial preparation, client misinformation, and more. Or, you may learn that something that seemed like an issue is not an issue at all.

2. Meeting with your client

Clients are a critical source for potential issues. A client often has the best grasp of the underlying facts of the case and the facts relevant to sentencing, and has a good idea of the history of the court proceedings. This is not to say that every client

observation or complaint is accurate or legally significant. But every, or nearly every, client observation is worth your consideration as to whether it could be significant.

See Chapter Three, below, for a detailed discussion of communicating with clients and working with them to find issues.

3. Speaking with the trial attorney

Trial attorneys are another invaluable resource for finding appellate issues – not just as the target of ineffective-assistance claims – and you should attempt to speak with the trial attorney in every case.

Unfortunately, because claims of ineffective assistance of counsel are so common in Wisconsin, communications between appellate and trial attorneys sometimes can be strained. For that reason, it is often helpful to contact the trial attorney soon after your appointment (when you aren't investigating an ineffective-assistance claim) in order to ask for the attorney's thoughts on the case and establish a friendly, professional relationship.

At minimum, an early issue-spotting conversation with the attorney should address any issues that he thinks might be raised on appeal, any concerns that he had about the client or the case in general, and his thoughts on whether the ultimate disposition was comparable to similarly-situated cases in that county and with that judge. If you haven't already requested or received the trial case file, this conversation is a good time to do so.

If you have this type of neutral initial contact, and you later need to have an investigative conversation – inquiring why the attorney did or did not take a particular action in the case – the investigatory conversation likely will be more pleasant and productive.

- Frequently asked question. *What if my client's trial attorney won't talk to me?* If the attorney was appointed by the SPD, you may contact an Appellate Division attorney manager who will work with you to get you what you need. Sometimes trial attorneys are more responsive when a manager calls; the manager also may be able to communicate the problem to an appropriate person SPD's ACD or Trial Division, which can motivate the trial attorney to work with you.

c. Developing potential issues

i. Investigating factual questions

1. Generally

Many factual issues that require investigation can be investigated by the appellate attorney. The most common factual issues in need of investigation are resolved by a conversation with the client or trial counsel. For example, if the judge neglected to explain the elements of the offense to a criminal client, you will need to determine whether the client nevertheless understood the elements of the offense.[49] Another example would be if the client claims that trial counsel did not present an exculpatory video at trial. You would need to find a copy of the relevant video, and if you determine it was or might have been exculpatory, ask trial counsel why he did not present it at trial.

In addition, an appellate attorney can (and should) personally obtain factual information from friendly or supportive potential witnesses (e.g. sometimes, but not always, a client's parent or spouse). The attorney may want to conduct at least an initial interview of other witnesses; but be mindful that if the potential witness tells you one thing at an initial interview and then changes their story, you will be in a bind because you cannot be a witness in the case.

Consequently, you should use a private investigator or other trained assistant to talk to (or be present when you talk to) any witness whose testimony may be critical to a post-judgment claim and/or to view any place or thing that may be critical to a post-judgment claim. In addition, appellate attorneys find investigators helpful in other circumstances, including when the attorney cannot find a witness.

As for experts, the appellate attorney must secure an expert any time the factual predicate for a claim can only be established by an expert.[50]

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[49] *See State v. Brown*, 2006 WI 100, ¶ 39, 293 Wis. 2d 594, 716 N.W.2d 906 (noting that a defendant seeking to withdraw his plea under *State v. Bangert*, 131 Wis. 2d 246, 261-62 389 N.W.2d 12 (1986), and its progeny, must not only demonstrate that there was a defect in the plea colloquy, but also must allege that the client did not know and understand the information that was not given).

[50] Common sorts of postconviction claims that may require experts include claims for sentence modification or resentencing based on new information about a defendant's mental or physical condition or the defendant's risk as measured by a standardized risk assessment instrument.

2. Hiring an investigator or expert

SPD staff attorneys have access to SPD investigators. Private bar attorneys must find their own investigators and get SPD approval to hire them. Both staff attorneys and private bar attorneys must get SPD approval to hire experts.

In order to get approval for hiring an expert, a staff attorney must submit a completed expert request form, which can be found on our intranet, to the Regional Attorney Manager in their office.

Private bar attorneys handing SPD cases must get approval for investigators and/or experts through the ACD. Information and forms for private bar attorneys regarding experts are found on the SPD's website at http://www.wispd.org.

Funds available for experts in SPD cases are extremely limited. For both staff and private bar, whether a request is approved will depend on whether and the degree to which the investigator or expert can help the client, i.e. make it more likely that your client will win his motion for relief; whether your claim has a reasonable chance of succeeding; and whether the investigator or expert is willing to work for an amount of money that is affordable for the SPD.

ii. Researching legal questions

1. Legal research 101

In order to do appellate work at a minimally competent level, you will need access to a searchable database of cases, statutes, and regulations; a reputable citator (generally Shepard's or Key Cite); and jury instructions. Ideally, you should also have some access to helpful secondary sources, such as those discussed above in Chapter Two, Section III.b.i.2., above.

In assessing any appellate case, you will be confronted with many legal questions with which you are already familiar. While you need not linger on these questions, it behooves you to do some minimal research on each potential issue in every case, including such mundane questions as the applicable maximum sentence. Run familiar cases through a citator and verify that familiar statutes remain unchanged. Although it may seem tedious, laws and rules change frequently.

In most – or at least many – cases, you will also need to research unfamiliar, and potentially complicated, legal questions. In addressing such questions, the advice that your legal research teacher gave you in law school remains sound: start with secondary

sources. If you are so unfamiliar with an issue that you do not even understand its terms, it can be helpful to take one more step back and start with an Internet search, then move to more specialized secondary sources. All of the websites and treatises listed in Chapter Two, Section III.b.i., above, are great secondary sources, and there are countless others.

Once you have a solid grasp of the basic law governing an issue, then you can turn to a database like Lexis, Westlaw, Loislaw, or Fastcase, to gather legal authority and figure out the application of the law to your case. This handbook presumes that attorneys taking our cases are reasonably adept doing this sort of research.

2. Specialized research

There are a few legal sources with which many attorneys may not be familiar, which can prove very helpful in litigating SPD appeals. This section discusses three: state legislative history, appellate briefs, and municipal ordinances.

a. State legislative history

If you are presented with a case involving the interpretation of a statutory section – particularly where the state's courts have never previously interpreted the section or relevant subsection – it is a good idea to conduct a thorough search of legislative history. If you have never previously searched state legislative history, an excellent primer is found in Chief Justice Shirley Abrahamson's concurring opinion in *State ex rel. Kalal v. Circuit Court for Dane County*.[51] Chief Justice Abrahamson's opinion identifies each source of Wisconsin legislative history and describes where one would find it and how it is used by the courts.[52]

Legislative history research almost always begins with the Wisconsin Statutes Annotated, in which each statutory section is followed by a list of every bill that has ever altered the section, including the bill that first created it.[53] The Statutes Annotated also includes, if applicable, any official legislative comment and any official Judicial Council notes.[54] These materials – showing changes over time and official statements of intent – are the easiest bits of legislative history to find and often the most valuable.

Once you know the bill or bills that created the language at issue in your case, you can turn to the bill itself. You can find recent bills (from 1995 to date) at the legislature's

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[51] 2004 WI 58, ¶69, 271 Wis. 2d 633, 681 N.W.2d 110 (Abrahamson, C.J., concurring). The majority opinion in the same case thoroughly discusses how the supreme court interprets statutes, and how it uses legislative history, as a general matter, and may be useful in determining whether and how to address any history that you find. Id., ¶¶38-52.

[52] *State ex rel. Kalal v. Circ. Ct. for Dane Co.*, 2004 WI 58, ¶69, 271 Wis. 2d 633, 681 N.W.2d 110.

[53] *See, e.g.,* WIS. STAT. § 973.20 (West 2007) (Historical and Statutory Notes).

[54] *See, e.g.,* WIS. STAT. § 973.20 (West 2007) (Judicial Council Notes – 1987 Act 398).

website (http://legis.wisconsin.gov/Pages/default.aspx) or pull most any bill from a commercial database (*e.g.* Lexis or Westlaw). Alternatively, you can find the bills in the State Law Library or one of the law school libraries.

Once you review the bill itself, you can identify the council or committee, if any, that created the bill and find council or committee materials in the State Law Library. Of particular interest, many Judicial Council materials are found in the State Law Library. You can find an index of Judicial Council materials, and where they are found, at http://wilawlibrary.gov/search/jc.html.

If you are looking at a bill that was created by the Joint Legislative Council, you may also find historical materials at http://legis.wisconsin.gov/lc/committees/jointcouncil/index.htm.

To do a thorough legislative history search, you may additionally need to turn to the Legislative Reference Bureau (LRB). The LRB's reference librarians are incredibly helpful and can be reached at (608) 266-0341. They can help you search through legislative drafting materials that occasionally shed light on legislative intent.

b. Appellate briefs

If you find a case that is directly or nearly on point, it is often helpful to find the briefs filed in the case. If the case is a defense win, you may want to use the briefs as a template for your own. If the case is a defense loss, you may want to see how the defendant/respondent argued the issue, either as a lesson in how not to brief your own case, or in an effort to find points for distinguishing your case.

Briefs filed after June 2009 may be found on the Wisconsin Supreme Court and Court of Appeals Case Access at http://wscca.wicourts.gov/index.xsl. Briefs filed between November 1992 and June 2009 can be found on the UW Law School Library's webpage at http://library.law.wisc.edu/eresources/wibriefs/. Hard copies of all briefs, whenever filed, may be found at the State Law Library.

c. Municipal codes

Occasionally, an SPD case will be impacted by a municipal (city or county) code.[55] Most municipal codes are not found on most commercial legal databases. For links to municipal codes, go to http://wilawlibrary.gov/topics/ordinances.php.

[55] For instance, whether a circuit court judge may order a juvenile to serve time in a secure detention facility as a disposition depends, in part, on whether the county board has passed a resolution authorizing such a disposition. WIS. STAT. § 938.34(3)(f)3. Also, determining the legality of a search or seizure occasionally involves an assessment of a suspected municipal violation. *C.f.* WIS. STAT. § 800.02(6).

3. Talking with other legal professionals

Don't forget a couple of the most important research tools: other lawyers and law librarians. Confer with colleagues. Use practitioner listservs, described in Chapter Two, Section III.b.i.1., above. If you are a private bar attorney, feel free to contact either Appellate Division office (at one of the phone numbers on the front cover of this handbook) and ask to speak with a manager or other experienced appellate attorney.

Reference librarians are also incredibly knowledgeable, and can help you find sources of information and come up with research plans for tough legal problems. Here is contact information for the state's largest law libraries:

Wisconsin State Law Library – Reference Desk
Telephone (800) 322-9755
Email form http://wilawlibrary.gov/services/ask.html

UW Law School Library – Reference Desk
Telephone (608) 262-3394
Email form http://library.law.wisc.edu/help/email.html
Online chat http://library.law.wisc.edu/help/research.html

Marquette Law School Library – Reference Desk
Telephone (414) 288-3837
Email form http://law.marquette.edu/law-library/ask-reference-desk

Any time you confer with another attorney or legal professional – just as with others – be cognizant of your ethical duty of confidentiality. Be particularly cautious when emailing listservs, since you cannot know the identity of all recipients.

IV. Understanding your client's appellate issues

a. Determining whether an issue is arguable

The threshold question for any issue that you are considering is: is it arguable? "Arguable" here is a synonym for "potentially meritorious," and both, for our purposes, are synonyms for "not frivolous." In other words, arguability is a very low standard. That an issue is unlikely to succeed, or even is *very* unlikely to succeed, does not mean that it is not arguable.

At the same time, an issue is only arguable if it has a factual and legal basis.

When you are faced with a marginal issue, there is no magic formula for determining whether it is arguable or frivolous. However, there are a few categories of potential, marginal issues that come up often enough that they are worth mentioning:

- ✓ *If you can allege a version of the facts that would support a meritorious appeal, you have an arguable issue.*

It sometimes occurs that a client or other potential witness will tell you something that, if true, would support a meritorious appeal but you do not think any judge would believe them. For example, your criminal client may tell you that he did not know when he pled guilty to felony bail jumping that the maximum sentence was six years. But you know he was convicted of that same crime three times within the past five years and his trial attorney has told you, and would testify, that he explained the correct maximum six-year penalty.

Even if you do not find your client's story or version of events to be credible and believe the court would not either, this likely presents an arguable issue. It is the postconviction court's job, not yours, to resolve factual disputes. This is not to say that you shouldn't explain the long odds, offer your opinion about what the court will likely do and (in an appropriate case) even discuss the possibility of perjury charges if the client does not tell the truth under oath. But, if the client sticks to his expressed version of events, you have an arguable issue.

- ✓ *If you find yourself debating with colleagues and coworkers about whether an issue is arguable, it probably is.*

This presents a near truism. If attorneys are arguing about whether an issue is arguable, then they have answered the question. There are, of course, exceptions. An issue may provoke debate but if, upon further investigation, you find case law or facts that foreclose it, your lively discussions will not be able to revive it.

- ✓ *If the court made a legal error and an objection was timely made, you may have an arguable issue – even if the error may have been harmless.*

With a preserved issue, in most circumstances, harmlessness is a defense that the opposing party bears the burden of proving (beyond a reasonable doubt) – not yours.[56] So, if the court, over trial defense counsel's objection, made a significant error, this may present an arguable issue even if you know that the State will respond with a harmless-error argument and you suspect the court will agree.

That said, there are errors so plainly harmless as to make any issue frivolous.

[56] *State v. Carlson*, 2003 WI 40, ¶ 46, 261 Wis. 2d 97, 661 N.W.2d 51.

- ✓ *In contrast, if you are considering a claim of ineffective assistance of counsel but you think that counsel's error was harmless, you may not have an arguable issue.*

Ineffective assistance of counsel is different than a claim of court error because, as discussed in Chapter Four, Section III.b.ii.2, below, your client bears the burden of proving prejudice; that means that harmlessness is your problem, not the state's.[57] Thus, even if you find that the trial attorney did something monumentally deficient, if you cannot, in good faith, allege prejudice, the trial attorney's action cannot form the basis for an arguable issue.

- ✓ *Related to that, if you cannot make any particular allegation that is necessary for a legal claim, you don't have an arguable issue.*

The most common manifestation of this arises in criminal plea cases. In such a case, you may find a plea colloquy so inadequate that the postconviction motion is half-written in your head before you even meet with the client. But if, upon meeting with the client, you learn that the client knew and understood all the information that he needed to at the time of the plea, you cannot make a necessary allegation and thus do not have an arguable issue.[58]

b. Considering the potential risks and benefits of each issue

In every appeal, you must tease out every potential risk and benefit to the client related to each arguable issue and attempt to assess the likelihood that any given risk or benefit will come to be.

Note that this subsection's discussion of risks is primarily applicable to criminal and juvenile delinquency cases. In an appeal of an involuntary TPR, mental commitment, or sexually violent offender commitment, there are few, if any, significant legal risks. In such cases, the client has probably already lost all he can lose.

i. Risks and benefits related to the remedy

In determining all of the potential risks and benefits of raising any potential issue, the threshold question is: What is the applicable remedy? With the vast majority of claims, the remedy – assuming you win – is clear. Some of the most common remedies, depending on the issue, include:

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[57] *State v. Thiel*, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305. Certain other kinds of claims also require the claimant to prove prejudice; this discussion would be relevant to any such claim. *See, e.g.* WIS. STAT. § 904.03.

[58] *See State v. Brown*, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906.

- Vacation of the judgment of conviction or dispositional order for a new trial;
- New sentencing or dispositional hearing;
- Sentence modification or modification or revision of dispositional order;
- Commutation of sentence, probation term, or juvenile detention; and
- Sentence credit or juvenile detention credit.

Each of these possible outcomes is addressed in turn.

1. Vacation of the judgment for a new trial

The first remedy listed above, vacation of the applicable judgment for a new trial, almost always has significant, complex risks and benefits that must be determined on a case-by-case basis. For a criminal defendant convicted upon entry of a negotiated plea, the risks are usually at their apex because the defendant will lose the benefit of a negotiated plea bargain. For a criminal or juvenile delinquency client who went to trial and has an arguable sufficiency-of-the-evidence or double-jeopardy claim, the risks are at their lowest; there are, essentially, none.[59]

In every case presenting an issue that could result in a vacated judgment, whether the case was resolved by a plea or by a trial, the true value of potential risks and benefits can only be determined by fully assessing the strength of the underlying case against the client, any uncharged crimes or matters that could be raised against the client, the opposing party's and the judge's attitudes toward the client and the case, and the client's history and/or personal characteristics that could make him more or less vulnerable to bad outcomes.

2. New sentencing or dispositional hearing

In general, at resentencing, the same judge is not permitted to give a criminal defendant a higher sentence than previously given unless the judge can point to new facts, unknown to the judge at the time of the original sentencing, that justify the higher

[59] If a judgment is vacated based on one of these claims, retrial would be barred. *See Arizona v. Washington,* 434 U.S. 497, 513 (1978) (double jeopardy); *State v. Ivy*, 119 Wis. 2d 591, 608, 350 N.W.2d 622 (1984) (sufficiency of the evidence).

sentence.[60] Presumably, the same rule applies to a new juvenile delinquency dispositional hearing. This somewhat limits the risks of an appeal that could result in a new sentencing or dispositional hearing.

However, there are two major qualifiers embedded in the above-stated rule. First, if a different judge resentences your client after a successful appeal, that judge is free to sentence the client up to the applicable maximum.[61]

Second, even if your client is resentenced by the same judge, if that judge can point to new facts, the judge is free to impose a higher sentence.[62] New facts may include old facts that the judge simply did not know about at the time of the original sentencing and/or post-sentencing conduct, particularly conduct that has resulted in new charges or prison disciplinary proceedings. Thus, it is important to brainstorm with your client about facts (or allegations) that that could become a factor at a new sentencing hearing prior to filing any motion that would result in resentencing.

3. Modification of sentence or dispositional order

A request for a sentence modification or for a modification or revision of a dispositional order is distinct from a request for resentencing. With the former, you are simply asking the court to improve your client's circumstances without further hearings. There is no risk inherent to this sort of claim; for example the court cannot use a motion for a sentence modification as an excuse to *increase* the sentence.[63]

4. Commutation and credit

The final two forms of relief commonly requested are commutation – of an illegal sentence, detention order, or probation term – and sentence or detention credit. These sorts of claims are generally risk-free unless some aspect of credit that was already given was improper, and pressing for additional credit may reveal that error. (See Section ii.2., below.) Unlike all other postconviction claims, a motion for commutation or credit does not necessarily waive future postconviction motions.

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[60] *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969).
[61] *State v. Naydihor*, 2004 WI 43, ¶48, 270 Wis. 2d 585, 678 N.W.2d 220.
[62] *State v. Naydihor*, 2004 WI 43, ¶¶35-48, 270 Wis. 2d 585, 678 N.W.2d 220.
[63] *See State v. Wood*, 2007 WI App 190, 305 Wis. 2d 135, 738 N.W.2d 81 (the postconviction court may not convert a motion for sentence modification to a motion for resentencing "in the absence of a clear, unequivocal and knowing stipulation by the defendant").

ii. Additional risk/benefit considerations

1. Overview

In addition to the risk-benefit analysis that is related to the request for relief, you should consider collateral matters that could be impacted by any appeal. Some matters are truly case-specific and will only become apparent through the client. For instance, a former spouse may agree to drop a civil lawsuit for child support arrears if the defendant agrees not to appeal his child abuse conviction and the restitution related to that conviction.

There are a few common collateral matters that can be affected by the appeal; your client may want, or need, to know about these.

2. Sentence credit

a. Errors in credit

If the sentencing court granted your client more sentence credit than he was due, any appeal presents some risk that someone will notice the mistake and correct it.

- Practice tip. There is nothing unethical about noticing a sentence credit calculation error and not bringing it to a court's attention. In fact, it would almost certainly be unethical to bring it to the court's attention.[64] However, if you file any sort of motion or appeal, you must avoid making any "false statement of fact or law" to the court.[65] Thus, if the court asks you directly about sentence credit, you may be required to reveal an error that benefited your client.[66]

The extent of the risk will depend on – among other things – how obvious the error is and the sort of motion or appeal that you propose to file. If the error is obvious, such as a classic "double credit" situation (in which the court grants a defendant the same credit in two cases although the sentences are consecutive), the Department of Corrections (DOC) is likely to spot the error at some point regardless of whether your client takes any action. On the other end of the spectrum, if the error is so complicated that it took you several hours and some graph paper to figure it out, it may be that no one

[64] *See* WIS. SCR 20:1.6 Confidentiality (prohibiting an attorney from revealing "information relating to the representation of the client" under most circumstances).
[65] WIS. SCR 20:3.3 Candor toward the tribunal.
[66] WIS. SCR 20:3.3 Candor toward the tribunal.

will notice it regardless of whether your client takes any action, so long as his appeal does not actually address credit.

The risk of losing erroneous sentence credit is particularly high if you seek, and win, relief in the form of a new trial or a new sentencing or dispositional hearing. In such cases, assuming your client is reconvicted, the court will determine sentence credit anew.

b. Credit after vacation of a conviction

A separate credit-related risk that is less common but can arise is the loss of credit for time spent under a later-vacated sentence.

Under WIS. STAT. § 973.04, "[w]hen a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement previously served." However, a problem can arise after a defendant wins an appeal, succeeds in vacating his conviction, and then, on re-trial, is convicted of a different crime.[67] He may not get credit for the time spent under the earlier sentence in such a case.

An additional problem can arise if the defendant originally gets multiple concurrent sentences and then succeeds in getting one, but not all, of those sentences vacated. If, at a new sentencing hearing, the court orders the sentence to run consecutive to other sentences, the client will not get credit for time previously served concurrently with the other sentences.[68]

3. DOC programming

The DOC has, at various times and at various institutions, informed clients that they cannot participate in special programs like the Earned Release Program (ERP) or the Challenge Incarceration Program (boot camp) if they are actively appealing their cases.[69] Furthermore, agents often tell clients convicted of sex offenses that they cannot attend sex offender treatment, and thereby graduate to a lower level of supervision, if they are actively appealing their cases.[70]

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[67] For example, imagine that a defendant was charged with reckless endangerment and felony bail jumping. Originally, he pleaded guilty to reckless endangerment and the bail jumping charge was dismissed. Five months later, the postconviction court vacated his plea, after which he went to trial and was acquitted of reckless endangerment but convicted of bail jumping. At sentencing, he is not entitled to credit for the five months he spent in prison under the first sentence.

[68] *State v. Lamar*, 2011 WI 50, ¶4, 334 Wis. 2d 536; 799 N.W.2d 758.

[69] *See* WIS. STAT. §§ 302.05(3) (ERP) & 302.045 (boot camp).

[70] This is not necessarily a bad thing, given that, under certain circumstances, the state may be able to use statements made during treatment against the client in a later proceeding.

While DOC policy on these and similar matters change from time to time, it is important to be aware that an appeal can potentially affect a client's programming.[71] Sometimes, a friendly call to a prison social worker or other appropriate person will clarify that the client will not be kept out of programming. However, if this does not work, in the end, a client may reasonably decide to focus on a treatment program that could result in early release from prison and forego any appeal.

4. Pending cases

Occasionally, an appeal may have some impact on a pending case. It may have a beneficial effect; a prosecutor may agree to drop a pending charge against your client if the client agrees to drop his appeal. Or it may have a negative affect; if your client wins a new sentencing hearing and, at the new hearing, the court learns about new charges that it did not previously address at the original sentencing, your client may end up with a harsher sentence.

It is always important to be aware of any pending court matters involving your client and it is almost always a good idea to talk with the attorney(s) representing your client in the other matters in order to discuss how the cases may impact each other.

[71] As for ERP and CIP, as of the time of publication, the DOC has informed the Appellate Division that it will not exclude clients from ERP or CIP simply for filing an appeal, but may exclude a particular client if his appeal were to interfere with programming.

V. Appendix to Chapter Two

a. Basic Plea Checklist

b. Annotated Plea Checklist

c. Basic Sentencing Checklist

d. Annotated Sentencing Checklist

e. Pre-Trial/Trial Issues Guide

***** NOTE: THE MATERIALS IN THIS APPENDIX MAY BE USEFUL IN ASSISTING YOU IN FINDING ISSUES IN THE RECORD. HOWEVER, THEY DO NOT INCLUDE ALL POSSIBLE ISSUES THAT MAY BE RAISED, AND SHOULD SERVE ONLY AS A GENERAL REFERENCE TOOL TO DOUBLE CHECK YOUR REVIEW OF THE RECORD. *****

BASIC PLEA CHECKLIST

A. Plea agreement

   a. Meeting of the minds?

   b. Illusory or premised on illegal deal?

B. Plea colloquy

   a. Court considered the defendant's characteristics

      i. Age/education

      ii. Alcohol/drugs

      iii. General comprehension

   b. Defendant understood essential elements of the crime(s)

   c. Defendant understood range of punishments

   d. Court explained that it was not bound by plea agreement

   e. Defendant verified that there had been no promises or threats (other than the plea agreement described on the record)

   f. Defendant understood rights waived by plea

      i. Jury trial

      ii. Unanimous verdict

      iii. Proof beyond reasonable doubt

      iv. Confront/call witnesses

      v. Self-incrimination

   g. Court gave immigration warning

   h. Court found a factual basis
      i. If Alford plea, there is strong proof of guilt

C. Defendant had the assistance of counsel

D. Any other concerns apparent from the record or raised by the defendant?

ANNOTATED PLEA CHECKLIST

Client _____ Case Number _____ Plea Date _____

Plea Agreement: _____

_____

_____ Plea agreement (if any) was understood by the parties and not illusory or illegal

_____ Court determined that defendant capable of entering a knowing and intelligent plea

- *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (holding that the court taking the plea must "[d]etermine the extent of the defendant's education and general comprehension" in order to assess his ability to understand the issues at the hearing).

_____ Court verified that defendant understood the nature of the crime(s)

- Wis. Stat. §971.08(1)(a) (requiring the court to "determine that the plea is made . . . with understanding of the nature of the charge and the potential punishment if convicted").
- *State v. Brown*, 2006 WI 100, ¶29, 293 Wis. 2d 594, 716 N.W.2d 906 (stating that "a plea will not be voluntary unless the defendant has a full understanding of the charges against him").
- *State v. Bangert*, 131 Wis. 2d 246, 268, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) ("Whether the trial court communicates the elements of the crime at the plea hearing or . . . refers to a document or portion of the record predating the plea hearing, the operative time period for determining the defendant's understanding of the nature of the charge remains the plea hearing itself.").
- *State v. Howell,* 2007 WI 75, ¶55, 301 Wis. 2d 350, 734 N.W.2d 48 (finding that the failure of the circuit court to ensure that defendant understood party-to-a-crime liability during plea colloquy provided grounds for plea withdrawal).

_____ Court explained the correct maximum punishment(s)

- Wis. Stat. §971.08(1)(a) (requiring the court to "determine that the plea is made . . . with understanding of the nature of the charge and the potential punishment if convicted").
- *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (finding that the court must "[e]nsure the defendant's understanding of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering the plea").
- *But see State v. Cross*, 2010 WI 70, ¶4, 326 Wis. 2d 492, 786 N.W.2d 64 (holding that where the circuit court had informed the defendant of a maximum sentence that was "higher, but not substantially higher, than that authorized by law," there had been no *Bangert* error).

_____ Court explained that it was not bound by any plea agreement and could sentence up to the maximum

- *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (stating that, at the plea colloquy, the court must "[e]stablish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement").
- *State v. Hampton*, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14 ("in taking plea of guilty or no contest from a criminal defendant, the circuit court must advise the defendant personally on the record that the court is not bound by any plea agreement and ascertain whether the defendant understands the information").

_____ Court verified that no one made threats or promises to induce the plea, other than any promises in the plea agreement

- *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (holding that the court must "[a]scertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney").

_____ Court determined that defendant understood the constitutional rights that he was waiving by pleading guilty or no contest

  - Right to jury trial
  - At trial, right to have 12-person jury unanimously decide guilt
  - At trial, right to proof beyond a reasonable doubt
  - At trial, right to confront state's witnesses and call own witnesses
  - At trial, right to remain silent or, if choose, to testify

- *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (holding that the court must "[i]nform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights").
- *But see State v. Moederndorfer*, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987) (finding that it was sufficient for the court to inquire about the waiver of constitutional rights enumerated in the plea questionnaire without going over each individual right).

_____ Court advised that if the defendant was not a citizen, conviction could have negative immigration consequences

- Wis. Stat. § 971.08(1)(c) (describing this requirement).

_____ Court found, or defense stipulated to, factual basis

- Wis. Stat. § 971.08(1)(b) (stating that before accepting plea, the court must "[m]ake such inquire as satisfies it that defendant in fact committed the crime charged").
- *State v. Lackershire*, 2007 WI 74, ¶53, 301 Wis. 2d 418, 734 N.W.2d 23 (finding that the colloquy was defective where the circuit court failed to sufficiently inquire into the factual basis for the plea and there was a question as to the factual bases).
- *State v. Smith*, 202 Wis. 2d 21, 23, 549 N.W.2d 232 (1996) (noting that, in order to accept an *Alford* plea, the court must find strong proof of guilt).

_____ Defendant had the assistance of counsel

- *State v. Klessig*, 211 Wis. 2d 194, 203 (1997) (holding that, before a defendant can proceed pro se, the circuit court must ensure that he is knowingly and voluntarily waiving his right to counsel and that he is competent to proceed pro se).

_____ Discussed with appellate client his understanding of the plea and any concerns that he has that may be related to the plea

BASIC SENTENCING CHECKLIST

A. Sentence imposed

B. State recommendation
   a. Consistent w/ plea agreement?

C. Defense recommendation

D. Total exposure

   a. Without plea

   b. With plea

E. Sentence hearing

   a. Court exercised discretion

      i. Protection of the public

      ii. Gravity of the offense

      iii. Character of the offender

   b. Court relied on accurate information

   c. Court provided opportunity for allocution

   d. If sentencing after revocation and different judge, court demonstrated familiarity with original sentencing hearing

F. Ultimate sentence

   a. Legal – including application of any enhancer?

   b. Harsh and excessive?

   c. If re-sentencing, vindictive?

G. Defendant had the assistance of counsel

H. Sentence credit

I. Eligibility for ERP/SAP or CIP

J. Fines & fees

K. Basis for sentence modification?

L. Any other concerns apparent from the record or raised by the defendant?

ANNOTATED SENTENCING CHECKLIST

Client _____ Case Number _____ Sentencing Date _____

Sentence Imposed: _____

Maximum Possible: _____
State's Recommend'n: _____
Defense Recommend'n: _____

_____ The term of incarceration and/or probation falls within the applicable maximum

- Wis. Stat. § 973.01 (describing the maximum penalties for felonies).
- Wis. Stat. § 939.51(3) (describing the maximum penalties for misdemeanors).
- Wis. Stat. §§ 939.62, 939.621, 939.63, 939.632, 939.635 & 939.645 (providing for increased penalties for certain offenders).
- Wis. Stat. § 973.09(2) (describing the maximum term of probation).
- Wis. Stat. § 973.09(4) (describing the maximum term of jail time as a condition of probation).

_____ The prosecutor properly stated the plea agreement (if applicable)

- *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").
- *State v. Smith*, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997) ("A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement.").

_____ The court explained its reasoning, with reference to proper sentencing factors

  - Gravity of the offense: _____
  - Character of the defendant: _____
  - Protection of the public: _____

- *Harris v. State*, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977) (discussing *McCleary v. State*, 49 Wis. 2d 263, 274-76, 182 N.W.2d 512 (1971), and noting the factors that the court should consider when imposing sentence).

_____ The court sought to impose the minimum period of incarceration necessary to meet its objectives, considering probation (where requested) first

- *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197 (stating that sentencing courts should impose the minimum amount of incarceration necessary to further its objectives and should consider probation as the first alternative).

_____ The factual information that the court discussed at sentencing was correct

- *State v. Tiepelman,* 2006 WI 66, ¶¶9, 26-27, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1 (recognizing a defendant's right to be sentenced upon accurate information and noting that a defendant arguing for re-sentencing based on inaccurate information must show that the circuit court was presented with inaccurate information and that it actually relied on that information).

_____ The court provided the defendant with an opportunity for allocution

- Wis. Stat. § 972.14(2) (providing a right of allocution).
- *State v. Greve*, 2004 WI 69, ¶35, 272 Wis. 2d 444, 681 N.W.2d 479 (discussing the right).

_____ If the defendant was sentenced after revocation, and by a judge new to the case, the judge demonstrated familiarity with the original sentencing proceeding

- *State v. Reynolds*, 2002 WI App 15, ¶¶ 8-10, 249 Wis. 2d 798, 643 N.W.2d 165 (finding that in a sentencing proceeding after revocation of probation, when the judge is not the one who presided at the original sentencing, the judge should demonstrate that it is familiar with "the entire record, including the previous comments at the first sentencing.").

_____ If the defendant sentenced under a sentence enhancement provision, the state proved or the defendant admitted to the basis for the provision at or before sentencing

- Wis. Stat. §§ 939.62, 939.621, 939.63, 939.632, 939.635 & 939.645 (providing for increased penalties for certain offenders).
- Wis. Stat. § 961.48 (altering the classification of second or subsequent drug offenses).
- *State v. Liebnitz*, 231 Wis. 2d 272, 603 N.W.2d 208 (addressing the application of the habitual criminality enhancer based on the defendant's admission).
- *State v. Koeppen*, 195 Wis. 2d 117, 536 N.W.2d 386 (Ct. App. 1995) (addressing the proof necessary to sustain a habitual criminality enhancer where there is no admission).

_____ The sentence is not legally "harsh and excessive"

- *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (finding that a sentence is unduly harsh and excessive only when it is "so disproportionate to the offense committed as to shock the public sentiment").

_____ Defendant had the assistance of counsel

- *State v. Klessig*, 211 Wis. 2d 194, 203 (1997) (holding that, before a defendant can proceed pro se, the circuit court must ensure that he is knowingly and voluntarily waiving his right to counsel and that he is competent to proceed pro se).

_____ If resentencing after appeal, court did not impose harsher sentence due to vindictiveness

- *State v. Sturdivant*, 2009 WI App 5, ¶8, 316 Wis. 2d 197, 763 N.W.2d 185 (noting that when a judge imposes a harsher sentence after an appeal, it must be apparent that there was no retaliation).

_____ Court awarded all sentence credit due

- Wis. Stat. § 973.155(1)(a) (providing for credit for all days spent in custody in connection with the course of conduct for which the sentence was imposed").

_____ Court properly determined eligibility for prison programming (where relevant)

- Wis. Stat. § 973.01(3g) & (3m) (describing eligibility criteria for certain programs).

_____ DNA surcharge, and any other fines and fees, legally ordered

- *State v. Cherry*, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (requiring sentencing courts to exercise discretion in imposing the DNA Surcharge).
- *But see State v. Ziller*, 2011 WI App 164, ¶¶11-13, 338 Wis. 2d 151, 807 N.W.2d 241 (finding that there is no error where the reasons are apparent from the record).

_____ The judgment of conviction is accurate

_____ Discussed with appellate client any concerns that he has that may be related to the sentencing process & possible bases for sentence modification

- *State v. Harbor*, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828 (outlining the standard applicable to a motion for sentence modification).

PRE-TRIAL/TRIAL ISSUES GUIDE

A. Potential Pre-trial Issues

1. Properly charged by information or complaint
2. Offense (elements) properly charged (and specific offense)
3. Charge properly amended
4. Venue Proper
5. Double jeopardy-collateral estoppel
6. Delay in commencing prosecution
7. Substitution of judge
   (a) Generally
   (b) Exclusion on race or sex
8. Change of place of trial
9. Valid counsel waiver
10. Fitness for trial properly determined
11. Continuance problem
12. Discovery problem
13. Joinder-Severance problem
14. Speedy trial problem
15. Jury selection problem
16. Valid jury waiver

B. Potential Suppression Issues

1. Search and seizure

(a) Standing problem
(b) Warrant
  (1) Probable cause, facts furnished to judge, hearsay-reliability delay in obtaining
  (2) Particularly described place/person to be searched and items to be seized
  (3) Issued by neutral judge and comply with procedures
  (4) Improper execution of-time of, manner of entry, scope of search
(c) Warrantless
  (1) Warrantless entry
  (2) Incident to arrest-probable cause for arrest, search prior to arrest, scope of search
  (3) Consent to search-valid consent authority of 3d party to consent, scope of search
  (4) Plain view-police saw from place they were lawfully viewing advertent, immediately apparent that item was evidence of crime
  (5) Motor vehicles-improper stop, scope of search, probably cause
  (6) Inventory search-right to seize, need to open, scope too broad, crime related purpose
  (7) Stop and frisk-sufficient grounds for stop, was it an arrest, scope of search too broad
  (8) Emergency search-time to obtain warrant, scope of search
  (9) Search by private party-acting as police agent
  (10) Administrative search
(d) Eavesdropping
(e) Fruit of poisoned tree problem
(f) Proper suppression hearing, findings of fact, conclusions of law

2. Confessions/admissions

(a) Miranda violation-in custody, interrogation, proper warnings, effective waiver
(b) Interrogation after a request for counsel or to remain silent
(c) Involuntary
(d) Use of defendant's silence
(e) Impeachment with inadmissible statements
(f) Statements after illegal arrest
(g) Plea negotiation statements
(h) Use of co-defendant statements
(i) Statements during mental exam
(j) Proper suppression hearing

3. Identification

(a) Suggestive
(b) Independent basis for
(c) Right to counsel at
(d) Photographic
(e) Proper suppression hearing

C. Potential Trial Issues

1. Generally

(a) Public trial
(b) Defendant present (trial in absentia)
(c) Physical restraints
(d) Defendant in jail clothes
(e) Interpreter problems
(f) Joinder/severance

2. Defense counsel

(a) Right
(b) Waiver of
(c) Counsel fees
(d) Ineffective assistance
(e) Conflict of interest
(f) Right to argue, object, make offer of proof

3. Prosecutor

(a) Misstating law or evidence
(b) Make insinuations
(c) Continuing with argument/question after objection sustained
(d) Using false evidence
(e) Comments on:
  (1) Defendant not testifying
  (2) Defendant's failure to call witnesses
  (3) Facts not in evidence (opinion)
  (4) Rulings of judge/exclusion of evidence
  (5) Race
  (6) Defense counsel
  (7) Victim's family/injuries
  (8) Misc. matters
  (9) Defendant

4. Judge

(a) Comments/insinuations
(b) Opinion on evidence/defenses
(c) Questioning witnesses
(d) Hostility toward defense counsel
(e) Substitution of
(f) Private investigation by

5. Witnesses

(a) Obtaining and calling
(b) Experts for indigents
(c) Discovery of
(d) Competency of
(e) Cross-examination of
  (1) Impeachment
  (2) Bias
  (3) Immoral conduct
  (4) Drug use
  (5) Prior convictions
  (6) Pending charges
  (7) Insinuations

6. Evidence

(a) Right to present
(b) Relevant/material
(c) Objections/offers of proof
(d) Limited purpose
(e) Curative admissibility
(f) Character/reputation
(g) Courtroom demonstrations
(h) Escape/flight/tampering
(i) Hearsay
    (1) Admissions
    (2) Co-conspirator statements;
    (3) Consistent statements
    (4) Corroborative complaints
    (5) Dying declarations
    (6) Prior identification statements
    (7) Inconsistent statements
    (8) Penal interest, against
    (9) Physician, statements to
    (10) Testimony from prior proceedings
    (11) Spontaneous declarations
    (12) State of mind
    (13) "Completeness" doctrine
    (14) Hearsay statements of child
    (15) Business records
    (16) Past recollection recorded
(j) Judicial notice
(k) Opinion
    (1) Non-expert
    (2) Expert
(l) Other crimes
    (1) Substance evidence
    (2) Impeachment
(m) Photographs
(n) Physical evidence-foundation, chain of custody
(o) Privileged communications
(p) Scientific evidence
(q) Writings
    (1) Best evidence rule
    (2) Business records
    (3) Refreshing recollection
    (4) Past recollection recorded

7. Jury

(a) Right to-Waiver of
(b) Selection of
(c) Impartial
(d) Communications with
(e) Questions form
(f) Sequestration
(g) Instructions to
(h) Polling of
(i) Impeachment of verdicts

8. Sufficiency of evidence

(a) Every element of offense problem
(b) Proof conform to charge (variance)
(c) Affirmative defense rebutted
(d) Conviction based on
    (1) Circumstantial evidence
    (2) Presumptions
    (3) Conflicting, confusing testimony
    (4) Doubtful identification
    (5) Accomplice testimony
(e) Inconsistent verdicts
(f) Multiple verdicts on same acts
(g) General verdict

CHAPTER THREE
COMMUNICATING WITH YOUR CLIENT

I. Introduction

This handbook presumes that you will set up at least one in-person meeting with your appellate client. This is consistent with the Appellate Division's performance standards and is the best practice.

The appellate attorney-client relationship is often fraught. By the time you are appointed, your client has already lost something; he may be critical of his trial attorney and wary of all attorneys. Many clients begin the appellate process with the mistaken belief that an appeal can make their case go away, so even when there are strong issues for appeal, a client may be frustrated by the notion that the best case scenario might be a new trial or plea withdrawal.

A personal visit with your client, in combination with regular and timely written and/or telephone communication, goes a long way toward building a relationship of trust. It will encourage your client to provide you with all of the information you need to understand the case. It will make your client more comfortable if he is required to testify at a hearing. And it will make it more likely that your client will trust your advice on the advisability of any arguable appeal or your opinion that there is no issue for appeal.

We understand that not every appellate attorney meets personally with every client on every case. Circumstances may make it impossible or very difficult to visit your client and, in some cases, conversations over the telephone may have to suffice. But you should accept every case with the expectation that you will meet with the client in person at least once.

II. Arranging a meeting

a. Finding your client

Your case appointment materials will always include your client's last known address – that is, last known as of the time of appointment. The materials will usually not include a phone number. Unfortunately, by the time you get the case materials, your client may have moved. Although your client has a responsibility to notify you of any change in address, if the only address you have is not current, you should take reasonable steps to locate him rather than simply closing the file, and should document what steps you took in a note or memo to the file.

If your client is incarcerated, finding him or her is simple. You may contact him at the relevant county jail or determine his location within the state penal system by contacting the Department of Corrections' Master Records Department at (608) 240-3750.

If your client is not incarcerated, the best ways of finding him or her are generally through the trial attorney or through a probation agent or social worker. You can also look at recent cases on CCAP to see if any alternative address is listed there.[72] Or you can contact the jail where he or she was previously held to ask for the address that was reported upon release. In some cases, you may decide to request the assistance of an investigator.

- Frequently asked question. *What if I have taken reasonable steps to locate my client and still can't find him?* Where you have not identified any arguable issue for appeal, the only thing you can do is document for your file what you did to locate the client and then close the case. Because under Wisconsin rules an appeal can involve matters outside the trial record, in the absence of a conversation with your client, you cannot know whether there are arguable issues that occurred off the record. Moreover, rules governing no-merit procedure in Wisconsin require you to certify to the court of appeals that you consulted with your client about the no-merit options, which you cannot do if you were unable to locate your client.[73]

  Where you have identified an arguable issue for appeal, if there is any risk to the appeal, you would need to close the case as well. You cannot prosecute a risky appeal without first consulting your client. If you find the rare appellate issue that comes with no risk – like commutation of an illegally long sentence or probation term – it may be possible for you to appeal that issue, relying on your client's last known directive: the notice of intent to pursue postconviction or postdisposition relief.

  If, shortly after you close the case, your client materializes and has a good reason for being incommunicado, you can help him with a motion to reopen the time for appeal or advise him to contact the SPD Appellate Division. If you decide to help with the motion, you should contact the Appellate Division Intake Unit to re-open your SPD appeal case.

[72] CCAP refers to the Wisconsin Circuit Court Access Program, found at http://wcca.wicourts.gov/index.xsl.
[73] *See* WIS. STAT. RULE 809.32(1)(b)1.

b. Setting up a meeting

i. Meeting in the prison system

Setting up a meeting with your client in the state prison system is easy. In the appendix to this Chapter is a document with contact information for each of the state's prisons (as well as jails, juvenile detention facilities, and state mental health facilites). At most prisons, either the records department or the social services department sets up the meeting; just let the operator know that you would like to set up an attorney meeting with an inmate and he or she will connect you to the correct department.

Most prisons require you to set up a meeting at least forty-eight hours in advance. It is good to set up visits well ahead of time anyway so you can let your client know that you are coming.

When you go to your visit, give yourself an extra fifteen minutes to park and go through security. All attorneys will have to run their briefcase and/or other belongings through an x-ray machine. Private bar attorneys and any staff attorney without a state employee ID will also have to walk through a very sensitive metal detector.[74]

Be sure to take a photo ID, bar card, and anything you need for the meeting, and leave most everything else at home or in your car. Prison staff will not let you through security with (among other things) cell phones, money, cigarettes, or anything (e.g. a pocketknife) that could be considered contraband.

The prison should provide you with a place to meet with your client where confidentiality will not be compromised. If there is any question whether a guard or someone else can listen to your conversation, raise it with prison staff. If prison staff does not resolve it, report it to the Appellate Division so we can act to ensure that the prison understands its obligation to facilitate confidential attorney-client meetings.

ii. Meeting in a county jail or in the community

Procedures for meeting with your client in a county jail differ from county to county. In most, you can come most any time (except mealtimes or late at night) and see your client with a photo ID and bar card. However, it is advisable to call ahead if you are visiting your client in any unfamiliar county jail.

With clients who are not incarcerated, many appellate attorneys ask the client to travel to the attorney's office or meet with the client in a conference room at a circuit

[74] DOC staff may require private attorneys to remove underwire bras in order to visit clients.

court or an SPD trial office that is reasonably convenient to the attorney. Remember, though, that your client is indigent and may be challenged to find transportation. If the client cannot make such a meeting, then conferences may need to occur telephonically.

iii. Timing the meeting

There is no right or wrong time to set an initial meeting with your client – as long as it is set well in advance of your deadline for filing a notice of appeal or post-judgment motion.

Many attorneys wait until they have received and reviewed all of the case materials, talked to the trial attorney, and completed their initial research of all the legal issues revealed by these sources. A smaller number of attorneys visit their clients early in the case, when they have a general idea of the case but have not yet completed their review of the case materials or initial research.

An attorney who waits until he has completed his initial assessment is able to speak more confidently about the case and the potential issues. On the other hand, he may go to the meeting with a fixed idea about the issues at play and be less open to new information and new ideas. Furthermore, the client may think that the attorney prejudged him and his case from the start.

In the end, this is a matter of personal preference and (especially if you are driving a long distance) convenience.

III. The initial meeting

a. Establishing rapport and building trust

We hope that everyone reading this guide is at least minimally familiar with the concept of "client-centered" legal interviewing. In a client-centered interview, the attorney does not approach the client as a bully (immediately telling the client what he should do) or a bureaucrat (asking generic questions and recording the answers), but as a counselor and with respect and compassion. The meeting should feel like a conversation.

When first meeting a client, establish an initial connection before delving into the case – make eye contact, shake his hand, and introduce yourself. Give the client a business card, if you have one. Make sure that he understands that you are his attorney and you are there to help him. It is usually a good idea to explain that the client has not yet filed an appeal but he has indicated that he wants to appeal, and explain your role as the appellate attorney.

Most experienced attorneys then start the interview process by asking the client why he decided to appeal. After asking this question, actively listen to your client's concerns without rushing to judgment. While listening, pay attention to non-verbal and verbal cues – his body language and affect, his vocabulary and fluency, and his understanding (or lack thereof) of the criminal and appellate process.

Active listening does not mean sitting silently and observing; you should ask questions, interrupting the client if necessary, and respond to his concerns and stories, just as you would in a conversation with a friend. And if you notice unusual non-verbal cues, consider whether to ask or comment about them. It may be that your client has medical issues or may be on medication that affects his behavior or ability to understand or process what is going on or went on with his case; that information could be relevant both to a potential appellate claim and to your approach to counseling him.

While you should let the conversation develop naturally, you will sometimes need to steer it toward areas relevant to potential appellate issues. And while you may want to keep the legal pad down for the first few minutes of your conversation in order to encourage careful listening, at some point, you need to start taking notes for your file. However, prior to picking up the legal pad and pen, it is a good idea to tell the client that you will be taking notes and explain why you may find them useful later.

Throughout the meeting, listen carefully and show the client that you are listening and working to find issues that can be raised on appeal. If he tells you something that might be relevant to a potential issue, ask him for more information and explain your interest in the statement. If he raises plainly meritless issues or irrelevant facts, nudge the discussion in a more productive direction, perhaps explaining that the subjects he is addressing are unlikely to affect any appeal, but try not to criticize or ignore his ideas as he makes them. Your goal is to draw as much relevant information out of the client as possible; you don't want to shut him down.

For more general tips on speaking with clients (in both appellate- and trial-level representation), the SPD's Quality Indicators Work Group put together a guide that is available at http://www.wispd.org.

b. Discussing the case

The issues and events that you need to discuss with your client in order to assess potential claims will be different in every single case. Some may be clear from the case materials (like his reasons for not going to trial), while others may become apparent at your meeting (like whether a hearing impaired client was wearing his hearing aid during the trial or whether it was functioning properly).

Clients often present topics that may not be relevant to appeal but are nevertheless worth discussing; these topics, too, will be different in every case. For instance, a client may seek information about how the Department of Corrections will interpret his sentence structure or how a criminal case may affect a family matter or vice versa. Or he may need assurance that an assistant public defender, who is a state employee, is independent of "The State" and is ethically obligated to competently and zealously advocate for him.

This section addresses a few items for discussion that are relevant to just about every case, be it criminal, juvenile, or mental. But it is not intended to limit in any way the many areas of discussion that may be relevant to an appeal and/or useful in developing a good attorney-client relationship.

i. Facts related to potential appellate issues

There are at least two categories of issues that should be discussed in every single case because the client is usually the best source of information: (1) his understanding of decisions entrusted to him and (2) the underlying facts relevant to sentencing or disposition. In addition, you should inquire with each client whether anything that happened at the trial level just seemed wrong.

1. Client's understanding of personal decisions

With any decision entrusted to the defendant or respondent, not the attorney, you should talk to your client about his understanding of that decision, as well as the facts and legal concepts associated with that decision.

The likelihood that you will succeed in any claim that your client made a decision without sufficient understanding will depend, at least in part, on the circuit court's colloquy that preceded that decision. But even where the colloquy was sufficient, you may find a potential lack-of-understanding claim or you may learn something about your client or the case that would be useful to a different sort of claim.

The decisions entrusted to clients include:

- Whether to waive the right to counsel,[75]
- Whether to waive the right to trial as to any element,[76]

[75] *N.E. v. Wis. Dep't of Health and Soc. Servs.*, 122 Wis. 2d 198, 206, 361 N.W.2d 693 (1985).
[76] *State v. Smith*, 2012 WI 91, ¶53, 342 Wis. 2d 710, 817 N.W.2d 410.

- Whether to waive the right to trial by jury (where applicable),[77] and
- Whether to testify.[78]

As to each of these decisions, case law dictates a number of matters that the client must understand prior to making the decision. For instance, before waiving the right to counsel, the client must be aware of his right to counsel, the difficulties and disadvantages of self-representation, the seriousness of the charges, and the range of possible penalties.[79] Before waiving the right to trial, the client must be aware of much more, including all of the rights associated with a trial.[80]

As to any decision relevant to your client's case, you should understand the case law addressing that decision before meeting with your client so you can have a full discussion of the relevant matters with him.

2. Facts relevant to sentencing/disposition

Two potential issues that should be considered in nearly every case are: (1) whether the judge relied on any inaccurate information at the sentencing or dispositional hearing (giving rise to a claim for a new sentencing or dispositional hearing), and (2) whether there is new information that would affect the advisability of the sentence or disposition (giving rise to a claim seeking modification of the sentence or revision of the dispositional order).

Your client is an expert on his own life history and circumstances and you should involve him in brainstorming these kinds of claims. You may want to send him a copy of the sentencing or dispositional hearing transcript prior to your meeting, or give him time to read it at the meeting. Ask him about each item of historical fact that was discussed and that may be untrue. Ask him about the judge's assumptions about the operation of the sentence or disposition. Ask him about his present circumstances.

Most clients appreciate the opportunity to play an active role in identifying meritorious issues and this is one place where they can be very helpful.

- Practice tip. In a criminal case, don't forget to ask about sentence credit! Just like clients are experts on their own lives, they are often experts on their incarceration history. In each case, ask your client whether he agrees with the court's determination of credit and, if not, ask for his theory of credit. He just might know what he's talking about.

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[77] *State v. Livingston*, 159 Wis. 2d 561, 569, 464 N.W.2d 839 (1991).
[78] *State v. Denson*, 2011 WI 70, ¶68, 335 Wis. 2d 681, 799 N.W.2d 831.
[79] *State v. Imani*, 2010 WI 66, ¶19, 326 Wis. 2d 179, 786 N.W.2d 40.
[80] *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (citing *State v. Bangert*, 131 Wis. 2d 246, 261-62 389 N.W.2d 12 (1986)).

3. Things that seemed wrong

The rules of criminal and civil procedure are generally based on notions of fairness. Therefore, it is fruitful to ask each client what he thought was unfair about his case. Actions that would strike a layperson as "unfair" are also occasionally unlawful, and your client's gripes may trigger recognition of a cognizable issue. This is particularly true where the client's concerns involve matters outside of the record, which generally cannot be identified from the transcripts.

In having this discussion, you will want to direct your client's attention to each of the phases of the case: the circumstances underlying the filing of the case, the trial or plea hearing, the sentencing or dispositional hearing, and the attorney-client discussions and advice related to each of these phases.

If nothing else, this sort of conversation, involving careful and active listening on your part, will help build rapport with your client and allow you to understand his decision to appeal and his understanding of the law, all of which will enable you to better counsel him through the appellate process.

ii. Appellate procedure

It is easy to assume that our clients already know, at least generally, how appeals work. But most of our clients – even those with significant criminal records – have never previously appealed a case and may not know how appeals work.

Thus, at some point at your first meeting, it is a good idea to explain the basics of appellate procedure in Wisconsin. The "Information for Clients" document the SPD sends to the client in every case can be good template for this discussion. At a minimum, you will likely want to cover (in plain English) the following:

- You are looking for any non-frivolous issue to raise on appeal, whether first in the trial court or straight to the court of appeals, and whether related to the conviction/adjudication or sentencing/disposition.

- If you determine that there is any arguable issue, you will talk to the client about it and the client will decide whether he wants to actually pursue the appeal.

- If you find no arguable issue, the case is not necessarily over but, if that happens, you and the client will have to have a discussion later about how to proceed.

- A non-TPR appeal can take anywhere from a few months (if it only goes as far as the trial court) to a couple of years or more (if it goes to the appellate courts). A TPR appeal is usually resolved within a few months, unless it goes to the state supreme court.

If your client has filed a notice of intent in the past and then pursued an appeal, closed the case, or gone through a no-merit appeal, it can be useful to ask him about that experience. Sometimes, a single appellate experience will color a client's idea of how the process works and it is helpful for the attorney to know this early in the relationship and dispel any misunderstandings.

iii. Expectations for the future

Your first client meeting should end with a discussion of expectations – general and specific. As for general expectations, you should invite your client to contact you with questions, concerns, and new developments, and give him an idea of how quickly you would expect to respond to any such communication. Tell him that he must notify you of any change in contact information, and that you will send him a copy of any letter sent or court document you file in relation to his case, including a copy of any extension motion you may file. Alert him to any other practices and procedures that you have that may be helpful for him to know.

As for specific expectations, you should let your client know your thoughts about clearly or potentially arguable issues and your plan and timeline for resolving whether any potentially arguable issues are in fact arguable. Be careful to not oversell expectations when imparting your opinions on the relative strength of any arguable issue, particularly on issues being litigated in the court of appeals. It is very difficult to predict what the court of appeals will do in any case. You should also tell the client what each potential issue, if successful, would conceivably get the client; if he would "win" a form of relief that he does not want, he may not want you to examine it at all.

If your client has raised specific issues that you know or suspect do not have any arguable merit, explain that as well. Do not simply brush him off. If you know that something would not be arguable, explain why; describe the applicable law. If the client pushes the matter, you can end the discussion (while avoiding an argument) by telling the client that you will go back to your office, double-check the applicable law, and send him a letter with further explanation, with citations to controlling law. If you suspect, but do not know, that a client's issue would not have any arguable merit, explain the reasons why you believe this and tell the client that you will check on the state of the law and get back to him about it later, and then do so.

At the end of your meeting, you should review your notes and set a post-meeting to-do list for the case, which you should explain to your client. For example, in a criminal (sexual assault) case, you might have the following list:

- Request an expert to do a sex offender risk evaluation
- File a motion for time so you can get the risk evaluation
- Research the community caretaker doctrine in order to determine whether trial attorney missed a possible suppression issue
- Find a case to share with the client showing that a post-sentencing change to the sentencing laws is not a basis for a sentence modification

By making this sort of list, and sharing it to your client, you force yourself to organize the case and you show your client what you are doing. Don't forget to tell this hypothetical client when he should reasonably expect to see a copy of the motion for time, and the sentence-modification-related case.

Then, *follow through*. If you make any promise to a client, treat it just as you would a promise to a colleague or a judge. It is always a good idea to follow up a client meeting with a letter to the client confirming what happened and what was decided at the meeting.

iv. Final determinations

Occasionally, by the end of the first meeting after your review of the complete record, it is already clear that there are one or two clearly arguable issues for appeal, and no more, or that there are no arguable issues for appeal. If the case involves arguably meritorious issues, you will need to discuss the risks and benefits that you see, as discussed in Chapter Two, Section IV.b., above, and Chapter Four, Section II, below. If the case presents no arguable issues, see Chapter Five, Section II., below, in regard to the "no merit" conversation you must have.

IV. Follow-up conversations

Once you have had an initial in-person meeting and established rapport with your client, it is often appropriate and more efficient to have follow-up conversations over the telephone and – if you have determined that the client is literate – via mail or email.[81]

What is important is that you promptly respond to your client's letters and phone calls, provide the client with any information or copies that you have promised him, and provide him with updates on the case even in the absence of a contact from him. An update may come in the form of mailing a copy of a motion for enlargement of time, expert request, or other case-related document, or it may come in the form of a letter describing the status of the case. Alternatively, you can set a different expectation at the initial meeting. Whatever expectation you have set, meet it.

Once you have determined your client's options for appeal, you will have to have fairly extensive conversations about his options for appeal and the risks and benefits associated with those options, as discussed in this handbook's subsequent chapters.

V. Communication barriers

a. Non-native-English speakers

i. Determining whether an interpreter is needed

If your client speaks no English, or speaks little enough English that trial counsel and/or the circuit court previously found that an interpreter was necessary, it should be clear that you too must hire an interpreter.

If your client is a non-native-English speaker, you should assess whether an interpreter is needed even if the client speaks some English, and even if he says that he does not need or want an interpreter. If your client speaks only elementary-level English and you believe that he would be more proficient in another language, you should hire an interpreter. You should compliment your client's English skills, but explain that some of the concepts you will need to discuss may be complicated and involve terminology that can be confusing even for native speakers. You may also mention that you may want to explore whether the trial court should have used an interpreter as an issue for appeal and, in order to do that, you will need to assess his understanding of the case in both English and his native language.

[81] It sometimes makes sense to conduct *all* meetings in person, such as where your client has low intellectual functioning or is hearing impaired.

Of course, if you speak the client's non-English language, you may not need an interpreter. However, you should assess your own linguistic abilities carefully; if you have any doubts about your ability to explain complex or subtle legal concepts, you should consider getting an interpreter.

If you determine that an interpreter is necessary, you will only need the interpreter for the purpose of meeting with your client and communicating with him in writing and over the telephone. If the appeal necessitates a hearing, the court is required to furnish a translator for the hearing.[82]

Note you are not obligated to provide the client with translated copies of documents such as transcripts, motions or briefs and the SPD does not have the resources to pay for such translations. You are required to convey to the client in his language the content of any document you file and you still should provide the client a copy of the document as filed in English. When filing a no-merit report, however, the client may need a translated copy of the no-merit report so that he may file a response to the report. The SPD will pay for the production of a translated copy in this instance if the client needs it. If the client is illiterate, a translated copy would be pointless and in that situation you must have the interpreter explain the content of the report orally. If a non-English speaking client files a response to a no-merit report in the client's native language, it is the court's responsibility to pay for a translation of the response into English.

ii. Hiring an interpreter

If you determine that an interpreter is necessary, whether you are an SPD staff attorney or a private bar attorney taking SPD appointments, you will need to find and arrange to hire the interpreter. You should find an interpreter who is close to the location where you will be meeting with your client, if possible, so the SPD can avoid paying travel costs.[83] If your client is in prison, remember that you will need to notify prison officials that an interpreter will be joining you for the meeting.

If one is available, you should always hire a court-certified interpreter. A database of certified interpreters is found at http://wicourts.gov/services/interpreter/search.htm. Certified interpreters have all been tested on their abilities, should have a solid grasp of legal vocabulary, and understand client confidentiality.

If possible, you should attempt to find an interpreter who has experience and feels comfortable interpreting with clients who are from the same country or region as yours.

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[82] It will be your responsibility to make arrangements for a translator with court personnel.

[83] For written correspondence, you can generally arrange translation via email, and for telephone calls, you can generally arrange a three-way call.

There are major linguistic differences between, for example, a French speaker from France and one from Senegal.

As for logistics, if you are a staff attorney, you can find the interpreter hiring request form on the intranet. If you are a private bar attorney, you can find the form at http://www.wispd.org.

iii. Working with the client

Establishing a strong working relationship with a non-English-speaking client can prove difficult. In part, this is because you are attempting to build a relationship through an intermediary – the interpreter – which can be awkward. The following are some tips for improving communication through an interpreter:

- Early in your conversation, explain the role of the interpreter and the fact that both you and the interpreter will maintain confidentiality.
- Determine if your client speaks any English, even if just a little, so that you can exchange some pleasantries and ask simple questions in English in order to establish a direct connection.
- Speak directly to your client and make eye contact with him; do not look to the interpreter as if playing a game of "telephone."
- Speak slowly and clearly, pause often, and ensure that your client understands your advice by asking him open-ended questions and/or asking him to paraphrase your advice.
- At the end of the meeting, discuss how future communications will work. Does your client prefer written or oral communications? Does your client understand the interpreter well?[84]

Effective communication can also be inhibited by cultural differences between you and your client. There may be cultural differences that are directly related to the relationship; for instance, your client may be uncomfortable working with someone of a different gender or uncomfortable shaking hands. There may also be cultural differences regarding the criminal justice system and roles of legal actors that make it difficult for your client to understand his case generally or understand specific legal concepts.

With any sort of cultural barrier to communication, you should learn as much as practical about the client's perspective, including potentially educating yourself about the

[84] In formulating these tips, we borrowed some ideas from a fact sheet produced by Community Legal Services of Philadelphia, Pennsylvania, available at http://onlineresources.wnylc.net/pb/orcdocs/LARC_Resources/LEPTopics/LS/CLS_TipsforLegalProvidersonUsinganInterpreter.pdf.

client's native legal system, and discuss any concerns thoroughly with the client. In cases where these issues arise, schedule longer and/or more frequent meetings and conversations and listen carefully to your client. While you may want to skip ahead to the appellate options, it is only by addressing barriers to understanding those options that you can ensure your client is capable of making a rational and informed decision.

b. Deaf and hard-of-hearing clients

It can be particularly challenging to communicate with deaf and hard-of-hearing clients. If a deaf client fluently speaks American Sign Language, you can obtain an interpreter, as discussed above. Alternatively, or additionally, if the client is literate, you may be able to arrange for use of a TTY telephone or other real-time translation device.

A more profound problem could arise with a deaf client who does not speak sign language and has minimal language skills, which may necessitate a relay interpreter or could suggest that the client is not competent to proceed on appeal and/or was not competent at the trial level.[85] If you are ever faced with such a client, please feel free to contact an Appellate Division attorney manager to discuss the matter.

c. Clients with other communication problems

Additional communication problems arise with a client who is functionally or completely illiterate, has a very low IQ, has a communication disorder or serious mental illness, and/or is a juvenile.[86] In adult cases, these problems arise much more frequently than one might expect. And in juvenile cases, young clients – even those who function and communicate at a developmentally-appropriate level – almost always pose significant communication challenges. Unfortunately, no interpreter can resolve these problems.

The most important thing is to be aware of the possibility, or even likelihood, that each client will have significant educational or developmental deficits, or a significant mental illness. Do not assume that your client is literate, and do not convey any important information in writing that you do not plan to repeat orally unless and until you have first assessed his literacy. Do not assume that your client understands your advice just because he nods his head or answers affirmatively. Ask meaningful, open-ended questions of your client that test his understanding and/or ask him to paraphrase or summarize your advice.

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[85] For a discussion of deaf individuals with minimal language skills, *see* Michele LaVigne & McCay Vernon, *The Deaf Client: It Takes More Than a Sign -- Part 1,* CHAMPION, June 2005, at 26.

[86] For a discussion of communication disorders, *see* Michele LaVigne, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 UC DAVIS J. JUV. L. & POL'Y 37 (2011).

If your client does not seem to understand something, explain it again, as often as necessary, and in as many ways as it takes to establish understanding. If your client seems incapable of understanding an important matter, see the discussion of competency below.

d. The incompetent client

If you doubt whether your client is capable of understanding the risks and benefits of the appellate options that you have provided him, rationally making the decision whether to appeal, and (if necessary) assisting you with developing a factual record in the circuit court, you may need to act to protect your incompetent client.[87]

You may want to simply extend the appellate timelines and attempt to counsel the client to competence.[88] If that does not work, you will need to file a motion for determination of competency in the circuit court.[89] An form for this sort of motion, in a criminal case where the appellate attorney has determined that an examination of the client is needed, is found in the appendix to this section. A competency motion will allow the circuit court to appoint a temporary guardian for the purpose of making appellate decisions on the client's behalf, if this is appropriate, and will create a record so that the client may have collateral postconviction motions heard at a later date if he becomes competent.[90]

Note that if there is an appellate option that comes with *no* risk, you may be able to proceed with the appeal even if your client is incompetent.[91] Risk-free appeals are rare; examples include commutation of an illegal sentence or probation term or correction of a sentence credit error.

e. Dealing with a breakdown in communication

The best way to deal with a breakdown in communication with your client is to avoid it in the first place. If you meet with your client personally, actively listen to him, and promptly respond to questions and requests for information, if and when you have to deliver bad news, he is more likely to respond productively.

Sometimes, though, regardless of the attorney's actions, a client will become hostile and communication will become unproductive and/or nonexistent. When this happens, it is usually after the attorney has told the client that he thinks there would be no

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[87] *See State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994).
[88] *See State v. Debra A.E.*, 188 Wis. 2d 111, 130, 523 N.W.2d 727 (1994).
[89] *State v. Debra A.E.*, 188 Wis. 2d 111, 131, 523 N.W.2d 727 (1994).
[90] *State v. Debra A.E.*, 188 Wis. 2d 111, 132-33, 523 N.W.2d 727 (1994).
[91] *State v. Debra A.E.*, 188 Wis. 2d 111, 130, 523 N.W.2d 727 (1994).

arguable merit to any appellate issue or after the attorney has told the client that there is an arguable issue, but not the one the client wants.

In this unfortunate – and hopefully very rare – situation, it is important for both the attorney and the client to understand that the Appellate Division does not reappoint appellate counsel just because the attorney-client relationship has soured. The client is not entitled to a new attorney to render a second opinion about the case. And, unlike with a trial appointment, the appellate attorney usually does not need to work closely with the client in order to provide quality representation – at least, not once the attorney has talked to the client enough to determine what, if any, are the arguable issues for appeal.

Furthermore, the client cannot force re-appointment by filing an ethics complaint against you or making idle threats (or advances) toward you. (Of course, if things get so contentious that you actually feel threatened, please contact an Appellate Division attorney manager.)

Assuming that the appellate attorney has had whatever initial conversations with the client were necessary to determine the arguable issues, if any, for appeal, the only critical communication that must occur is how the client wishes to proceed. Many attorneys deal with a client's refusal to speak with the attorney about this decision by putting together a basic form listing the appellate options, with a checkbox next to each option and instructions to check one box and return the form by a date certain. It is usually a good idea to send a self-addressed, stamped envelope with this sort of form.

If the case is in a no-merit posture, meaning that you have determined that there are no non-frivolous issues that can be raised on appeal, there is a statutory default option that is discussed in Chapter Five, Section II., below. Therefore, in the end, if you have counseled your client on his no-merit options and your client refuses to choose a no-merit option, you simply file a no-merit report.

If there is an arguable issue for appeal, and your client will not authorize you to file the appeal but also does not consent to have you close the file or discharge you so he can proceed pro se or with retained counsel, this is a more difficult dilemma. If you face this situation – which is, thankfully, rare – you should contact an Appellate Division attorney manager. We will help you come up with a plan for dealing with it.

VI. Ethical note

The single most common client complaint to the Appellate Division – and the most commonly verified as true – is that the appellate attorney did not reasonably communicate with the client.

Remember, throughout your representation, you have an ethical duty to:

- Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;
- Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- Keep the client reasonably informed about the status of the matter;
- Promptly comply with reasonable requests by the client for information; and
- Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.[92]

You also have a duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[93]

In our practice, this ethical rule requires that – at a minimum – you should respond to all client attempts at communication and requests for information quickly (generally within one or two weeks); consult fully with your client about his appellate options and provide him with the information and advice he needs to make an informed decision regarding those options; and send your client a copy of all correspondence, court filings, and court actions related to his appellate case.

[92] WIS. SCR 20:1.4(A).
[93] WIS. SCR 20:1.4(b).

VII. Appendix to Chapter Three

a. Directory of Correctional Institutions, Mental Health Facilities & County Jails

b. DOC Release Form – Non-Health Information (DOC-1163)

c. DOC Release Form – Protected Health Information (DOC-1163A)

d. General Release Form *(for use with individuals or organizations that do not provide a more specific form)*

e. Form – Motion for Competency Evaluation *(for use in criminal cases)*

DIRECTORY OF CORRECTIONAL INSTITUTIONS,
MENTAL HEALTH FACILITIES & COUNTY JAILS
(When making prison appointments be prepared to give attorney's state bar number and client inmate number or date of birth)
http://www.wi-doc.com/

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
ADULT INSTITUTIONS		
Chippewa Valley Correctional Treatment Facility	2909 East Park Avenue Chippewa Falls, WI 54729	(715) 720-2850
Columbia Correctional Institution	2925 Columbia Drive P.O. Box 900 (Inmates) P.O. Box 950 (Staff) Portage, WI 53901-0900/0950	(608) 742-9100
Dodge Correctional Institution	644 Maxon Street P.O. Box 700 (Inmates) P.O. Box 661 (Staff) Waupun, WI 53963-0700/0661	(920) 324-5577
Fox Lake Correctional Institution	W10237 Lake Emily Road P.O. Box 200 Fox Lake, WI 53933-0200	(920) 928-3151
Green Bay Correctional Institution	2833 Riverside Drive, 54301 P.O. Box 19033 Green Bay, WI 54307-9033	(920) 432-4877 Social Services (48 hrs) Ext. 3373
Jackson Correctional Institution	N6500 Haipek Road P.O. Box 233 (Inmates) P.O. Box 232 (Staff) Black River Falls, WI 54615-0233/0232	(715) 284-4550 Ext. 7344
Kettle Moraine Correctional Institution	W9071 Forest Drive P.O. Box 282 (Inmates) P.O. Box 31 (Staff) Plymouth, WI 53073-0031	(920) 526-3244
Milwaukee Secure Detention Facility	1015 North 10th Street, 53233 P.O. Box 05911 (Inmates) P.O. Box 05740 (Staff) Milwaukee, WI 53205-0911/0740	(414) 212-4979
New Lisbon Correctional Institution	2000 Progress Road, 53950 P.O. Box 4000 (Inmates) P.O. Box 2000 (Staff) New Lisbon, WI 53950-4000/2000	(608) 562-6400
Oakhill Correctional Institution	5212 County Highway M P.O. Box 938 (Inmates) P.O. Box 140 (Staff) Oregon, WI 53575-0938/0140	(608) 835-3101

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
Oshkosh Correctional Institution	1730 West Snell Road, 54901 P.O. Box 3310 (Inmates) P.O. Box 3530 (Staff) Oshkosh, WI 54903-3310/3530	(920) 231-4010
Prairie du Chien Correctional Institution	500 East Parrish Street P.O. Box 9900 (Inmates) P.O. Box 6000 (Staff) Prairie du Chien, WI 53821-9900	(608) 326-7828
Racine Correctional Institution	2019 Wisconsin St., 53177-1829 P.O. Box 900 Sturtevant, WI 53177-0900	(262) 886-3214
Racine Youthful Offender Correctional Facility	1501 Albert Street P.O. Box 2500 (Inmates) P.O. Box 2200 (Staff) Racine, WI 53401-2500/2200 **FOR UPS SHIPMENT USE:** **1414 Albert Street** **Racine, WI 53404**	(262) 638-1999
Redgranite Correctional Institution	1006 County Road EE P.O. Box 925 (Inmates) P.O. Box 900 (Staff) Redgranite, WI 54970-0925/0900	(920) 566-2600
Stanley Correctional Institution	100 Corrections Drive Stanley, WI 54768-6500 (do not use PO Box)	(715) 644-2960
Sturtevant Transitional Facility	9351 Rayne Road, 53177-1842 P.O. Box 903 Sturtevant, WI 53177-0903	(262) 884-2410
Taycheedah Correctional Institution	751 County Road K, 54935-2946 P.O. Box 3100 Fond du Lac, WI 54936-3100	(920) 929-3800
Waupun Correctional Institution	200 South Madison Street P.O. Box 351 Waupun, WI 53963-0351	(920) 324-5571
Wisconsin Secure Program Facility (Super Maximum Security)	1101 Morrison Drive P.O. Box 9900 (Inmates) P.O. Box 1000 (Staff) Boscobel, WI 53805-9900/1000	(608) 375-5656

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
WISCONSIN CORRECTIONAL CENTERS		
Black River Falls Correctional Center	W6898 East Staffon Road Black River Falls, WI 54615-6426	(715) 333-5681
Community Correctional Center Mailing address is same as Milwaukee House of Correction 8885 S 68th Street Franklin, WI 53132-8202	1004 North 10th Street Milwaukee, WI 53233-1413 (The above address is a "walk-in" address)	(414) 223-1350 Send mail to mailing address at far left
Drug Abuse Correctional Center	1305 North Dr P.O. Box 190 (Inmates) P.O. Box 36 (Staff) Winnebago, WI 54985-0190/0036	(920) 236-2700
Felmers O. Chaney Correctional Center	2825 North 30th Street Milwaukee, WI 53210-2051	(414) 874-1600
Flambeau Correctional Center	N671 County Road M Hawkins, WI 54530-9400	(715) 585-6394
Gordon Correctional Center	10401 East County Road G Gordon, WI 54838-9029	(715) 376-2680
John C. Burke Correctional Center	900 South Madison Street P.O. Box 900 Waupun, WI 53963-0900	(920) 324-3460
Kenosha Correctional Center	6353 14th Avenue Kenosha, WI 53143-4903	(262) 653-7099
Marshall E. Sherrer Correctional Center	1318 North 14th Street Milwaukee, WI 53205-2596	(414) 343-5000
McNaughton Correctional Center	8500 Rainbow Rd Lake Tomahawk, WI 54539-9558	(715) 277-2484
Office of the Sheriff Correctional-South (formerly House of Corrections) NOTE: Put d/o/b, bed number & dorm on envelope if known.	8885 S. 68th Street Franklin, WI 53132-8202 Sgt. Cheryl Gmach, Medical Rec Pat Cook, Inmates Records Lt. R. Pee, Visitation Log/Records (414) 223-1350 Fax (414) 427-6001	General (414) 427-4700 Visitor (414) 427-4720
Milwaukee Women's Correctional Center	615 West Keefe Ave. Milwaukee, WI 53212	(414) 267-6101
Oregon Correctional Center (facility shared with Wisconsin Correctional Center System, Oregon Farm)	5140 Highway M P.O. Box 25 Oregon, WI 53575-0025	(608) 835-3233 (608) 835-5305 S.S.
Robert E. Ellsworth Correctional Center	21425-A Spring Street Union Grove, WI 53182-9408	(262) 878-6000

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
St. Croix Correctional Center	1859 North 4th Street P.O. Box 36 New Richmond, WI 54017-0036	(715) 246-6971
Sandridge Secure Treatment Facility	1111 North Road P.O. Box 700 (Records) P.O. Box 800 (Patients) Mauston, WI 53948-0700/0800	(608) 847-4438
Sanger B. Powers Correctional Center	N8375 County Line Road Oneida, WI 54155-9300	(920) 869-1095
Thompson Correctional Center	434 State Farm Road Deerfield, WI 53531-9501	(608) 423-3415
Thurgood Marshall House	1914 North 6th Street Milwaukee, WI 53212-3623	(414) 264-7447
Winnebago Correctional Center	4300 North Sherman Road P.O. Box 219 (Inmates) P.O. Box 128 (Staff) Winnebago, WI 54985-0219/0128	(920) 424-0402
Wisconsin Correctional Center System (facility shared with Oregon Correctional Center, Oregon Farm)	5140 Highway M P.O. Box 25 Oregon, WI 53575-0025	(608) 835-5711
Wisconsin Resource Center Bryan Bartow, Superintendent **FOR UPS SHIPMENT USE:** **1300 SOUTH DRIVE** **WINNEBAGO, WI 54985**	1505 North Drive P.O. Box 16 (Staff) P.O. Box 129 (Patients) P.O. Box 220 (Inmates) Winnebago, WI 54985-0016/0129/0220	(920) 426-4310

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
JUVENILE INSTITUTIONS		
Eau Claire Academy	550 North Dewey Eau Claire, WI 54703-3218	
Homme Youth and Family Programs	W18105 Hemlock Road Wittenberg, WI 54499	(715) 253-2116 toll free (877) 455-2707
Ladd Lake	P.O. Box 158 Dousman, WI 53118	(262) 965-2131
Lincoln Hills School	W4380 Copper Lake Road Irma, WI 54442-9711	(715) 536-8386
Mendota Juvenile Treatment Center	301 Troy Drive Madison, WI 53704-1521	(608) 301-1042 or 1215
Milwaukee Juvenile Detention Center	10201 West Watertown Plank Rd Wauwatosa, WI 53226-3532	(414) 257-7715
Norris Adolescent Treatment Center	W247 South 10395 Center Drive Mukwonago, WI 53149-9805	(262) 662-3336
Racine Detention Center	1717 Taylor Avenue Racine, WI 53403-2405	(262) 638-6735
Rawhide Boys Ranch	E7475 Rawhide Road New London, WI 54961-9025	(920) 982-6100
Rock County Juvenile Detention Center	Highway 14 210 East Janesville, WI 53545	(608) 757-5930
St. Charles Youth & Family Services	151 South 84th Street P.O. Box 14005 Milwaukee, WI 53214-0005	(414) 476-3710
Sprite House	2909 Landmark Place, Suite 104 Madison, WI 53713	(608) 288-3356
Taylor Home	3131 Taylor Avenue Racine, WI 53405-4543	(262) 553-4100
Wyalusing Academy	601 South Beaumont Road P.O. Box 269 Prairie du Chien, WI 53821-0269	(608) 326-6481

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
MENTAL HEALTH FACILITIES		
Badger Prairie Health Care Center	1100 E. Verona Ave. Verona, WI 53593	
Brown County Mental Health Center	2900 Saint Anthony Drive Green Bay, WI 54311-5859	(920) 468-1136
Community Treatment Alternatives	124 West Mifflin Madison, WI 53703	(608) 255-7586
Dane County Mental Health Center	625 West Washington Avenue Madison, WI 53703-2637	(608) 280-2700
Fond du Lac County Health Care Center	459 East First Street Fond du Lac, WI 54935-4505	(920) 929-3571
Mendota Mental Health Institute	301 Troy Drive Madison, WI 53704-1521	(608) 301-1000 Fax (608) 301-1358
Milwaukee County Mental Health Complex	9455 Watertown Plank Road Milwaukee, WI 53226	(414) 257-6995
North Central Health Care Facilities (Marathon County)	1110 Lakeview Drive Wausau, WI 54403	(715) 848-4600
Outagamie Health Center	3400 West Brewster Street Appleton, WI 54914-1603	(920) 832-5400
Waukesha County Mental Health Center	1501 Airport Road Waukesha, WI 53188-2461	
Winnebago Mental Health Institute	P.O. Box 9 Winnebago, WI 54985-0009	(920) 235-4910
CORRECTIONAL FARM OPERATIONS		
Central Office – Farm Operations	3099 E. Washington Ave., 53704 P.O. Box 8990 (mailing address) Madison, WI 53708-8990	(608) 240-5234
Waupun Dairy *Mailing address: W6199 Hwy 49 E* *Waupun, WI 53963*	900 South Madison Waupun, WI 53963	(920) 324-8771 or (920) 324-8773
Oregon Farm (facility shared with Oregon Correctional Center, Wisconsin Correctional Center System)	5140 Cty Hwy M P.O. Box 25 Oregon, WI 53575-0025	(608) 835-5784
Waupun Farm	W6199 Hwy 49 E P.O. Box 900 Waupun,WI 53963-0900	(920) 324-2759

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INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
COUNTY JAILS		
Adams County Jail	400 Main Street P.O. Box 279 Friendship, WI 53934-0279	(608) 339-4239
Ashland County Jail	220 East 6th Street Ashland, WI 54806-3201	(715) 682-7050
Barron County Jail	1420 State Highway 25 North Barron, WI 54812-3008	(715) 637-6701
Bayfield County Jail	117 East 6th Street P.O. Box 115 Washburn, WI 54891-0115	(715) 373-6117
Brown County Jail	3030 Curry Lane Green Bay, WI 54311-4875	(920) 448-4250
Buffalo County Jail	407 South Second Street Alma, WI 54610-9715	(608) 685-4433
Burnett County Jail	7410 County Road K, #122 Siren, WI 54872-9067	(715) 349-2128
Calumet County Jail	206 Court Street Chilton, WI 53014-1127	(920) 849-1447
Chippewa County Jail	50 East Spruce Street Chippewa Falls, WI 54729-2542	(715) 726-7704
Clark County Jail	517 Court Street Neillsville, WI 54456-1971	(715) 743-5379
Columbia County Jail	403 Jackson Street Portage, WI 53901-1800	(608) 742-6476
Crawford County Jail	224 North Beaumont Road Prairie du Chien, WI 53821-1405	(608) 326-0239
Dane County Jail **Dane County Huber Center** **Vine System**	115 West Doty Street Madison, WI 53703-3276 2120 Rimrock Road Madison, WI 53713-1444	(608) 284-6100 (608) 267-8855 1-877-418-8463
Dodge County Jail a/k/a Dodge County Detention Facility	216 West Center Street Juneau, WI 53039-1086	(920) 386-3734 and (920) 386-3743
Door County Jail	1203 South Duluth Avenue Sturgeon Bay, WI 54235	(920) 746-2418
Douglas County Jail	1310 North 14th Street Superior, WI 54880	(715) 395-1375
Dunn County Jail	615 Stokke Parkway Drive Menomonie, WI 54751-7900	(715) 232-2220
Eau Claire County Jail **Website: http://www.co.eau-claire.wi.us/eau_claire/POPULATION PUBLIC_.pdf** **Northwest Regional Detention Center**	728 Second Avenue Eau Claire, WI 54703-5413 721 Oxford Avenue Eau Claire, WI 54703-5441	(715) 839-4702 (715) 839-5128

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
Florence County Jail	501 Lake Avenue P.O. Box 678 Florence, WI 54121-0678	(715) 528-3346
Fond du Lac County Jail/Fond du Lac Secure Detention Facility	63 Western Avenue Fond du Lac, WI 54935-4239	(920) 929-3394
Forest County Jail	100 South Park Avenue Crandon, WI 54520-1431	(715) 478-3331
Grant County Jail	1000 North Adams Street Lancaster, WI 53813-0506	(608) 723-6372
Green County Jail	2827 6th Avenue P.O. Box 473 Monroe, WI 53566-0473	(608) 328-9598 or Communications Center (608) 328-9400
Green Lake County Jail	486 Hill Street P.O. Box 586 Green Lake, WI 54941-0586	(920) 294-4059
Iowa County Jail	1205 North Bequette Street Dodgeville, WI 53533-1103	(608) 935-5827
Iron County Jail	300 Taconite Street Hurley, WI 54534-1546	(715) 561-3800
Jackson County Jail	30 North 3rd Street Black River Falls, WI 54615-1332	(715) 284-9009
Jefferson County Jail	411 South Center Avenue Jefferson, WI 53549-1703	(920) 674-7310
Juneau County Jail	200 Oak Street Mauston, WI 53948-1365	(608) 847-9513
Kenosha County Jail Website: http://www.kccjs.org/jail/inmate_search/index.html	1000 55th Street Kenosha, WI 53140-3707	(262) 605-5111
Kenosha County Detention Center (formerly known as Kenosha County House of Corrections)	4777 88th Avenue Kenosha, WI 53144-7439	(262) 605-5800 Booking (262) 605-5451
Kewaunee County Jail	620 Juneau Street Kewaunee, WI 54216-1300	(920) 388-3100
La Crosse County Jail (main jail) Website: http://www.lacrossecounty.org/sheriff/InmateView/Default.aspx **La Crosse County Jail** (female) **La Crosse County Huber Facility**	333 Vine Street La Crosse, WI 54601-3296 400 North 4th Street La Crosse, WI 54601 300 North 3rd Street La Crosse, WI 54601	(608) 785-9630
Lafayette County Jail	138 West Catherine Street Darlington, WI 53530-1398	(608) 776-4870

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
Langlade County Jail	840 Clermont Street Antigo, WI 54409-1947	(715) 627-6444 Jail Administrator (715) 627-6410
Lincoln County Jail	1104 East First Street Merrill, WI 54452-2535	(715) 536-6275
Manitowoc County Jail http://www.manitowoc-county.com/upload/25/alpha%20prisoner%20listing.html	1025 South 9th Street Manitowoc, WI 54220-5340	(920) 683-4338
Marathon County Jail	500 Forest Street Wausau, WI 54403-5554	(715) 261-1200
Marinette County Jail	2161 University Drive Marinette, WI 54143-1254	(715) 732-7630
Marquette County Jail	77 West Park Street P.O. Box 630 Montello, WI 53949-0630	(608) 297-2115
Menominee County Jail	c/o Shawano County Jail 405 North Main Street Shawano, WI 54166	(715) 526-7950
Milwaukee County Jail For a telephone conference with client must fill out and FAX one hour before call a Telephone Conference Request Fax Form, Fax #(414) 226-7066 website: http://www.inmatesearch.mkesheriff.org/	**Criminal Justice Facility** 949 North 9th Street Milwaukee, WI 53233-1422	(414) 226-7070
Monroe County Jail	210 West Oak Street P.O. Box 208 Sparta, WI 54656-0208	(608) 269-8759
Oconto County Jail	301 Washington Street Oconto, WI 54153-1675	(920) 834-6918
Oneida County Jail	2000 East Winnebago Street Rhinelander, WI 54501-8863	(715) 361-5180
Outagamie County Jail Website: http://www.co.outagamie.wi.us/mis/reports/Current%20Inmate%20List%20Public.pdf	410 South Walnut Street P.O. Box 1779 Appleton, WI 54913-1779	(920) 832-5266
Ozaukee County Jail	1201 South Spring Street P.O. Box 245 Port Washington, WI 53074-0245	(262) 238-8440
Pepin County Jail	740 7th Avenue West P.O. Box 39 Durand, WI 54736-0039	(715) 672-5944
Pierce County Jail	432 West Main Street P.O. Box 477 Ellsworth, WI 54011-0477	(715) 273-5051
Polk County Jail	1005 West Main Street Balsam Lake, WI 54810	(715) 485-8370
Portage County Jail	1500 Strongs Avenue Stevens Point, WI 54481-2947	(715) 346-1259

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
Price County Jail	164 Cherry Street P.O. Box B Phillips, WI 54555-0902	(715) 339-4116
Racine County Jail Website: http://rcj-web.goracine.org/	717 Wisconsin Avenue Racine, WI 53403-1237	(262) 636-3929
Richland County Jail	181 West Seminary Street Richland Center, WI 53581-2356	(608) 647-2106
Rock County Jail	200 East U.S. Highway 14 Janesville, WI 53545	(608) 757-7916
Rusk County Jail	311 East Miner Avenue Ladysmith, WI 54848-1829	(715) 532-2200
St. Croix County Jail	1101 Carmichael Road Hudson, WI 54016-7708	(715) 386-4752
Sauk County Jail and **Sauk County Huber Center**	1300 Lange Court Baraboo, WI 53913	(608) 355-3210
Sawyer County Jail	15880 East 5th Street P.O. Box 567 Hayward, WI 54843-0567	(715) 634-4858
Shawano County Jail	405 North Main Street Shawano, WI 54166-1948	(715) 526-7950
Sheboygan County Jail	2923 S. 31st Street (Males) 527 North 6th Street (Females/ Juveniles) Sheboygan, WI 53081	(920) 459-3127
Taylor County Jail	224 South Second Street Medford, WI 54451-1811	(715) 748-1431
Trempealeau County Jail	36245 Main Street Whitehall, WI 54773	(715) 538-4351
Vernon County Jail	1320 Bad Axe Court Viroqua, WI 54665-1555	(608) 638-5780
Vilas County Jail	330 Court Street Eagle River, WI 54521-8362	(715) 479-4441
Walworth County Jail **Walworth County Huber Center**	1770 County Road NN Elkhorn, WI 53121-4338 1770 County Road NN Elkhorn, WI 53121-4338	(262) 741-4540 (262) 741-4580
Washburn County Jail	421 Highway 63 P.O. Box 429 Shell Lake, WI 54871-0429	(715) 468-4720
Washington County Jail	500 North Schmidt Road West Bend, WI 53095-2601	(262) 335-4427

INSTITUTION/FACILITY	LOCATION/MAILING ADDRESS	TELEPHONE
Waukesha County Jail Website: http://www.waukeshacounty.gov/inmates/Internet%20Inmate%20Information.pdf **Waukesha County Huber Center**	515 West Moreland Blvd. P.O. Box 217 Waukesha, WI 53187-0217 1400 Northview Road Waukesha, WI 53188	(262) 548-7170 (262) 548-7181
Waupaca County Jail	1402 East Royalton Street Waupaca, WI 54981-1611	(715) 256-4545
Waushara County Jail	430 East Division Street Wautoma, WI 54982-6923	(920) 787-6591
Winnebago County Jail **Winnebago County Work Release Center**	4311 Jackson Street Oshkosh, WI 54901	(920) 236-7380 (Press 9 for operator) (920) 232-1900
Wood County Jail	400 Market Street P.O. Box 8095 Wisconsin Rapids, WI 54495-8095	(715) 421-8730

AUTHORIZATION FOR DISCLOSURE OF NON-HEALTH CONFIDENTIAL INFORMATION

NOTICE: DO NOT USE TO AUTHORIZE DISCLOSURE OF PROTECTED HEALTH INFORMATION. USE FORM DOC-1163A

INDIVIDUAL/AGENCY BEING AUTHORIZED TO RELEASE INFORMATION/RECORD(S)

NAME OF INDIVIDUAL / AGENCY | TELEPHONE NUMBER | FAX NUMBER

ADDRESS | CITY | STATE | ZIP CODE

SUBJECT OF INFORMATION/RECORD(S)

NAME | IDENTIFYING/DOC NUMBER | DATE OF BIRTH

ADDRESS | CITY | STATE | ZIP CODE

INFORMATION/RECORD(S) MAY BE RELEASED TO

NAME OF INDIVIDUAL / AGENCY | TELEPHONE NUMBER | FAX NUMBER

ADDRESS | CITY | STATE | ZIP CODE

SPECIFIC INFORMATION AUTHORIZED FOR DISCLOSURE

INSTRUCTIONS: Check All That Apply

☐ **Institution Social Service File** (Use DOC-1163A for disclosure of information relating to therapy/counseling provided by a social worker or any other health information.)

☐ **Legal**

☐ **Division of Community Corrections File** (Use DOC-1163A for disclosure of any health information.)

☐ **Two-way Release** By checking this box I authorize the individual/agency named in this authorization, to RELEASE TO EACH OTHER, only the information/records listed for release on this form in the category(ies) below. I authorize this exchange of information on an ongoing basis for the duration of this authorization.

Check the category(ies) and sub-categories of information authorized for release.

☐ EDUCATION

Identify Time Period Of Records: _____

☐ Regular education information/records (including attendance records) ☐ SPED information/record(s) e.g. IEP, MMPI, M-Team, etc. ☐ High school credits ☐ Disciplinary Actions

☐ High School Transcript ☐ GED or HSED Scores ☐ Vocational/technical school or college transcript

☐ Other: _____

Purpose: ☐ To assist in educational/vocational planning ☐ Other: _____

Purpose: ☐ To complete PSI

☐ EMPLOYMENT

Identify Time Period Of Records: _____

☐ Period(s) of employment ☐ Job performance evaluation(s) ☐ Job attendance ☐ Job duties & title

Purpose: ☐ To assist in career planning ☐ Other _____

Purpose: To complete PSI

☐ OTHER

Identify Time Period Of Records: _____

Type(s) or information/record(s): _____

Purpose: _____

Continued

YOUR RIGHTS WITH RESPECT TO THIS AUTHORIZATION

Signing of Authorization - I am under no legal obligation to sign this authorization. If I do, I have a right to receive a copy.

AODA Information - My educational information/record(s) may contain alcohol and other drug abuse information. If so, I must sign DOC-1163A or that information will be redacted before the education information/record(s) are released.

Re-disclosure of Education Information/Record(s) - If I authorize release of education information/record(s) to an individual or agency covered by federal or state laws that prohibit re-disclosure, the recipient cannot re-disclose the information/records without a signed information release from me, a court order or other specific authorization under the law . However, if I consent to release education information/record(s) to an individual/agency not covered by federal or state laws that prohibit re-disclosure, my private information/record(s) may not remain confidential.

Right to Inspect and/or Copy Education Information/Records - I have the right to inspect and copy my educational records as permitted under s. 118.125 Wis. Stats. I may be charged a reasonable fee for copies.

AUTHORIZATION SIGNATURE

INITIAL ONE ONLY (Required)

☐ Authorization expires as of _____ . (Date)

☐ Authorization expires _____ month(s) from the date I sign this authorization.

☐ Authorization expires after the following action takes place: _____

☐ Authorization expires upon substantial change in criminal justice system status. (e.g., released from prison.)

I have read or had read to me the contents of this authorization. I have had an opportunity to discuss and ask questions. By signing this authorization, I am confirming that it accurately reflects my wishes regarding disclosure of confidential information.

SIGNATURE OF INDIVIDUAL WHO IS SUBJECT OF RECORD		DATE SIGNED
SIGNATURE OF OTHER PERSON LEGALLY AUTHORIZED TO CONSENT TO DISCLOSURE (If Applicable)	TITLE OR RELATIONSHIP TO INDIVIDUAL WHO IS SUBJECT OF RECORD	DATE SIGNED

FAX OR PHOTOCOPY MAY BE TREATED AS ORIGINAL

DISTRIBUTION: Original- Individual/Agency authorized to release Information/Record(s); Copy-Offender/Other Person Signing Release; Copy-Appropriate Offender Education/Legal/Social Service File

DEPARTMENT OF CORRECTIONS
Division of Management Services
DOC-1163A (Rev. 2/2012)

WISCONSIN
Wisconsin Statutes
§§ 146.81-84, 252.15, 938.78 and 51.30
Federal Regulations
42 CFR Part 2 & 45 CFR Parts 160 & 164

AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION (PHI)

INDIVIDUAL / AGENCY BEING AUTHORIZED TO DISCLOSE PHI

NAME OF INDIVIDUAL / AGENCY		TELEPHONE NUMBER	FAX NUMBER
ADDRESS	**CITY**	**STATE**	**ZIP CODE**

SUBJECT OF PROTECTED HEALTH INFORMATION (PATIENT)

PATIENT NAME	DOC NUMBER	HOUSING UNIT	DATE OF BIRTH	TELEPHONE NUMBER
ADDRESS		**CITY**	**STATE**	**ZIP CODE**

RECIPIENT OF PROTECTED HEALTH INFORMATION

NAME OF INDIVIDUAL / AGENCY		TELEPHONE NUMBER	FAX NUMBER
ADDRESS	**CITY**	**STATE**	**ZIP CODE**

NOTICE: Records of the Department of Corrections that contain protected health information (PHI) may include a Division of Adult Institutions and/or Division of Juvenile Corrections Health Care Record, Social Services File or Division of Community Corrections file. The records include those created by DOC and non-DOC health care providers. Disclosure of PHI can be written, electronic or verbal.
READ CAREFULLY AND CHECK APPROPRIATE BOXES.

SPECIFIC PROTECTED HEALTH INFORMATION AUTHORIZED FOR USE/ DISCLOSURE

THIS AUTHORIZATION APPLIES TO MEDICAL, MENTAL HEALTH, DEVELOPMENTAL DISABILITY AND ALCOHOL/DRUG ABUSE INFORMATION, AND HIV TEST RESULTS, UNLESS EXCLUDED BELOW.

I DO NOT want the following information disclosed.

☐ Medical (Physical Health) ☐ HIV Test Results ☐ Alcohol and Drug Abuse Diagnosis/Treatment ☐ Developmental Disability
☐ Mental Health ☐ Records related to a stay in a Division of Juvenile Corrections facility

☐ **Two-Way Release** By checking this box, I authorize the individuals/agencies named in this authorization, to disclose to each other, the PHI identified below on an ongoing basis for the duration of this authorization.

☐ **Check the box to the left if a copy of an entire record may be disclosed and explain below why the entire record is needed.** Entire record includes all the types of information listed below plus correspondence, consents/refusals, medication administration sheets, flow sheets and miscellaneous documents. **If this box is checked, no checkboxes in the section below need to be checked**.

DOCUMENTS AUTHORIZED FOR USE/DISCLOSURE

☐ Problem List
☐ Record of Immunizations and TB test Results
☐ Medical History/Physical Exam
☐ Progress Notes
☐ Prescriber's Orders/Medications (no psychotropic meds if mental health excluded above.)
☐ Consultations
☐ AODA (diagnosis only) ☐ AODA Program/Treatment Information
☐ Psychiatric
☐ Psychological
☐ Laboratory Results
☐ Medical Imaging (X-Rays, MRIs, etc.)
☐ Dental
☐ Optical
☐ Patient Request Folder (e.g. Health Service Requests, Medication/Medical Supply Refill Requests)

Describe time period of records by entering start and end dates. If no dates are entered, records for the most recent 12 months will be provided. FROM: _____ TO: _____

If Authorization is **limited** to specific medical or mental health conditions(s), describe:

☐ **LOCATION**: I authorize the disclosure of my location knowing that this will reveal that I am in a mental health or AODA treatment facility.

PURPOSE OR NEED FOR DISCLOSURE OF PROTECTED HEALTH INFORMATION (check applicable category)

☐ Ongoing health care/treatment ☐ Review by patient ☐ Legal representation/proceedings (Court/Administrative)
☐ Coordination of care or eligibility for services/benefits. ☐ Review by family member/friend.
☐ Other

Continued

PATIENT NAME | DOC NUMBER

PATIENT RIGHTS

Right to Receive Copy of This Authorization. Patients have a right to receive a copy of this form after signing it.

Right to Refuse to Sign This Authorization. DOC can not condition treatment or payment for treatment based on a patient's decision not to sign this form, except for research-related treatment and provision of health care solely for the purpose of creating PHI for disclosure to a third party.

Right to Withdraw This Authorization. Patients have the right to revoke this Authorization at any time by completing a Revocation of Authorization for Use/Disclosure of PHI (DOC-1163R), or equivalent . Revocation is effective when DOC, or other individual/agency authorized to disclose PHI, receives the form, and is not effective regarding the uses/disclosures of PHI made prior to receipt of the DOC-1163R, or equivalent.

Re-disclosure. If a patient authorizes disclosure to an individual/agency not covered by laws that prohibit re-disclosure, the PHI may be re-disclosed by that individual/agency.

Right to Inspect and/or Copy PHI. Patients have the right to inspect, and obtain copies of PHI for a reasonable fee used/disclosed based upon this form.

Authority to Sign DOC-1163A. A **minor** is a person under the age of 18 years. An **adult i**s a person 18 years or older.

- Adults can sign the form regarding all types of PHI about themselves.
- A court appointed guardian of the person or an agent under an activated Power of Attorney for Health Care (POAHC) can sign the form for the incompetent adult or principal regarding all types of PHI, unless restricted by the Letters of Guardianship or POAHC document.
- A parent/guardian can sign the form for a minor child regarding medical/ physical health, mental health and developmental disability information.
- Minors 12-17 years can sign the form for AODA information about themselves. A parent/guardian can **not** access or authorize disclosure of AODA information about a minor child 12-17 years without consent of the minor.
- Minors 14 -17 years old can sign the form regarding mental health and developmental disability information about themselves from a community provider whose records are covered by s. 51.30, Wis. Stats.
- Minors 14 -17 years can sign the form regarding HIV test results about themselves. A parent/guardian can **not** access or authorize disclosure of HIV information about a minor child 14-17 years without consent of the minor.

AUTHORIZATION EXPIRATION: DATE/EVENT

This Authorization is in effect until the following date or event: _____

If no date/event is entered, this Authorization expires one year from the date of signing.

I have read or had read to me this Authorization form. I have had an opportunity to ask questions. By signing this Authorization, I am confirming that it accurately reflects my wishes regarding use and disclosure of my Protected Health Information.

SIGNATURE OF PATIENT		DATE SIGNED
SIGNATURE OF OTHER PERSON LEGALLY AUTHORIZED TO CONSENT TO DISCLOSURE (If Applicable)	TITLE OR RELATIONSHIP TO PATIENT	DATE SIGNED

LIST OF DOCUMENTS/INFORMATION DISCLOSED BASED UPON THIS AUTHORIZATION

(Write on back-side of form or attach additional sheets if needed, include name and DOC number on each sheet)

INITIALS OF PERSON DISCLOSING PHI _____ DATE DISCLOSED _____ TIME DISCLOSED _____

FACSIMILE OR PHOTOCOPY CAN BE TREATED AS ORIGINAL

DISTRIBUTION: Original - Medical Chart, Consents/Refusals Section; or PSU Record, Legal Documents/Consents/Outside Records Section; or Social Services File, Confidential Envelope; or Division of Community Corrections Supervision File
Copy - Individual/Agency authorized to disclose PHI when other than DOC Copy - Patient /Other Person signing form

CONFIDENTIAL INFORMATION RELEASE AUTHORIZATION

TO:

Individual Who is Subject of Record:

Name:

Address:

Information May be Released to:

Name:

Address:

Identifying No.: _____

Date of Birth: _____

Specific Records Authorized for Release (Include dates of records, if applicable)

Purpose or Need for Release of Information

Legal assistance in _____ County Case No. _____.

This authorization is voluntary. I understand that any treatment, payment, enrollment or eligibility for benefits is not conditioned upon me signing this authorization.

I understand that my personal health information disclosed pursuant to this authorization may be re-disclosed and may no longer be protected by federal law. My personal health information may be released to any of the following, but not limited to, experts, other parties and/or attorneys involved in my case, and the court hearing this matter.

I understand that I may revoke this authorization, in writing, at anytime. I understand that my revocation will not apply to information that has already been released pursuant to this authorization. Unless revoked, this authorization will remain in effect until the expiration time indicated below.

_____ Authorization expires as of _____

_____ Authorization expires ___ month(s) from the date I sign this authorization

As evidenced by my signature below, I hereby authorize disclosure of records to the person(s) or agency(s) as specified above. I intend that a photocopy of this authorization shall be as effective as the original.

_____ _____

Signature of individual who is subject of record ***Date***

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. _____

_____,

Defendant.

DEFENDANT'S MOTION FOR COMPETENCY EVALUATION

The defendant, _____, by undersigned counsel, moves the court for a determination of his competency to seek postconviction relief pursuant to *State v. Debra A. E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994). The following is alleged in support of this motion:

1. On _____, 20___, the defendant was convicted of _____. The _____ County Circuit Court, the Honorable _____ presiding, sentenced the defendant to _____.

2. The defendant filed a timely notice of intent to pursue postconviction relief, after which undersigned counsel was appointed to represent *[him/her]* on appeal. Counsel has reviewed the court file and transcripts and has spoken with the defendant. As a result of counsel's contacts with the defendant, counsel has a good faith doubt regarding the defendant's ability to assist counsel in postconviction matters and make postconviction-related "decisions committed by law to the defendant with a reasonable degree of rational understanding." *Debra A. E.*, 188 Wis. 2d at 126.

3. Under *Debra A.E.*, if the circuit court "determines that a reason to doubt a defendant's competency exists, it shall, as an exercise of its discretion, determine the method for evaluating a defendant's competency, considering the facts before it and the goals of a competency ruling." 188 Wis. 2d at 131-32. The court "may order an

examination of the defendant by a person with specialized knowledge." *Id.* at 132. An examination would be appropriate in this case.

FOR THE REASONS STATED, counsel asks this court to order an examination of the defendant. Counsel further asks that the order require the examiner to specifically address the defendant's ability to assist postconviction counsel and to make postconviction decisions committed by law to the defendant with a reasonable degree of rational understanding.

Dated this ____ day of _____, 20___.

Respectfully submitted,

_____
[Attorney's name]
State Bar No. _____

[Attorney's address]
[Attorney's phone number]

cc: *[Opposing counsel]*

[Defendant]

CHAPTER FOUR
LITIGATING A MERITORIOUS APPEAL

I. Where to initiate the appeal

a. RULE 809.30 appeals

In a RULE 809.30 appeal, there are two categories of issues you can take straight to the court of appeals: (1) "sufficiency of the evidence" presented at trial and (2) "issues previously raised."[94]

Other than these two categories, all other issues must first be litigated in the circuit court via a post-judgment motion prior to filing a notice of appeal. In some circumstances, this is counter-intuitive – as with a claim that the circuit court erroneously exercised its discretion at sentencing. Regardless, even with these sorts of claims, you must press your argument in the circuit court before proceeding to the court of appeals, or risk waiver.

One potential gray area arises when an attorney is unsure of whether an issue was "previously raised."[95] This usually relates to the nature of the legal claim. For example, say the trial attorney objected to a bit of testimony based on hearsay rules but not the confrontation clause. The question is: is the confrontation issue preserved ("previously raised")? If not, you would have to first raise it (likely as ineffective assistance of counsel) in the circuit court. For this particular example, the answer is fairly clear: the confrontation issue was not preserved.[96] The example would present a tougher question if the trial attorney objected based on both hearsay rules and the confrontation clause, but neglected to mention a supportive case directly on point or inaccurately argued the matter.[97]

On very rare occasions, an appellate attorney will recognize that an issue was not preserved but decide, for strategic reasons, to go straight to the court of appeals. After all, waiver is a rule of judicial administration, which the appellate courts may choose to ignore.[98] This is an extremely risky maneuver and is something that should generally not be done when challenging a sentence or if the case involves an ineffective-assistance-of-counsel claim. At a minimum, before making this sort of strategic decision, you should consider the likelihood of prevailing in the various courts; the likelihood that the

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[94] WIS. STAT. RULE 809.30(2)(h).
[95] WIS. STAT. RULE 809.30(2)(h).
[96] *See State v. Marshall*, 113 Wis. 2d 643, 652-53, 335 N.W.2d 612, 616-17 (1983).
[97] Whether the appellate attorney should consider this issue sufficiently preserved would depend on all of the surrounding facts of the case. Furthermore, this may ultimately raise a strategic question – would the circuit court likely overrule itself if told about the case or the corrected information?
[98] *See, e.g., State v. Moran*, 2005 WI 115, ¶31, 284 Wis. 2d 24, 700 N.W.2d 884.

opposing party will raise waiver (cases briefed by attorneys with the attorney general's office almost always raise waiver) and, if so, whether you have a good argument against application of the waiver doctrine; and your client's own preference. If you are planning to risk waiver by going directly to the court of appeals with an unpreserved issue, we would urge you to consult with an Appellate Division attorney manager before doing so.

On the other hand, an attorney may for strategic reasons decide to file a post-judgment motion even regarding a preserved error or sufficiency of the evidence – although the attorney could take such a claim straight to the court of appeals. For example, an attorney may realize upon reading the transcripts that the circuit court misstated an important fact in deciding a motion to suppress. In this circumstance, the attorney may decide that the circuit court might reverse its own decision if the error were pointed out, which would be accomplish the client's goals much faster than taking the case to the court of appeals. There could be risks associated with this, such as giving the circuit court an opportunity to supplement the record with additional reasoning that could make it harder to prevail in the appellate courts.

b. TPR appeals

In a TPR appeal, as noted in Chapter Four, Section III.a., below, every case starts in the court of appeals.[99] If the case "require[s] postjudgment fact-finding," the appellant files a motion to remand the case to the circuit court after the court of appeals has taken jurisdiction over it.[100]

This rule means that, in TPR appeals, the circumstances in which the case goes back to the circuit court are much more limited than in RULE 809.30 appeals. Some circumstances clearly require fact finding and must be remanded to the circuit court, like an appeal based on ineffective assistance of trial counsel or based on the lack of a knowing and voluntary plea. However, other circumstances, like an appeal based on the trial court's erroneous exercise of discretion at disposition, would not necessarily require fact finding and therefore would not necessarily require remand.

[99] WIS. STAT. RULE 809.107(5).
[100] WIS. STAT. RULE 809.107(6)(am).

II. Client consultation regarding meritorious appellate options

a. The nature of the discussion

Once you have determined the issues that you can argue on your client's behalf, you will need to have a detailed discussion with him about the issues, covering, at a minimum, the following:

- The relief available for the particular issue, and the best and worst case scenarios,
- The risks and benefits of any appeal based on each arguable issue,
- The logistics of any postconviction hearing, including whether the client will need to attend the hearing and testify, and
- The likely timeline for the appeal.

In addition, it is your job as counselor to actually give your client advice. That does not mean that you should bully your client into making the decision that you would make, were you in his shoes. But it does mean that you should share with your client your honest thoughts about how he should proceed, and why.

b. Who decides how to proceed?

The quick and easy answer is that your client chooses whether to appeal and determines the goals of the appeal, while you determine whether an issue is arguable and how the issue will be litigated. What that means in practice is that your client – not you – decides whether he wants to seek specific relief (say, plea withdrawal but not resentencing), or ask for every kind of relief potentially available, or drop the appeal altogether.

You decide which specific issues to raise, how to raise and argue them, and in which court to argue them first. If you have thought of five different grounds for plea withdrawal, but only four of them are strong, you may decide to drop the fifth claim in order to focus on your stronger ones, even if your client wants you to raise all five. Or you may decide to raise them all in order to give the impression that the plea colloquy was so riddled with errors as to be worthless. But that is your ultimate decision.[101]

[101] *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

That said, it is usually a good idea to involve the client in making strategic decisions. Not only does this promote positive client relations, but you may find that your client has good ideas. Remember, your client has already appeared in front of the judge who presumably will serve as the post-judgment motion court and he knows at least some of the prosecutors. Your client might also have an idea of how he, his former trial attorney, and/or others would serve as witnesses. So do not count him out as a valuable resource in determining strategy.

c. Your client's options

In any case where you have identified one or more arguable issues for appeal, your client ultimately has three options: (1) ask you to pursue an appeal based on one or more of the issues that you have identified; (2) ask you to withdraw from the case so he can appeal pro se or with the help of retained counsel; (3) ask you to close his case without further action, waiving his right to direct appeal.

If you have identified any arguable issue – even if it is not one that the client is interested in raising – your client is not entitled to a "partial" no-merit report and you should not file such a report.[102] In other words, you should not file a no-merit report for the purpose of explaining that your client has opted not to pursue an arguable appeal and asking the court of appeals to determine whether the case presents any other issues.[103] A no-merit report is reserved for cases in which the appointed attorney has not identified *any* arguable issues for appeal.

d. Resolving disputes on how to proceed

Unfortunately, resolving disputes with a client where there are meritorious issues to litigate can sometimes be more difficult and frustrating than in a no-merit situation. In the no-merit context, there is a default position. If your client cannot or will not make up his mind regarding how to proceed, ultimately, you will have to file a no-merit report in the court of appeals, as discussed in Chapter Five, Section II., below.

A typical dispute involving a meritorious appeal arises where the attorney has identified an arguable issue, but not one that furthers your client's goal. For instance, you may have identified an arguable basis for plea withdrawal but your client does not want

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[102] *See State ex rel. Ford v. Holm*, 2006 WI App 176, 296 Wis. 2d 119, 722 N.W.2d 609 (holding that there is no right to a partial no-merit report and noting that there may be ethical reasons that an attorney may not file such a report).

[103] There are at least two reasons for the SPD's rule against partial no-merit reports. First, a client is not entitled to a partial no-merit report and, as an administrative matter, having SPD-appointed attorneys take this unnecessary step would be burdensome and expensive. *See State ex rel. Ford v. Holm*, 2006 WI App 176, ¶12, 296 Wis. 2d 119, 722 N.W.2d 609. Second, this sort of partial no-merit report raises ethical qualms for the attorney and could ultimately prove detrimental to the client. *See id.*, ¶13.

to withdraw his plea. He only wants a sentence modification but, unfortunately, you cannot identify any new factor that would arguably support a sentence modification.[104]

In this example, there is no default option. The client must ultimately choose one of the three options identified above: (1) ask you to file an appeal based on one or more of the issues that you have identified; (2) ask you to withdraw from the case so he can appeal pro se or with the help of retained counsel; or (3) ask you to close his case without further action, waiving his right to direct appeal.

If you get stuck in this situation and cannot obtain a decision from your client – after diligently attempting to obtain a decision – the best manner for proceeding is not entirely clear. Some attorneys in this situation file a motion to withdraw as counsel, which has the effect of forcing a decision from the client. The procedure for withdrawal is set forth in Chapter Five, Section IV. If you end up in this situation, though, please do not hesitate to call an Appellate Division attorney manager for help in setting a plan for moving forward.

III. Litigating a post-judgment motion in the circuit court

a. Applicable deadlines

In a RULE 809.30 appeal, from the date of service of the record or the last transcript, whichever is later, you have sixty (60) days to file the post-judgment motion or notice of appeal.[105] When a post-judgment motion is filed, from the date of filing, the circuit court has sixty (60) days to decide the motion or the motion is deemed denied.[106]

In a TPR appeal, from the service of the record or the last transcript, whichever is later, you have thirty (30) days to file the notice of appeal.[107] Then, from the date the court record is filed with the court of appeals (which should be within fifteen days of the filing of the notice of appeal), you have fifteen (15) days to file the motion to remand the case for the filing of a post-disposition motion.[108] If the court of appeals grants your motion, its order will set deadlines for the post-disposition motion.

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[104] *See State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (regarding sentence modification).

[105] WIS. STAT. RULE 809.30(2)(h).

[106] WIS. STAT. RULE 809.30(2)(i). If it looks like the court is not going to decide the issue within the sixty-day deadline, you should move for an extension in the court of appeals.

[107] WIS. STAT. RULE 809.107(5)(a). You will need to file a statement on transcript and order transcripts for the other parties between the filing of the notice of appeal and the filing of the motion for remand. WIS. STAT. RULE 809.107(5)(c)&(d). See Chapter Four, Section IV.a.ii.4., below, for information about the form and content of the notice of appeal and the statement on transcript, and about ordering transcripts for the other parties.

[108] WIS. STAT. RULE 809.107(6)(am). A form for filing the motion for remand appears in the appendix to this chapter.

b. The post-judgment motion

i. Motion practice, generally

1. Persuasive motion writing

If you think that the "real" appeal starts after you file the notice of appeal, think again. With any claim requiring a post-judgment motion, we bear the burden of production; in many cases, we bear the burden of proof. That means that our motions have to be thoroughly researched, factually accurate, persuasively written, and complete. Furthermore, while it is hard for some brief-loving appellate attorneys to accept, more of our clients win relief in the circuit court than in the appellate courts. So our motions should be compelling and involve as much effort, preparation and craft as our briefs.

At worst, if you write a great post-judgment motion and lose anyway, well, your brilliant and well-crafted motion can be easily modified into an opening brief to the court of appeals.

The precise form each motion takes will vary. For example, in a *Bangert*[109] motion, which is discussed in Chapter Four, Section III.b.ii.1., below, the defendant or respondent has a limited burden of production. There is no need to write pages of powerful prose, but you must clearly and concisely point to the errors in the record, make the necessary factual allegations, and cite to the applicable law.

In contrast, in a motion seeking a sentence modification based on new information that sheds light into your criminal client's brain damage, about which the sentencing court did not previously know, you will need to tell a moving story and persuade the court that justice requires a sentence reduction. This sort of motion will generally win at the circuit court level or not at all.

We do not know of specific resources devoted to writing great motions. However, you can improve your persuasive motion writing by reading resources about brief writing. See Chapter Four, Section IV.b.iii., below, for some helpful tips and references.

2. Filing requirements

There is no uniform set of rules governing motions that prescribes any particular form, word count, etc. If you do not regularly practice in a particular circuit court, be

[109] *State v. Bangert*, 131 Wis. 2d 246, 261, 389 N.W.2d 12 (1986).

sure to check out the local rules.[110] Many courts, including the Milwaukee Circuit Court, have rules governing motion practice, including post-judgment motions.

As far as we know, every circuit court will accept a postconviction motion that lays out the entire argument within the motion and may read like a brief; every court will also accept a minimal motion with a longer brief attached. Which form you use to make your case is a matter of personal preference or style.

It is important to remember that the sixty-day deadline for the postconviction motion is applicable to the *filing* (not mailing) of the motion. The majority of circuit courts will accept motions filed via facsimile – if the total number of pages, including exhibits, is no more than fifteen.[111] If you are filing a motion in a county where filing via facsimile is not allowed, or if you are filing a motion exceeding fifteen pages, you must place the motion in the mail early enough that it can be filed by the due date.

As with any filed document, the motion must be served on opposing counsel (including, if applicable, counsel for any other parties and the GAL) and your client. In a criminal case, even one involving a felony, for the purpose of a postconviction motion, the district attorney is opposing counsel. (As previously noted, in felony cases at the appellate court level, the attorney general is opposing counsel.)[112]

3. Making factual allegations

Virtually every claim that must be raised in a post-judgment motion requires the defendant or respondent to make some number of factual allegations. Attorneys often wonder whether such allegations must be made in the form of an affidavit or whether they can be made in some other manner.

In general, an allegation made by the defendant or respondent himself may be made in the body of the motion.[113] It should be remembered that you swear to any document that you file with the court and that you are an agent of your client and are authorized to speak for him.[114] While you may attach to the motion an affidavit signed by your client, you are not required to do so.

If your motion involves allegations made by any other party, such as a trial spectator who witnessed a juror sleeping during the trial or an alibi witness never called by trial counsel, that party's allegation should generally be made in the form of an

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[110] Most local court rules are available at http://www.wisbar.org/AM/Template.cfm?Section=Circuit_court_rules2.
[111] *See* WIS. STAT. § 801.16. As of the time of the writing of this handbook, the following counties do not accept motions by facsimile: Langlade, Oneida, Polk, Portage, and Sawyer. This is subject to change.
[112] *See* WIS. STAT. RULE 809.80. As discussed above, in a felony case, any motion directed to the court of appeals – even prior to the filing of the notice of appeal – should be served on the attorney general. *Id.*
[113] *See State v. Brown*, 2006 WI 100, ¶62, 293 Wis. 2d 594, 716 N.W.2d 906.
[114] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 (2000).

affidavit attached to the motion. If your motion requires an expert, it is generally acceptable to attach the expert's report to the motion, rather than an affidavit signed by the expert.

No matter what form the factual allegations take, your motion and attachments, if any, function only as an offer of proof or a prima facie case. If you bear the ultimate burden of proof, you will have to prove any factual matter necessary to the claim at a motion hearing, usually through testimony.

ii. Common post-judgment motions

There are at least three categories of post-judgment motions that are so commonly filed as to be singled out here: the *Bangert* motion, the ineffective-assistance-of-counsel motion, and the motion for sentence modification. This section also identifies some other commonly-filed post-judgment motions.

1. The *Bangert* motion

In Wisconsin, the term "*Bangert* motion" is used as shorthand for two related, but distinct, concepts. First, it is often used specifically to refer to a motion to withdraw a guilty plea in a criminal case based on a defect in the plea colloquy, which was the specific claim addressed in the namesake case.[115]

This section uses the term in its broader sense – to refer to a motion that is governed by a burden-shifting scheme that was first announced in *State v. Bangert*.[116] This burden-shifting scheme is generally applicable to claims that a trial court failed to conduct a colloquy required by law regarding the defendant's or respondent's decision to waive a fundamental right, including:

- The decision to plead guilty or no-contest, or enter an Alford plea, in a criminal case,[117]
- The decision to admit or plead no-contest in a juvenile delinquency case,[118]

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[115] *See State v. Bangert* 131 Wis. 2d 246, 261, 389 N.W.2d 12 (1986). This use of the term *Bangert* motion is often contrasted with the "*Nelson/Bentley* motion," in which a criminal defendant seeks to withdraw a plea based on some problem extrinsic to the plea colloquy, and in which the defendant faces a greater burden. *See, e.g., State v. Howell*, 2007 WI 75, ¶¶73-75, 301 Wis. 2d 350, 734 N.W.2d 48.

[116] 131 Wis. 2d 246, 261, 389 N.W.2d 12 (1986).

[117] *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (citing *State v. Bangert* 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986)).

[118] *See State v. Kywanda F.*, 200 Wis. 2d 26, 38, 546 N.W.2d 440 (1996).

- The decision to admit or not contest grounds for termination in a TPR case,[119]

- The decision to waive the right to testify at a criminal trial,[120] and

- The decision to waive the right to a jury trial in any case involving the right to a jury trial.[121]

Under the *Bangert* scheme, your client bears an initial burden of production. In order to meet this burden, your client must point to a defect in the relevant colloquy – a failure of the trial court to explain something that it was required by law to explain – and must also allege that he did not understand the matter not explained to him.[122] Once your client meets this initial burden (also referred to as "making a prima facie case"), the court must hold an evidentiary hearing at which the opposing party bears the burden of proving by clear and convincing evidence that, despite the inadequacy of the colloquy, your client's waiver was "knowing, intelligent, and voluntary."[123]

Thus, if you are filing a *Bangert* motion, the motion *must* contain at least two sets of allegations: (1) allegations showing that the court's colloquy on the waiver in question was defective, with citation both to the record and the applicable law, and (2) allegations indicating that your client did not understand the information not provided by the court in the colloquy.[124]

A *Bangert* motion is a very simple sort of post-judgment motion but it can be unforgiving. If you fail to allege that your client did not understand the relevant information, as often happens, you risk losing the motion without a hearing. Ultimately, what could have been a meritorious *Bangert* motion may later form the basis for an ineffective assistance of counsel claim – against you.[125]

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[119] *Oneida County Dep't of Soc. Servs. v. Therese S.*, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122.
[120] *See State v. Weed*, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485
[121] *State v. Anderson*, 2002 WI 7, ¶¶24-26, 249 Wis. 2d 586, 638 N.W.2d 301.
[122] *See State v. Brown*, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906.
[123] *See State v. Brown*, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906. Usually, the state will attempt to meet this burden by calling the trial attorney and/or your client as witnesses.
[124] It follows that if your client tells you he did fully understand the missing information, it would be frivolous to file a *Bangert* motion.
[125] *See State v. Giebel*, 198 Wis. 2d 207, 216-17, 541 N.W.2d 815 (Ct. App. 1995).

2. Motion based on ineffective assistance of counsel

Perhaps the most common way – in Wisconsin, at least – to raise an issue that was waived at the trial-court level is via a claim of ineffective assistance of counsel (IAC).[126] Under *Strickland v. Washington* and its progeny, counsel is ineffective if he performed deficiently (i.e., acted incompetently and not based on a reasonable strategy) and this deficient performance prejudiced the defendant (i.e. undermines the reviewing court's confidence in the outcome of the proceeding).[127]

- ❖ Technical point. Although the law regarding IAC was developed in the criminal context (in which there is a constitutional right to counsel), the Wisconsin courts have extended the application of this law to cases involving the statutory right to counsel.[128] As a practical matter, that means that it applies to any SPD-appointed case that is not appointed under the SPD's discretionary authority.

When a defendant or respondent raises an IAC claim, he bears the full burden of proving both that trial counsel's performance was deficient and that this deficient performance was prejudicial.[129] In drafting an IAC motion, your immediate goal is getting an evidentiary hearing on the claim, known as a "*Machner* hearing," without which your client cannot win the motion.[130]

In order to get a *Machner* hearing, you must allege facts that, if found to be true at the hearing, would prove deficient performance and prejudice.[131] *This cannot be done in conclusory fashion.* An IAC motion requires allegations of fact that are far detailed than a *Bangert* motion.[132] As for deficient performance, the motion should not only describe trial counsel's improper actions or omissions, but also explain how and why these actions or omissions were improper and not based on a reasonable strategy.[133] If the motion alleges that counsel performed deficiently by not raising some sort of legal defense,

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[126] Many other jurisdictions have a more robust "plain error" doctrine, which allows a litigant to appeal unpreserved issues without alleging ineffective assistance of counsel. The plain error doctrine exists in Wisconsin, but it is generally reserved for extreme circumstances. *See, e.g., State v. Jorgensen*, 2008 WI 60, ¶¶1-19, 310 Wis. 2d 138, 754 N.W.2d 77 (in which the judge who presided over the trial had witnessed the crime). Even when plain error is raised, IAC is often raised in the alternative in order to avoid a finding of waiver/forfeiture. *C.f. State v. Miller*, 2012 WI App 68, ¶¶17-23, 341 Wis. 2d 737; 816 N.W.2d 331 (finding that the defendant forfeited a claim that the prosecutor's closing argument involved plain error).

[127] *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984).

[128] *A.S. v. State*, 168 Wis. 2d 995, 1004, 485 N.W.2d 52 (1992).

[129] *State v. Roberson*, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111.

[130] *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905. (Ct. App. 1979) (holding that "it is the duty and responsibility" of postconviction counsel to compel the trial attorney to testify at a hearing on an IAC motion so that the court can assess the attorney's actions and strategies).

[131] *State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). An IAC motion claiming that trial attorney's deficient performance caused the defendant to enter a guilty or no-contest plea unknowingly or involuntarily (notwithstanding a proper plea colloquy) is a sort of "*Nelson/Bentley* motion." *See, e.g., State v. Hoppe*, 2009 WI 41, ¶¶59-61, 317 Wis. 2d 161, 765 N.W.2d 794.

[132] *See State v. Balliette*, 2011 WI 79, ¶56, 336 Wis. 2d 358, 805 N.W.2d 334.

[133] *State v. Balliette*, 2011 WI 79, ¶60-69, 336 Wis. 2d 358, 805 N.W.2d 334.

argument, or objection, it should explain how the issue not raised was obvious and strong.[134]

As for prejudice, the motion must explain specifically how trial counsel's actions prejudiced your client. If the claim involves some sort of trial error, the motion will need to describe precisely how counsel's errors impacted the trial in the context of all of the evidence and defenses that were presented.[135] If the claim involves a client waiver – e.g. a claim that trial counsel's erroneous advice led the client to unknowingly/involuntarily waive his right to go to trial – prejudice is established by proving that the client would not have waived the right at issue if he had been given correct advice.[136] However, an IAC motion involving client waiver cannot rest its prejudice discussion on a simple allegation that the client "would not have waived his right to X if he had known X."[137] It must allege facts that would support that claim.[138] For example, a client claiming that he would not have pleaded guilty to third-degree sexual assault if his attorney had told him that he would have to register as a sex offender may need to explain why this issue was important to him and/or explain a plausible defense to the charged crime that supports his allegation that, if he had known about registration, he would have gone to trial.[139]

In other words, you cannot "hide the ball." Although your instinct may tell you to leave information out of a motion in order to avoid giving the opposing party an advantage at the hearing, this instinct is dangerous in the post-judgment context. In an IAC motion – as with any motion in which your client bears the burden of proof – you must make specific, detailed factual allegations regarding each element that you must prove and persuasive arguments for why they entitle your client to relief, or risk losing the case without a hearing.

3. Motion for sentence modification

There are provisions for modifying or revising dispositional orders in nearly every kind of case, but this subsection addresses only motions for sentence modification filed in criminal cases. In many criminal cases, clients only want a sentence modification, and these motions are extremely common. However, because of the unusual nature of sentence modification, motions for sentence modification usually only succeed at the trial court level. This means that appellate case law provides little guidance.

The circuit court cannot modify (*i.e.* reduce) a sentence based on a change of heart. However, it has inherent authority to modify a sentence when it identifies a "new factor" and/or when it determines that the sentence was "unduly harsh or

[134] *State v. Balliette*, 2011 WI 79, ¶69, 336 Wis. 2d 358, 805 N.W.2d 334.
[135] *See State v. Balliette*, 2011 WI 79, ¶¶70-78, 336 Wis. 2d 358, 805 N.W.2d 334.
[136] *See, e.g., State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).
[137] *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).
[138] *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996).
[139] *See State v. Bentley*, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996).

unconscionable."[140] The court must engage in a two-part analysis: first, whether there a new factor or information showing that the sentence was unduly harsh; second, whether a reduction of sentence is appropriate.[141] The first question, at least involving a new factor, is legal in nature; the second is a matter for the circuit court's discretion.[142]

Where a defendant has filed a notice of intent to pursue postconviction relief, a motion for sentence modification can be filed under RULE 809.30(2)(h) either on its own or combined with additional or alternative postconviction claims.[143]

- ❖ Technical point. You should generally file any motion for sentence modification under RULE 809.30(2)(h), *not* WIS. STAT. § 973.19(1)(a). Section 973.19(1)(a) is a provision permitting (presumably unrepresented) defendants who have not filed a notice of intent to ask for a sentence modification soon after sentencing. A defendant who files a motion under § 973.19(1)(a) waives his right to appeal his conviction and sentence; thus, the section can act as a trap. Such a defendant can theoretically appeal the denial of the sentence modification, but not other errors, and only under the less forgiving procedure applicable to civil appeals.[144]

- ➢ Practice tip. When combined with a strong legal claim – say, a claim for plea withdrawal, a new trial, or resentencing – a motion for sentence modification can provide an avenue for negotiating with the prosecutor, as discussed in Chapter Four, Section III.c.ii.1.d., below. The prosecutor may be willing to agree to a sentence modification in exchange for your client's waiver of other legal claim(s).

The vast majority of sentence modification motions are based on a "new factor." A new factor in this context is defined as "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."[145]

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[140] *State v. Stenklyft*, 2005 WI 71, ¶115, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, C.J., concurring). Chief Justice Abrahamson also noted that a court could modify a sentence upon determining that it was "legally erroneous." *Id.* This section will not discuss that possibility since it is both obvious (e.g. that the court can correct an unlawfully long sentence) and rare. *See id.*

[141] *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828.

[142] *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. In recent history, there have only been two cases involving a modification for an unduly harsh sentence; it is not clear whether the courts considered the determination of harshness to be a legal or a discretionary question. *See McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971); *State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990).

[143] WIS. STAT. RULE 809.19(1)(b).

[144] WIS. STAT. § 971.19(4)-(5). As noted in Chapter One, Section IV., above, the deadline for filing a notice of appeal can not be extended in civil appeals. WIS. STAT. RULE 809.82(2)(b).

[145] *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

Wisconsin's appellate courts have rejected numerous issues as potential new factors, including a post-sentencing change to the applicable maximum sentence,[146] post-sentencing rehabilitation or good behavior,[147] and a victim's change of heart regarding his sentence recommendation.[148] They have been slower to declare issues to be proper new factors. It is at least clear that the correction of erroneous information presented at sentencing can be a new factor,[149] as can post-sentencing assistance to law enforcement.[150]

However, attorneys should not limit themselves to raising new factors that have been recognized by the appellate courts. Whether something is a new factor is a highly fact-specific inquiry. And an issue that is a proper new factor in one case may not be in another. For example, if the sentencing court stated that it was sentencing your client to three years in prison specifically so that he could complete the Department of Corrections' new three-year sex offender treatment program, information showing that he was placed in an older, six-month program may be a new factor. However, if the sentencing court said only that it hoped your client would get intensive treatment while in prison, this same information probably would not be a new factor.

As this example illustrates, the starting point for searching for new factors is the sentencing court's own comments. Once you note each of the issues that the court considered important for sentencing purposes, you can talk to your client about, and search records for, information that was not previously given to the court that is "highly relevant" to the issues the court identified.[151] There are myriad issues that may fit this standard. This is not to say that a "new factor" can be found in every case; indeed, the majority of cases do not present any new factors. However, in order to make this determination, you will need to minimally examine the court's sentencing remarks and talk to your client about issues discussed in the remarks.

Sentence modification motions based on the harshness of a sentence are much rarer than those based on a new factor, and the applicable law is less clear. In order to win sentence modification based on harshness, the circuit court must find that the sentence it previously imposed was "unduly harsh or unconscionable" – a daunting task for any sentence within the applicable maximum.[152] However, such claims are not always frivolous; if you have a client who received the maximum sentence, or a near-maximum sentence, in a mitigated case, you should consider the issue.[153]

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[146] *State v. Tucker*, 2005 WI 46, 279 Wis. 2d 697, 694 N.W.2d 926.
[147] *State v. Kluck*, 210 Wis. 2d 1, 7, 563 N.W.2d 468.
[148] *State v. Johnson*, 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990).
[149] *See State v. Norton*, 2001 WI App 245, ¶10, 248 Wis. 2d 162, 635 N.W.2d 656
[150] *State v. Doe*, 2005 WI App 68, ¶10, 280 Wis. 2d 731, 697 N.W.2d 101.
[151] *See State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828.
[152] *See Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979).
[153] In at least one case, a circuit court has found that its own sentence was harsh and excessive. *State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990). In two others, appellate courts found that the sentencing court erroneously exercised its discretion based, in part, on the unreasonable harshness of the sentences. *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971); *State v. Hall*, 2002 WI App 108, ¶¶15-16, 255 Wis. 2d 662, 648 N.W.2d 41. While a motion based on an erroneous exercise of

Many sentence modification motions based on harshness provide the court with information about a co-defendant or other similarly situated defendant who received a much lower sentence or statistical information about sentences for similarly-situated defendants.[154] This is not required. Moreover, the law is clear that a disparity does not necessarily entitle a defendant to a sentence modification.[155] However, the court can consider a disparity for the purpose of determining whether a sentence is unduly harsh and, therefore, it is often a good idea to provide the court with this information.[156]

4. Other common motions

Other sorts of legal claims that require a post-judgment motion which are very common in SPD practice include:

- Motion for a new trial in the interests of justice.[157]
- Motion for a new trial based on newly discovered evidence.[158]
- Motion for resentencing or new dispositional hearing based on the court's reliance on inaccurate information at the original hearing.[159]
- Motion for resentencing or new dispositional hearing based on the court's erroneous exercise of discretion at the original hearing.[160]
- Motion for resentencing or plea withdrawal based on the prosecutor's breach of the plea agreement.[161]

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discretion is a different sort of legal claim than a motion for a sentence modification, these cases are relevant to the matter at hand.

[154] Statistical information regarding sentences can be collected manually or through a commercial database like Court Tracker, available at http://www.courttracker.com/.

[155] *Ocanas v. State*, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975).

[156] *See State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990). It is helpful to gather data about other defendants whether or not you plan to make it central to your motion; if there is no great disparity, and your client's sentence does not stick out from other sentences, this may indicate that the claim is not arguable after all.

[157] *See* WIS. STAT. § 805.15(1); *see also State v. Harp*, 150 Wis. 2d 861, 443 N.W.2d 38 (Ct. App. 1989) (discussing the standard).

[158] *See State v. Edmunds*, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590; *State v. Armstrong*, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98.

[159] *See State v. Tiepelman*, 2005 WI App 179, ¶5, 286 Wis.2d 464, 703 N.W.2d 683.

[160] *See State v. Gallion*, 2004 WI 42, ¶38, 270 Wis. 2d 535, 678 N.W.2d 197.

[161] *See State v. Quarzenski*, 2007 WI App 212, ¶¶17-19, 305 Wis. 2d 525, 739 N.W.2d 844; *see also State v. Williams*, 2002 WI 1, ¶¶36-44, 249 Wis. 2d, 637 N.W.2d 733 (involving a prosecutor's "end run" around the plea agreement); *and State v. Smith*, 207 Wis. 2d 258, 271-81, 558 N.W.2d 379 (1997) (involving trial counsel's ineffective assistance for failing to object to a breach of the plea agreement).

- Motion to revise dispositional order.[162]
- Motion for sentence or detention credit.[163]
- Motion for commutation of an illegal sentence or period of detention, probation, or other confinement.[164]

In each of these motions, the defendant or respondent bears the burden of persuasion and, if additional fact-finding is necessary, the burden of production and proof. Each kind of motion requires particular allegations and is governed by a distinct legal standard, which you would need to thoroughly research before drafting.

While the above list represents some of the most common claims that SPD-appointed appellate attorneys raise in the circuit court, it is not exhaustive. Post-judgment motions can be used to challenge the circuit court's competency or jurisdiction, restitution or costs, and just about any other error not previously raised.[165] Sometimes, post-judgment motions are filed even regarding preserved issues for the purpose of supplementing or correcting the record in preparation for an appeal. Moreover, as noted in Chapter Four, Section I.a., above, an attorney may decide, for strategic reasons, to file a motion even for an issue that could go straight to the court of appeals.

c. The post-judgment motion hearing

i. Getting a hearing

Many circuit courts in Wisconsin grant hearings on post-judgment motions as a matter of course. A few courts (notably the Milwaukee County Circuit Court) do not. It is best to presume that any motion that does not necessitate fact-finding or persuade the court to grant relief may be denied without a hearing.

Even in courts that grant a hearing for every motion, you must usually contact the court (generally the relevant judge's assistant) after filing the motion in order to get a hearing date. There are exceptions – some courts simply issue a notice of hearing – but it is a good idea to call the court soon after filing the motion to ask for a hearing unless you already know that the particular judge has a different procedure.

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[162] *See, e.g.,* WIS. STAT. § 938.363.

[163] *See* WIS. STAT. § 973.155; *see also State v. Johnson*, 2008 WI App 34, ¶¶26-70, 307 Wis. 2d 735, 746 N.W.2d. 581 (reviewing cases addressing various aspects of credit).

[164] *See* WIS. STAT. §§ 973.13 (commutation of sentence), 973.09(2m) (commutation of probation), 971.17(1) (providing the maximum duration of commitment for persons found not guilty by reason of mental disease or defect), 938.355 (providing the dispositional options in delinquency cases), *and* 51.20(13)(g) (providing the maximum duration of involuntary mental commitment under Chapter 51),

[165] Of course, any error that is not preserved and not raised under the rubric of ineffective assistance of counsel is likely to draw an accusation of waiver from the state.

If your motion necessitates an evidentiary hearing, it is advisable to call all of your witnesses – including, if the claim raises ineffective assistance of trial counsel, your client's trial attorney – to ask them for scheduling conflicts before calling the court for a date. This will keep you on good terms with your witnesses and the judge's assistant and obviate the need for multiple scheduling orders.

ii. Preparing for the hearing

1. Preparation common to all hearings

a. Arranging for your client's appearance

In most circumstances, you should arrange for your client to attend the hearing. The court should require your client to attend any evidentiary hearing and may require him to attend even a non-evidentiary hearing. Moreover, regardless of the nature of the hearing, most clients want to attend.

- Frequently asked question. *What if my client doesn't want to or can't appear?* If the hearing is not evidentiary, let the judge's assistant know ahead of time; usually, no one objects. For an evidentiary hearing, it can be difficult to convince the judge to excuse your client's nonappearance. You can explain that you are your client's agent and he has authorized you to represent him in his absence. You can seek a stipulation from the opposing party. You can submit an affidavit signed by your client waiving his right to appear. In the end, though, if the judge can point to a rational reason for requiring your client to appear, there is the possibility of a default decision against your client if he does not appear.

If your client is not in custody, you simply need to inform your client of the time and place and make sure that he wants to, is able to, and plans to attend. You might help with travel arrangements, if necessary, and remind him of the hearing the day before the hearing.

If your client is in custody, you will usually have to prepare an "order to produce" for the court, for which there is a circuit court form.[166] When you talk to the judge's assistant about scheduling the hearing, you should verify that you are expected to prepare

[166] The form is available at available at http://www.wicourts.gov/formdisplay/GF-190.pdf?formNumber=GF-190&formType=Form&formatId=2&language=en, and appears in the appendix to this chapter. Historically, a client was produced with a writ of habeas corpus, but nearly all circuit courts now prefer the order to produce.

the order and submit it to the judge. Occasionally, the court instead prefers the prosecutor to prepare the order to produce.

If you must prepare the order, do so promptly. If the prosecutor is to prepare the order, at least a week before the hearing, make sure that he actually submitted the order. And regardless of who prepared the order, about a week before the hearing, make sure that the court signed the order and the sheriff's office – which effectuates the transport – received the order.

b. Staying ahead of the circuit court's deadline for deciding the motion

As noted above, from the date that a post-judgment motion is filed (under RULE 809.30), the circuit court has sixty days to decide the motion.[167] Does that mean the court will get in trouble if it decides the motion late? No! It means your client will automatically lose the motion and, depending on what happens afterwards, it could tie your case up in procedural knots.

Therefore, at any point after filing the motion, if it becomes clear that the court will not decide the motion within the statutorily allotted time (often because it has set the hearing for a date outside of that time), you should file a motion to extend the circuit court's deadline for deciding the motion under WIS. STAT. RULES 809.30(2)(i) & 809.82(2).

c. Preparing for oral argument

While you need not necessarily prepare to argue to the circuit court as if it were to the supreme court, you should not just "wing it" either. Remember that your goal is to win in the circuit court. And if you do not meet that goal, you will need a complete record for your appeal – including a record of having preserved all of your arguments.

Prior to any hearing, jot down each element of your client's claim so you can remember to address each of them. Determine your strongest points, so you can emphasize them. Determine your weakest points and come up with some way to neutralize them. Brainstorm the opposing party's likely arguments and the judge's likely questions.

If you will be arguing at the end of an evidentiary hearing, you cannot fully prepare for the argument; you do not do exactly how the evidence will come in. Usually, though, you have a pretty good idea of how it will come in – e.g. the lawyer will say that he did not object because he did not want to alienate the jury, or the client will say that he

[167] WIS. STAT. RULE 809.30(2)(i).

did not know something covered in the plea questionnaire because he is only minimally literate. Therefore, you should be prepared to argue the motion in relation to the ways that the evidence is likely to come in.

d. Considering negotiation with opposing counsel

In many cases, there is no point to negotiating with opposing counsel. If your client only wants a new trial, it is probably a good bet that opposing counsel will not agree to that. Opposing counsel is also not likely to concede in the face of a relatively weak claim. In certain categories of cases, such as TPRs and 980s, there is little or no middle ground and therefore negotiation may be futile.

However, in many cases, if you have a strong claim, opposing counsel may be willing to negotiate for a shorter sentence or period of detention or commitment, or for different conditions of detention or commitment. For example, if your client is willing to waive a meritorious claim for, say, plea withdrawal or a new trial, opposing counsel may agree to a sentence modification or revision of the dispositional order. And in many cases, this is the best possible outcome for your client: the client drops a claim that carries some measure of risk in exchange for an improvement in circumstances.

Thus, in every case involving a post-judgment motion, you should consider whether it makes sense to attempt to negotiate with opposing counsel. If so, and your client is interested in that, go for it.

e. Getting your paperwork in order

Other advisable preparation for a post-judgment motion hearing can include:

- Making copies of the motion and any exhibits for you, the court, and opposing counsel,
- Making copies of any appellate case or statute that you are relying on heavily, particularly if the exact language of the case or statutory section is important to the issue,
- Making copies of any document (e.g. transcript excerpts, motions, discovery materials) that you may reference in your questioning of a witness – for yourself, the court, opposing counsel, and the witness, and
- Organizing and labeling your case materials for easy reference.

f. Preparing orders for the court

The deadline for the court's decision on the post-judgment motion, discussed in Chapter Four, Section III.c.ii.1.b., above, is met by the filing of a written decision on the motion. For that reason, it is a good idea to bring to the hearing a proposed order granting the motion and a proposed order denying the motion. An example of such an order is found in the appendix to this chapter.

Whether the court grants or denies the motion, your preparation of the order helps to ensure that its decision falls within the deadline, avoiding further motions for enlargement of the time limit. If the court denies the motion, it permits you to proceed with the appeal. If the court grants the motion, it can expedite relief.

2. Additional preparation specific to evidentiary hearings

a. Subpoenaing witnesses

You must subpoena your witnesses for any evidentiary hearing, just as you would for a trial. If you neglect to do this, and your witness does not show up, your client could potentially lose his motion by default. Therefore, even if you already think your witness is planning to attend, as is often true with *Machner* hearings, you should take steps to compel his attendance.

When dealing with witnesses who are reasonably friendly and/or are professionals (including attorneys), you may chose to mail the witness a subpoena and an admission of service by mail and ask the witness to sign and return the admission, rather than formally subpoenaing the witness. A form for admission of service by mail is found in the appendix to this chapter.

b. Preparing witnesses for testifying

You should prepare your own witnesses for testifying at a post-judgment hearing. That, of course, does not mean that you should coach your witnesses or tell them how to testify. In fact, it is generally a good idea to tell every witness clearly (and repeatedly) that he should testify honestly. If, at the hearing, opposing counsel asks the witness whether defense counsel gave him any advice on how to testify, the witness can honestly say that you told him to testify honestly.

With certain witnesses – including your own client when he must be a witness – it is also a good idea to emphasize that you want the witness to answer the question asked,

and only the question asked, and that he should *not* try to tailor his testimony to what he thinks you want to hear. He should be honest. He would not want to expose himself to a perjury charge and, in any event, most witnesses are bad at guessing the "right" answer.

As for the specifics of preparation, it is usually best to ask each witness every question that you might conceivably want to ask at the hearing and also ask him every question that you can imagine opposing counsel might ask. If a question elicits an unhelpful response, you may decide not to ask that particular question and/or brainstorm ways to neutralize any negative impact of the answer in your argument to the court.

Finally, be sure to brainstorm about any witness that opposing counsel might call. If possible, talk to these witnesses as well.

c. Reviewing the rules of evidence

You are the appellate attorney; everyone will expect you to be an expert on the rules of evidence. Therefore, before going into court and presenting evidence, if not before, become an expert on the rules of evidence. See Chapter Two, Section III.b.i.2., above, for suggestions of evidence treatises that may assist you in this endeavor.

If you expect a particular evidentiary conflict to arise – say, because you plan to present hearsay testimony or expect the state to do so – decide how to respond to any objection, or whether and how to object. But be aware that most judges relax the rules of evidence at post-judgment hearings.

iii. Conducting the hearing

Hopefully, given your conscientious preparation, each of your post-judgment motion hearings will go smoothly. For tips on questioning witnesses, presenting exhibits, and other technical matters that may come up at a hearing, you may wish to consult a guide intended for trial attorneys, such as L. Michael Tobin, WISCONSIN CRIMINAL DEFENSE MANUAL (State Bar of Wisconsin 2011).

d. Final circuit court-level steps

i. Obtaining an appealable order

Once the circuit court decides the post-judgment motion, you must ensure that it files a written order memorializing that decision. If the court denies the motion, you

cannot appeal the case further – or file a no-merit appeal – until the court files a written order with the clerk's office.[168] If the court grants the motion, your client may not get the benefit of the win until the court files a written order with the clerk's office.

ii. Final steps after a loss

After losing any post-judgment motion, you must determine whether the case presents any arguable issue(s) for the appellate courts, reassess the risks and benefits of further appeal, consult with your client about these matters, and determine how he wants to proceed.

Deciding whether there is an arguable issue for the appellate courts follows the same standard discussed in Chapter Two, Section IV.a., above. You are assessing whether there is any non-frivolous issue for appeal. If the issue raised in the post-judgment motion was purely legal, and you found it arguable there, the issue will almost certainly be arguable in the appellate courts. If it was factual or involved an exercise of the circuit court's discretion, whether the issue is arguable in the appellate courts will depend on whether you received a hearing and what occurred at any hearing.

As for risks and benefits, these usually remain the same at the circuit court and the appellate court level. However, if your client is charged with new offenses or serious misconduct at an institution at any point during your representation, depending on the issue being litigated, his risk may increase.

If, after you consult with him, your client wants to proceed with an arguable appeal or a no-merit report, you should promptly request preparation of the post-judgment motion hearing transcript from the court reporter.

iii. Final steps after a win

If you are reading this section because you won a post-judgment motion in the circuit court, congratulations! Any time you win a case, you should determine whether there is yet some issue that needs to be litigated and, if appropriate, proceed with that. Regardless, you should hold the case open until the time for the opposing party to appeal has passed and ensure that your client actually gets the relief granted.[169]

Whether there is still an issue for litigation will depend on the nature of the issue that you raised in the trial court and the relief obtained. For example, if you only sought, and won, sentence credit, the client still has the right to review of the underlying

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[168] *State v. Malone*, 136 Wis. 2d 250, 252, 401 N.W.2d 563 (1987).

[169] In a case that comes within WIS. STAT. RULE 809.30, the state has forty-five days to file a notice of appeal from entry of an order granting a post-judgment motion. WIS. STAT. § 808.04(4). In a TPR case, the opposing party has thirty days. § 808.04(7m).

judgment. Therefore, if there is any arguable issue that could be raised in the appellate courts, your client has the option of going forward with that. If there is no arguable issue, your client has the right to any of the no-merit options discussed in Chapter Five, below.

If you won only a partial victory that does not result in the judgment being vacated – say, because you filed a motion for plea withdrawal and a motion for sentence modification and the court denied the plea withdrawal but granted the sentence modification – then your client has the option of appealing any issue that lost in the circuit court, if it is still arguable.

If you won any relief that does not vacate the judgment – like sentence modification – but there is yet an issue not raised in the circuit court that was preserved for the appellate courts – like a suppression issue – then your client still has the option of appealing the judgment based on the preserved issue.[170]

On the other hand, if you won any relief that resulted in the vacation of judgment, which sets the case up for further proceedings in the circuit court, you will not be able to go forward with any further appellate litigation.

Regardless of whether there is the possibility of further litigation, after any win, you should ensure that your client receives the relief granted. This often means communicating with the clerk of court (e.g. to see if the clerk's office vacated or amended the judgment as ordered) or with the Department of Corrections (e.g. to see if it has recalculated your client's sentence). Depending on the circumstances, you may need to take different or additional action.

Finally, in any case in which the court vacated the judgment and ordered a new trial or new dispositional hearing, you should *not* handle the new sentencing or plea hearing or new trial as part of your appellate appointment.[171] But you should contact the appropriate SPD trial office and let that office know that your client needs a new trial attorney to be appointed.

Once you have determined that there is no further need to appeal, the opposing party is not appealing, and your client has obtained the relief granted, you should send the your client a case closing letter summing up what has occurred, then close the case. If you are a private bar attorney, submit billing information to the SPD's Assigned Counsel Division.

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[170] If you won plea withdrawal, a new trial, or a new dispositional hearing, any of which would vacate the existing judgment, you cannot immediately go forward with an appeal based on a previously preserved issue because the judgment that was the object of the original notice of intent is no longer in effect. However, if the client is convicted again and files a second notice of intent, the suppression issue may yet be challenged on appeal. *See State v. Spaeth*, 2012 WI 95, ¶¶17-29, 343 Wis. 2d 220 819 N.W.2d 769.

[171] If the appellate attorney is a private bar attorney and is certified to take the trial case at issue, he or the client may ask the relevant trial office to appoint the appellate attorney to continue with the case. However, the trial office may have a policy that would defeat this request. Furthermore, the attorney should be aware that, if the case ends up on appeal again, the Appellate Division will not appoint an attorney to handle the appeal who represented the client at the trial level in the same matter.

IV. Pursuing an appeal in the court of appeals

a. Initiating the appeal and moving toward briefing

i. Applicable deadlines – notice of appeal, docketing statement, and statement on transcript

In a RULE 809.30 appeal, if there has been no post-judgment motion, from the date of service of the record or the last transcript, whichever is later, you have sixty (60) days to file the notice of appeal.[172] If there has been a post-judgment motion, from the date of entry of the circuit court's order deciding the motion, you have twenty (20) days to file the notice of appeal.[173] In either case, from the date of filing the notice of appeal, you have fourteen (14) days to arrange for the service of transcripts on the opposing party and file the statement on transcript.[174]

In a TPR appeal, from the service of the record or the last transcript, whichever is later, you have thirty (30) days to file the notice of appeal.[175] From the date of filing the notice of appeal, you have five (5) days to arrange for service of transcripts on the other parties and file the statement on transcript.[176]

In cases requiring a docketing statement, which includes Chapter 48 (other than TPR), 51, 55, and 938 cases, but not criminal or Chapter 980 cases, you must file the docketing statement at the same time as the notice of appeal.[177]

ii. Initiating the appeal

1. Overview

In order to initiate an appeal, you must file an original notice of appeal, along with a copy of the SPD order appointing you as counsel in the case, with the clerk of circuit court. At the same time, you must file a copy of the notice of appeal and order appointing counsel with the clerk of the court of appeals. If a docketing statement is

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[172] WIS. STAT. RULE 809.30(2)(h).
[173] WIS. STAT. RULE 809.30(2)(j).
[174] WIS. STAT. RULE 809.11(4).
[175] WIS. STAT. RULE 809.107(5)(a). If you file a notice of appeal in a TPR case and have the case remanded for the filing of a postdisposition motion, you do not need to file another notice of appeal after the circuit court decides the motion. In that circumstance, the court of appeals' remand order would describe how to move the case back to the court of appeals after the circuit court reaches a decision.
[176] WIS. STAT. RULE 809.107(5)(c)&(d).
[177] WIS. STAT. RULE 809.10(1)(d) & 809.30(2)(j).

required (which depends on the case type), you must file a docketing statement with the clerk of the court of appeals at the same time. Within two weeks of filing the original notice of appeal with the clerk of circuit court, you must arrange for service of transcripts on opposing counsel and file a statement on transcript. And, as always, you must serve a copy of every document that you file on opposing counsel and your client.

This section walks you through each of these steps.

2. The notice of appeal

The notice of appeal is a document that is filed with the clerk of circuit court and that, upon filing, initiates the appeal and sets the stage for transfer of jurisdiction from the circuit court to the court of appeals.[178]

It is important to note that the notice of appeal is filed when it is "actually received by the clerk of circuit court."[179] Thus, you should plan to mail the notice of appeal several days before the due date. If you delay action until the due date, if the relevant clerk's office permits it, you can submit it by facsimile;[180] otherwise, you will have to hand deliver it or file a motion asking the court of appeals to extend the deadline.

The notice of appeal, governed by WIS. STAT. RULE 809.10, must contain:

- A caption with the case name and number;[181]
- A statement identifying the judgment or order from which your client intends to appeal and the date on which it was entered;[182]
    - ❖ Technical point. If your client is appealing after the denial of a post-judgment motion, the notice of appeal should identify both the underlying judgment and the denial of the motion as the subject of the appeal. See the notice of appeal in the appendix to this chapter for an example.
- A statement of whether the appeal arises in one of the types of cases specified in WIS. STAT. § 752.31(2), i.e. whether it will be a one-judge (rather than three-judge) appeal;[183]

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[178] WIS. STAT. RULE 809.10(1)(a); *Roberta Jo W. v. Leroy W.*, 218 Wis. 2d 225, 228, 578 N.W.2d 185.
[179] *State v. Sorenson*, 2000 WI 43, ¶17, 234 Wis. 2d 648, 611 N.W.2d 240.
[180] *See State v. Sorenson*, 2000 WI 43, ¶¶28-35, 234 Wis. 2d 648, 611 N.W.2d 240 (holding that a notice of appeal may be filed by facsimile where the circuit court or presiding judge has permitted the filing of papers by facsimile).
[181] WIS. STAT. RULE 809.10(1)(b)1.
[182] WIS. STAT. RULE 809.10(1)(b)2.
[183] WIS. STAT. RULE 809.10(1)(b)3.

- A statement of whether the appeal is to be given preference pursuant to statute;[184]

  - ❖ Technical point. Of the appellate cases that are eligible for SPD-appointed counsel, only appeals of TPR cases and cases regarding parental consent to abortion are given preference pursuant to statute.[185]

- A statement of the date of service of the last transcript or court record if no post-judgment motion was filed; or, if a post-judgment motion was filed, the date of entry of the order deciding the motion; or, if the court of appeals extended the deadline for filing the notice of appeal, the due date that was established by the court of appeals;[186] and

- A copy of the SPD order appointing counsel.[187]

As noted above, in addition to filing the original notice of appeal with the clerk of circuit court, you must file a copy of the notice of appeal with the clerk of the court of appeals and serve copies on opposing counsel (including, if applicable, counsel for any other parties and the GAL) and your client.

3. The docketing statement

Two copies of a docketing statement must be filed with the court of appeals along with the copy of the notice of appeal in some, but not all, cases.[188] Criminal, TPR, and Chapter 980 appeals do *not* require a docketing statement.[189] CHIPS, juvenile delinquency, and mental commitment (other than 980) cases *do* require a docketing statement.[190]

You can find the docketing statement form at http://www.wicourts.gov/forms1/appeals.jsp?Category=59. In addition to filling out the blanks in the form regarding the nature of the appeal, note that you must attach copies of various documents to it.[191]

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[184] WIS. STAT. RULE 809.10(1)(b)4.
[185] David L. Walther, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 15.5 (5th ed. 2012); *see also* WIS. STAT. RULES 809.105 and 809.107.
[186] WIS. STAT. RULE 809.10(1)(b)5.
[187] WIS. STAT. RULE 809.10(1)(b)6. This will be on a separate sheet of paper that you should attach to the notice of appeal.
[188] WIS. STAT. RULE 809.10(1)(d).
[189] WIS. STAT. RULE 809.10(1)(d).
[190] WIS. STAT. RULE 809.10(1)(d).
[191] The necessary documents are similar to those that will ultimately need to be filed in the appendix to the brief in chief. *See* WIS. STAT. RULE 809.19(2).

Among the questions on the docketing statement is whether you would like the appeal to be placed on the court's "expedited" (also known as "fast-track") appeals calendar. An expedited appeal has a shorter briefing schedule and the court of appeals generally decides these appeals much faster (within a couple of months of briefing). It can be ideal for cases, like those under Chapter 51, that quickly become moot.

- Frequently asked question. *How does an expedited appeal work?* If, in the docketing statement, you ask for the appeal to be placed on the expedited calendar, the court will usually hold a telephonic "presubmission conference" at which it will determine whether all parties agree to the designation.[192] If all parties agree, the court will enter an order modifying the rules applicable to briefing, shortening deadlines, lowering word limits, and relaxing some formatting rules.[193]

Again, where a docketing statement is required, you must serve copies on opposing counsel and your client.

4. Transcript-related obligations

a. Overview

Within fourteen days of filing the notice of appeal in the circuit court, you must take several actions to ensure that the circuit court record is properly positioned for the appeal. You must arrange for the transcripts to be served on opposing counsel, obtain a court reporter certification regarding any transcript that you have not yet received, and file a statement on transcript.

b. Arranging for service of transcripts

If you are an SPD staff attorney, arranging for service of transcripts is easy: ask your clerical assistant to prepare the forms. If you are an SPD-appointed private bar attorney, you can find the form for requesting transcripts in the appendix to this chapter and at http://www.wispd.org. Just fill the form out (making sure to check the box indicating that it is going to opposing counsel and to include opposing counsel's name and address) for each court reporter and send it directly to the court reporter. The court reporters know to bill the SPD directly.

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[192] Pay close attention to the notice of presubmission conference. Some appellate districts set up the conference and call you at the appointed time. Others districts set a time and require you (the appellant) to actually arrange the conference and make the necessary phone calls.

[193] See the court of appeals' internal operating procedures, available at http://www.wicourts.gov/ca/IOPCA.pdf, for more information.

❖ Technical point. You do not need to arrange for service of the court record (documents filed with the circuit court that you received early in the case) on opposing counsel, only transcripts.

➢ Practical tip. If you do not want to look up each court reporter's address, just find the appointment paperwork that the Appellate Division sent you at the time of your appointment. That includes our original requests for transcripts, which will contain the names, addresses, and relevant transcripts associated with each reporter.

c. If necessary, obtaining a court reporter certification

If there is any transcript that has not yet been filed with the clerk of circuit court (because it is still in the process of being prepared) you will need to obtain a certification from the relevant court reporter that you have requested it.[194] By the time of the appeal, the only transcript that may not yet be filed with the clerk should be the post-judgment motion hearing transcript. Thus, if there was no post-judgment motion hearing, as long as you already received all of the transcripts that the SPD originally ordered for you, you can skip to the next section.

If you require a certification, the certification must:

- State that your client has requested copies of the relevant transcript(s) to be served both on you and the opposing party,
- State that your client has arranged for payment for the transcript(s) and copies (through the SPD), and
- Contain both the date of your request and the due date of the transcript(s).[195]

Generally, the court reporter will expect you to prepare the certification for him to sign and return to you; a form for doing so is included in the appendix to this chapter.

As discussed below, you will need to attach the certification to your statement on transcript; therefore, do not wait until the last day to ask the court reporter for it.

[194] WIS. STAT. RULE 809.11(4)(b).
[195] WIS. STAT. RULE 809.11(4)(b).

d. Preparing the statement on transcript

The statement on transcript is a simple document that acts as your own certification that you have taken care of the transcript-related tasks discussed above and the record is set for the appeal.[196] The statement on transcript must:

- List each transcript necessary for the appeal that has already been filed with the clerk of circuit court and state that you have arranged for these transcripts to be served on the opposing party at SPD expense;[197]

  - ❖ Technical point. If you have a transcript, you can generally presume that the clerk of circuit court does too.[198]

- List each transcript necessary for the appeal that has not been filed with the clerk of circuit court, if any, and state that you have arranged for any such transcript to be prepared and served on both you and opposing counsel;[199] and

- Contain the court reporter certification discussed above, if necessary, regarding any transcript that has not yet been filed with the clerk of circuit court.[200]

You must file the original statement on transcript, including the attached certification, if any, on the clerk of the court of appeals, and serve copies on the clerk of circuit court, opposing counsel (including, if applicable, counsel for any other parties and the GAL), and your client.[201]

- ➢ Practical tip. It is usually convenient to file the statement on transcript at the same time as the notice of appeal. However, if the post-judgment motion hearing transcript has not yet been prepared, you cannot file the statement on transcript without the court reporter certification. For that reason, consider requesting the certification from the court reporter when you first request the transcript, soon after the post-judgment hearing. That way you can file the notice of appeal and statement on transcript, as well as request the transcripts for opposing counsel, at the same time and move the case file off your to-do list for a while.

[196] WIS. STAT. RULE 809.11(4)(b).
[197] WIS. STAT. RULE 809.11(4)(b).
[198] WIS. STAT. RULE 809.30(2)(g)2.
[199] WIS. STAT. RULE 809.11(4)(b).
[200] WIS. STAT. RULE 809.11(4)(b).
[201] WIS. STAT. RULE 809.11(4)(b).

iii. Assessing the court record on appeal

The clerk of circuit court must compile and index the record for appeal, and send you a copy of the index, before sending it to the court of appeals.[202] It is very easy to ignore the proposed record index when it arrives in your mailbox. However, not infrequently, there is some problem with the record. And when there is a problem with the record, it is much quicker and easier to address it before the record is sent to the court of appeals.

Therefore, when you receive the record index, examine it carefully. Make sure that any document that you might conceivably want to cite is included in the index. With certain bits of the record, you should be particularly careful. Occasionally, exhibits, sealed documents, and/or correspondence do not make it into the indexed record. Often, parts of the record that were created prior to the filing of the complaint – notably including warrants and warrant applications – do not make it into the indexed record. And if there was anything that you had to specifically ask the clerk's office to send you – because that office did not send it to you in response to the SPD's original request for the record – you can usually bet that it will not make it into the indexed record.

If anything that was part of the circuit court record is not in the index of the appellate record, or if there is some sort of error in the record, before the clerk of circuit court sends the record to the court of appeals, you can usually resolve the issue quickly and easily with the circuit court. Once the record is sent to the court of appeals, you will need to file a motion to supplement or correct the record.[203]

- Frequently asked question. *What if I want to cite to something that is not indexed not because of a clerical error but rather because it was not filed at the circuit court level?* If the document is something that the trial attorneys should have presented and did not and/or that you could have placed in the record at the post-judgment motion level and did not, you are probably stuck with the record you have. However, it will depend on all of the circumstances. If opposing counsel stipulates that something should be part of the record, you may succeed with a joint motion to supplement the record. Even without a stipulation, the court of appeals may permit a party to supplement the record with a document not previously placed in the record; in some circumstances, this may require remanding the case to the circuit court. If you are presented with a thorny record problem, please feel free to call an Appellate Division attorney manager.

[202] WIS. STAT. RULES 809.15(2) & 809.107(5)(b).
[203] WIS. STAT. RULE 809.15(3)-(4). For a helpful discussion of the procedure for supplementing or correcting the record in both the circuit court and the court of appeals, *see* David L. Walther et al., APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 7.4 (5th ed. 2012).

iv. Motion practice in the court of appeals

Motions in the appellate courts are generally governed by WIS. STAT. RULE 809.14. As noted in Chapter One, Section IV., above, regarding motions for enlargement of time limits, you must file with the court of appeals five copies of any motion in a three-judge appeal and three copies of any motion in a one-judge appeal.[204] You must also serve copies on the clerk of the relevant circuit court, the opposing party (including, if applicable, counsel for any other parties and the GAL), and your client.[205]

The opposing party generally has eleven days (from service of the motion) to file a response.[206] In TPR appeals, the other parties get only five days to respond.[207] But the court can decide a motion for a "procedural order" – and that's most of them – quickly, without waiting for a response.[208] If the non-moving party objects to the motion, he can move for reconsideration within eleven days of the order.[209]

Any motion that would affect the disposition of the appeal or the filing of a brief, including common motions such as a motion to extend time or consolidate appeals, automatically tolls all deadlines from the date of filing until the date that the motion is decided.[210] A motion to supplement or correct the record automatically tolls all deadlines from the date of filing until the date that the motion is denied or, if the motion is granted, until the date that the supplemental or corrected materials are filed with the court of appeals.[211]

- Frequently asked question. *When do I need to consolidate SPD cases?* Each judgment requires its own notice of appeal, and each notice initiates a distinct appeal. It makes sense to consolidate two or more appeals if it would be more convenient for you and the court.[212] If you have a criminal client who entered pleas, or went to trial, on multiple cases at once, it often makes sense to consolidate the appeals. The same goes for a TPR client who entered pleas, or went to trial, on multiple cases (involving different children) at once. However, you should consider whether the cases raise identical or related appellate issues.

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[204] WIS. STAT. RULE 809.81(2).
[205] WIS. STAT. RULE 809.80.
[206] WIS. STAT. RULE 809.14(1).
[207] WIS. STAT. RULE 809.14(1m).
[208] WIS. STAT. RULE 809.14(2).
[209] WIS. STAT. RULE 809.14(2).
[210] WIS. STAT. RULE 809.14(3)(a).
[211] WIS. STAT. RULE 809.14(3)(b).
[212] *See* WIS. STAT. RULE 809.10(3).

b. Briefing

WIS. STAT. RULE 809.19 governs briefing and covers everything from deadlines (for most – but not TPR – appeals) to margins to substantive content. If you have not already carefully read this entire rule, you should do so now.

i. Applicable deadlines – briefing

In a RULE 809.30 appeal not designated as an expedited appeal, from the date of the filing of the record on appeal, you have forty (40) days to file the brief-in-chief.[213] From the filing or service of the brief-in-chief or from the filing of the record on appeal, whichever is later, the opposing party has thirty (30) days to file the response brief.[214] From the filing or service of the response brief, whichever is later, you have fifteen (15) days to file the reply brief.[215]

In a TPR appeal, from the date of the filing of the record on appeal, you have fifteen (15) days to file the brief-in-chief.[216] From the service of the brief-in-chief, the opposing party has ten (10) days to file the response brief.[217] From the service of the response brief, you have ten (10) days to file the reply brief.[218]

If there is a GAL involved with the case, if he chooses to participate in the appeal, the due date for his brief(s) will be the same as the brief(s) for whichever party he is aligned with.[219]

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[213] WIS. STAT. RULE 809.19(1). As discussed in Chapter Four, Section 4.a.ii.3., above, if your case is designated as an expedited appeal, you will be well aware of this fact because the court will enter an order designating the case as an expedited appeal. In an expedited appeal, the court of appeals sets the briefing schedule by court order.
[214] WIS. STAT. RULE 809.19(3)(a)1.
[215] WIS. STAT. RULE 809.19(4)(a).
[216] WIS. STAT. RULE 809.107(6)(a).
[217] WIS. STAT. RULE 809.107(6)(b).
[218] WIS. STAT. RULE 809.107(6)(c).
[219] WIS. STAT. RULES 809.19(6m) & 809.107(6)(d).

ii. Other briefing rules[220]

1. Required contents

a. Opening brief

Pursuant to statute, the brief-in-chief in any case not designated as an expedited appeal[221] must contain:

- A table of contents with page references for each section of the brief, including headings of each argument subsection;[222]
- A table of authorities, including cases (listed alphabetically), as well as statutes and any other legal authorities, with page references;[223]
- A statement of the issues presented for review and how the trial court decided each issue;[224]
- A statement as to whether oral argument is necessary and whether the opinion should be published, and the reasons therefore;[225]
- A statement of the case, including a description of the nature of the case; the procedural history of the case, including the trial court's disposition; and a statement of facts relevant to the issues presented, including proper citations to the record;[226]
    - ➢ Practical tip. Depending on the case, you may want to have two sections, usually titled "Statement of the Case" and "Statement of Facts," or a single section. The decision to have one or two sections is discussed in Chapter Four, Section IV.b.iii.2.b., below.
- An argument, arranged in the order of the statement of issues presented. Each argument must begin with a statement summarizing

[220] This handbook focuses on opening and reply briefs, which are the briefs that SPD-appointed attorneys are usually expected to produce. If you ever find yourself in a state's appeal, the requirements for the response brief, which are similar to those for a brief-in-chief, are also found in RULE 809.19.
[221] In an expedited appeal, there are fewer required sections; all requirements will be spelled out in the court order designating the case as an expedited appeal.
[222] WIS. STAT. RULE 809.19(1)(a).
[223] WIS. STAT. RULE 809.19(1)(a).
[224] WIS. STAT. RULE 809.19(1)(b).
[225] WIS. STAT. RULE 809.19(1)(c).
[226] WIS. STAT. RULE 809.19(1)(d).

the argument and contain the appellant's contentions and the reasons therefore, and include appropriately formatted citations to the authorities relied on;[227]

- A short conclusion stating the precise relief sought;[228]

  ❖ Technical point. When the statute says precise, it means precise; you must define what a "win" would entail. Sample conclusions would include: "John Doe asks this court to reverse the order denying the postconviction motion and remand this case to the circuit court for a *Machner* hearing"; "John Doe asks this court to vacate the dispositional order and remand this case to the circuit court for a new trial"; "John Doe asks this court to vacate the judgment of conviction and, because the evidence presented at trial was insufficient to support the conviction, instruct the clerk of circuit court to enter a judgment of acquittal."

- Reference to an individual by first name and last initial rather than by his or her full name when the record is required by law to be confidential;[229]

  Frequently asked question. *Am I required to refer to victims and/or witnesses by first name and last initial?* Presently, no statute makes the identity of victims or witnesses confidential. However, in practice, all SPD staff attorneys and most other attorneys avoid using the full names of victims, at least in sensitive cases. This is the courts' preferred practice.

- The signature (and state bar number) of the attorney who files the brief or, if the appellant is pro se, the appellant;[230]

- Reference to the parties by name, rather than party designation, throughout the argument section;[231]

- A signed certification that the brief conforms to the formatting rules contained in RULE 809.19(8)(b) and (c), in the form described in RULE 809.19(8)(d);[232] and

- A signed certification that the electronically-filed brief and appendix (if e-filed) are identical to the paper copies.[233]

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[227] WIS. STAT. RULE 809.19(1)(e).
[228] WIS. STAT. RULE 809.19(1)(f).
[229] WIS. STAT. RULE 809.19(1)(g). *See also* WIS. STAT. RULE 809.81(8).
[230] WIS. STAT. RULE 809.19(1)(h).
[231] WIS. STAT. RULE 809.19(1)(i).
[232] WIS. STAT. RULE 809.19(8)(d).

b. Appendix

Technically, an appendix could be included in the checklist above; it is a content requirement of the opening brief to which it is appended. But because there are numerous requirements for the content of the appendix itself, it necessitates its own list. At a minimum, the appendix must contain:

- The findings or opinion of the circuit court;[234]
- Limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues;[235]
- A copy of any unpublished opinion cited under WIS. STAT. RULE 809.23(3)(a) or (b);[236]
- If the appeal is taken from a circuit court order regarding an administrative decision, the findings of fact and conclusions of law, if any, and final decision of the administrative agency;[237] and
- A table of contents, which, if the appendix contains any confidential record, references persons by first name and last initial and includes a notation that the "portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record";[238]
  - ➢ Practical tip. Although it is not required, some jurists have told us that they prefer each item in the table of contents to reference the record index number. Thus, the table of contents might list "Transcript of Suppression Hearing Held August 6, 2012 (R.5)"
- A signed certification that the appendix complies with RULE 809.19(2)(a), in the form described in 809.19(2)(b).[239]

In order to produce a table of contents for the appendix, and to cite to your appendix, you will need to number the pages. SPD staff attorneys number the table of

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[233] WIS. STAT. RULE 809.19(12)(f) & (13)(f).
[234] WIS. STAT. RULE 809.19(2)(a).
[235] WIS. STAT. RULE 809.19(2)(a).
[236] WIS. STAT. RULE 809.19(2)(a).
[237] WIS. STAT. RULE 809.19(2)(a).
[238] WIS. STAT. RULE 809.19(2)(a).
[239] WIS. STAT. RULE 809.19(2)(b).

contents to the appendix "100" and go up from there; other pagination systems are certainly possible.

Failure to provide the court with a complete appendix can result in the court imposing a monetary sanction on the attorney.[240] Although the rule only requires that an attorney append portions of the transcript the attorney deems essential to understanding the issues presented, some court of appeals judges interpret the rule to mean the attorney must append all portions of the transcript essential to *deciding* the issue. You should err on the side of inclusion.

Also, pay attention to the requirement of confidentiality in cases that are required by statute to be confidential (e.g. juvenile, TPR). If your appendix has transcript pages or documents which include the client's last name (whether in reference to the client or his family member), you must redact the name to conform to the requirements of RULE 809.81(8).

c. Reply brief

There are few requirements for a reply brief. It must contain an argument and a conclusion and, if it cites to any unpublished opinion under RULE 809.23(3)(a) or (b), it must also contain a supplemental appendix including a copy of the opinion.[241]

- Practical tip. Although it is not required, if the opposing party made significant statements of fact that were erroneous or could be construed incorrectly, it may be advisable to include a factual section for the purpose of correcting or clarifying the matter.

Note that while the rule indicates that the reply brief is optional, if you neglect to file one, the court will consider the opposing party's arguments to be conceded.[242]

2. Other technical rules

a. Filing and service of briefs

You must file ten copies of any brief and appendix with the court of appeals.[243] You must also serve three copies on opposing counsel (and, if applicable, any other parties and the GAL).[244] As with all documents, you should send a copy to your client.

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[240] *State v. Bons*, 2007 WI App 124, ¶¶23-25, 301 Wis. 2d 227, 731 N.W.2d 367.
[241] WIS. STAT. RULE 809.19(4).
[242] *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corporation*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).
[243] WIS. STAT. RULE 809.19(8)(a)2. Indigent pro se litigants are permitted to file fewer copies. RULE 809.19(8)(a)3.
[244] WIS. STAT. RULE 809.19(6)(a)2.

Additionally, you must file a copy of the brief in electronic form and you may, if you choose, also file a copy of the appendix in electronic form.[245] The electronic copy must be filed on or before the date that you file the paper copies; however, the date on which the paper copies are filed is the "official" date of filing.[246] The electronic brief must be in text-searchable Portable Document Format (PDF).[247] The electronic appendix, if any, must be filed separate from the brief and must be in PDF but need not be text-searchable.[248] The e-filing process is governed by WIS. STAT. § 801.17.[249] If you are new to e-filing, we highly recommend you visit http://wicourts.gov/ecourts/efileappeals.htm. This website links to the e-filing website and contains a lot of good information about e-filing.

b. Form and length

The brief and appendix[250] must conform to the following:

- Produced such that is contains a clear, black image of the original on white paper, using either a monospaced font (like "Courier New") or a proportional serif font (like "Times New Roman");[251]
- Produced on 8 ½ by 11-inch white paper;[252]
- Formatted with margins and font size as described in RULE 809.19(8)(b)3., which has different specifications depending on whether a monospaced or proportional serif font is used;[253]
- Paginated at the center of the bottom margin;[254]
- Secured only on the left side with heavy strength staples or by means of velobinding or the hot glue binding method.[255]

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[245] WIS. STAT. RULE 809.19(12)(a) & (13)(a). A pro se litigant is not required to comply with this rule. *Id.* An attorney may file a motion seeking relief from the electronic brief rule but such motion must establish good cause for why the attorney is incapable of electronic filing. RULE 809.19(12)(g).
[246] WIS. STAT. RULE 809.19(12)(d) & (13)(d).
[247] WIS. STAT. RULE 809.19(12)(c).
[248] WIS. STAT. RULE 809.19(13)(c).
[249] WIS. STAT. RULE 809.19(12)(b)&(13)(b).
[250] The contents of the appendix – generally court orders and transcripts – generally do not (and need not) comply with the font and margin specifications of WIS. STAT. RULE 809.19(8)(b)3.
[251] WIS. STAT. RULE 809.19(8)(b)1.
[252] WIS. STAT. RULE 809.19(8)(b)2.
[253] WIS. STAT. RULE 809.19(8)(b)3.
[254] WIS. STAT. RULE 809.19(8)(b)4.
[255] WIS. STAT. RULE 809.19(8)(b)4.

The brief and, if bound separately, the appendix must have a front and back cover – colored blue for the opening brief, red for the responsive brief, gray for the reply brief, and white for the appendix (if the appendix is bound separately).[256] The front cover must contain:

- The name of the court (i.e. the Wisconsin Court of Appeals District [__]);
- The caption, including the full name of each party in the circuit court (except as required for confidentiality) and each party's designation in the circuit court (plaintiff/defendant or petitioner/respondent) and each party's designation in the court of appeals (appellant/respondent), and also including the number of the case;
- The court and judge appealed from;
- The title of the document; and
- The name and address (and state bar number) of counsel filing the document.[257]

As to length, if you use a monospaced font (again, like Courier New), the opening brief shall not exceed 50 pages and the reply brief shall not exceed 13 pages.[258] If you use a proportional serif font (again, like Times New Roman), the opening brief shall not exceed 11,000 words and the reply brief shall not exceed 3,000 words.[259] Note that, in determining the length of your brief, you count the statement of the case (including, if separated out, the statement of facts), the argument, and the conclusion.[260] You do *not* count the caption, tables, statement of issues, statement on publication and oral argument, signatures, and certifications.[261] However, if you are counting words, you must include the words in any footnotes.[262]

As noted in the brief content list, above, you must include with your brief a certification that you have complied with these rules.[263]

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[256] WIS. STAT. RULE 809.19(9).
[257] WIS. STAT. RULE 809.19(9).
[258] WIS. STAT. RULE 809.19(8)(c).
[259] WIS. STAT. RULE 809.19(8)(c). A motion to increase the page or word limit for a particular brief is permitted, although this sort of motion is disfavored and often denied. *See* David L. Walther et al., APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 11.31 (5th ed. 2012).
[260] WIS. STAT. RULE 809.19(8)(c).
[261] WIS. STAT. RULE 809.19(8)(c).
[262] WIS. STAT. RULE 809.19(8)(c).
[263] WIS. STAT. RULE 809.19(8)(d).

c. Adding supplemental authorities after briefing

After briefing, if you learn about a new decision that is pertinent to your case, you may advise the court of the decision through a letter directed to the clerk of the court of appeals and served on the other parties.[264] If the relevant decision was by the court of appeals, you should not utilize this procedure unless and until the court enters a publication order for the decision.[265] This letter should provide the court with proper citation to the new authority, including pinpoint citations to specific propositions made in the new authority, and discuss the impact of the new authority on your case.[266]

Of course, opposing counsel may also alert the court to supplemental authority through such a letter.[267] If opposing counsel does so, you may file a response to the letter within eleven days after service of the letter.[268]

d. Citation format

It may be tempting to take a casual attitude toward citation, justifying this attitude by telling yourself that you are focusing on what is more important: writing a good brief. But it is important to remember that accurate and consistent citations are critical elements of a good brief. Proper citations show the source of your arguments and the authority for the court to grant your client relief.

Moreover, on a personal level, this state's appellate courts have been known to castigate and occasionally sanction attorneys for not providing citations, including pinpoint citations, for factual and/or legal propositions.

i. Citing to the record

As noted in Chapter Four, Section IV.a.iii., above, after the clerk of circuit court compiles the court record but before he sends it to the court of appeals, the clerk must compile a record index.[269] In this index, each record item is assigned a number.[270]

In your brief, every sentence containing a factual proposition should generally be followed by a citation to the record. The preferred method of citing to the record is ([record index number]:[page number]). Thus, a sentence referring to a fact found on

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[264] WIS. STAT. RULE 809.19(10).
[265] WIS. STAT. RULE 809.19(10).
[266] WIS. STAT. RULE 809.19(10).
[267] *See* Wis. Stat. RULE 809.19(10).
[268] Wis. Stat. RULE 809.19(11).
[269] Wis. Stat. RULE 809.15(2).
[270] Wis. Stat. RULE 809.15(2).

page 45 of a trial transcript indexed as document number 12 might look like this: "According to Officer Friendly, Mr. Doe was not wearing a blue shirt at the time of the arrest. (12:45)."

If you are citing to a portion of the record that is included in your appendix, you will need to also cite to your appendix page number. Thus, if the relevant portion of the transcript referenced above is found on page 122 of your appendix, your sentence might look like this: "According to Officer Friendly, Mr. Doe was not wearing a blue shirt at the time of the arrest. (12:45; App. 122)."

ii. Citing to legal authority

Supreme Court Rule 80.02 prescribes the manner for citation of published Wisconsin opinions. It provides that any first reference to a published case must include parallel citations to the public domain citation, if any (i.e. if the opinion was published on or after January 1, 2000), the Wisconsin Reports, and the North Western Reporter.[271] Subsequent references (short cites) can cite to any one of these reports, but need not cite to all of them, and should be internally consistent.[272]

Further, each specific reference must include a pinpoint citation to the relevant paragraph if the paragraph number was printed (i.e. if the opinion was published on or after January 1, 2000), or, if the paragraph number was not printed, to the relevant page of the cited reporter.[273]

RULE 809.23(3) limits citation to unpublished Wisconsin (court of appeals) opinions.[274] An unpublished opinion decided prior to July 1, 2009, may not be cited "except to support a claim of claim preclusion, issue preclusion, or law of the case."[275] An unpublished opinion decided on or after July 1, 2009, may be cited as persuasive (but not mandatory) authority if it was "authored by a member of a three-judge panel or by a single judge under s. 752.31(2)."[276] If you cite an authored, unpublished decision issued on or after July 1, 2009, under this rule, you must file and serve a copy of the opinion with the paper in which the opinion is cited.[277] If you cite the unpublished decision in a brief, this copy must appear in the appendix.[278]

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[271] SCR 80.02(1).
[272] WIS. SCR 80.02(2).
[273] WIS. SCR 80.02(3).
[274] Note that WIS. STAT. RULE 809.23(3) does not address citation to unpublished opinions from other jurisdictions.
[275] WIS. STAT. RULE 809.23(3)(a) & (b).
[276] WIS. STAT. RULE 809.23(3)(b).
[277] WIS. STAT. RULE 809.23(3)(c).
[278] WIS. STAT. RULE 809.19(2)(a).

As to other legal authority, the supreme court has adopted the rules laid out in THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION.[279] If you do not already own the most current version of the Bluebook, by all means, buy it now. In addition, the Wisconsin State Bar publishes the WISCONSIN GUIDE TO CITATION, which applies Bluebook rules to commonly cited authorities, including jury instructions and secondary authorities.[280] This book can be helpful as a quick reference.

iii. Writing a persuasive brief

1. Introduction: telling an engaging story

If you have worked as a trial attorney, you probably know that the key to winning over a jury is telling an engaging story. Winning over an appellate judge is not so different. While you could get away with writing a brief mechanically – chronicling the facts, describing the applicable law in boilerplate fashion, then dutifully applying the law to the case – this is not likely to grab a busy judge's attention and is not particularly persuasive.

With appellate storytelling, you are weaving together a factual and a legal story. And you are telling a story of injustice, in which the theme may be something like police or prosecutorial misconduct, defense counsel incompetence, judicial sloppiness or bias, or client ignorance or naiveté.

It helps to begin the writing process by formulating a clear statement that encapsulates your theme in plain English. Imagine that a friend, or your favorite bartender or barista, were to ask: "Why should your client win his appeal?" Your thematic statement could serve as the response to this question. It need not, and indeed should not, be technical. You would not respond to your friend's question by saying: "The circuit court violated a rule requiring it to explain that it was not bound by the parties' plea agreement at the plea hearing." But you might say: "My client's attorney talked him into taking a plea, and the judge accepted his plea, without anyone ever telling him that the judge could sentence him to double what the prosecutor asked for!"

You will not include this statement – or, at least, this precise statement – anywhere in your brief; however, you should use it to guide your writing. You want the final brief to cause a reader to think to himself, "it's not fair that this defendant's attorney talked him into taking a plea, and the judge accepted his plea, without anyone ever telling him that the judge could sentence him to double what the prosecutor asked for!" When you are editing your brief, if you find instead that it projects only a dry, technical message, you may need to do some significant editing.

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[279] State Bar of Wisconsin, WISCONSIN GUIDE TO CITATION iii (6th ed. 2005).
[280] *See generally* State Bar of Wisconsin, WISCONSIN GUIDE TO CITATION (6th ed. 2005).

This is not to say that you can provide shallow legal analysis for the sake of a good story. You cannot. Your (nonfiction) story must be built on a discussion of the facts and law that is scrupulously accurate, precise, and complete. But accuracy is not an excuse for a dry recitation of the facts and completeness should not be achieved through boilerplate. A good appellate story presents significant facts in a meaningful order, discusses the law in a way that is relevant to the case at hand, and seamlessly weaves together facts and law.

2. Tips and strategies – section by section

a. Statement of issues

Many writing instructors teach that the issues section is the most important section of the brief. Many state court of appeals judges claim that it is irrelevant. We presume that the truth lies somewhere in the middle and urge you to take the time to craft well-written issues that introduce readers to your argument before setting out the facts.

Here are a few strategies for crafting good issue statements:

- If an issue (like most) involves the application of law to particular facts, it is often better to state the issue specifically, not generically, in order to set the stage for your factual section.

  Rather than this: "Was the evidence presented at trial insufficient to sustain the jury's verdict?"

  Try this: "Was the evidence presented at trial insufficient to show that John Doe possessed more than five grams of cocaine where the only evidence of weight was a police officer's testimony that he saw Mr. Doe consume white powder that 'looked like about five or six grams?'"

- While it is usually best for each issue to be stated as a single-sentence question, do not be afraid of multiple-sentence issues. A multiple-sentence issue is better than a single-sentence issue that is difficult to follow.

  Rather than this: "Has the defendant established deficient performance under the *Strickland* standard where he has shown that trial counsel neglected to object to prejudicial hearsay suggesting that John Doe had been the only person with access to a locked storage area in an apartment building where the drugs were found and, at the *Machner* hearing, the attorney testified that he

did not believe this was hearsay because it provided context and could not explain what hearsay exception this related to?"

Try this: "A hearsay statement was the only evidence presented at trial indicating that John Doe alone had access to the area of an apartment building where drugs were found. Mr. Doe's trial counsel did not object to this highly prejudicial statement. At the *Machner* hearing, the attorney testified that he thought the statement was admissible because it provided the jury with 'context,' although there is no general hearsay exception for 'context.' Did the attorney's failure to object amount to deficient performance under *Strickland v. Washington* and its progeny?"

- If an issue relies on more than one legal theory, it should probably be broken down into more than one issue.

Rather than this: "When there is no evidence that a police officer received information about John Doe from dispatch that would provide the officer with probable cause that Mr. Doe had committed a crime under the collective knowledge doctrine, does the officer's witnessing of Mr. Doe talking to a drug dealer and reaching into the dealer's car provide the officer with probable cause to arrest him?"

Try this: "Can the collective knowledge doctrine be used to justify an arrest if the collective knowledge was not communicated to the arresting officer?" *and* "John Doe spoke to a man the arresting officer believed was a drug dealer and, in the course of the conversation, reached into the man's car. Without more, did this give the officer probable cause to arrest Mr. Doe?"

- After writing your argument section, carefully re-read your issues statement to ensure that the tone and content are consistent with your argument. If your beautifully-written issues statement doesn't quite match your argument, delete it and start over.

b. Statement of the case/facts

The statement of the case and statement of the facts (whether presented separately or in a single section) are critical. Your factual section(s) will introduce your story and frame your argument.

The first principle of a factual section is that it must be correct, precise, and complete. If it is sloppy, misleading, and/or argumentative, your readers will lose faith in

you and your argument. As such, the following are not so much *tips* for writing about factual material as *rules* that you ignore at your peril:

- Place a record citation after each statement containing a factual proposition, whether or not it contains a quote.

- Make sure that every sentence that states a factual proposition is scrupulously and precisely true. To avoid inadvertent errors, double-check record citations before filing your brief.

- Never make argumentative statements in your factual sections. Do not say: "Even though Mr. Doe had done nothing more than bump his left tires on the median once, the officer pulled him over." Instead, say, "The officer saw Mr. Doe bump his left tires on the median one time, then immediately pulled him over."

- Never omit a fact that is necessary to understanding the nature or procedural posture of the case or relevant to deciding an issue presented on appeal – even if (or especially if) it is harmful. You can (and should) neutralize harmful facts in the context of argument.

Complying with the above four rules will hopefully avoid sanctions related to your factual section. Now here are a few tips for making it more readable:

- Consider whether to keep the procedural and historical facts together or separate them based on what is more readable and helpful. You may want to separate procedural from historical facts if the historical facts form the basis for your issues and the recitation of procedural facts might be distracting.[281] But there are many circumstances where it makes sense to combine them.

- Do not describe everything that happened in the case and note every date of every procedural or historical event. This is tedious and boring and will distract your reader from the truly important events. You need only discuss facts that are necessary to understanding the nature and procedural posture of the case and/or that are relevant to an issue presented on appeal.

- Do not necessarily describe facts in procedural chronological order (e.g. "and then Mr. Doe testified that . . . and then Ms. Doe testified that . . ."). This is rarely engaging. A historical story (e.g. the story of the crime or the police encounter) may best be presented in historical order, rather than witness by witness, noting factual

[281] For instance, if you are litigating a basic suppression issue in a case with a complex procedural history, you will probably want to separate the Statement of the Case (the procedural history) from the Statement of Facts (the evidence presented at the suppression hearing).

disputes as they arise. And there are numerous other possibilities. You may describe facts as they unfolded in an investigation. You may describe facts in order of relevance. You are free to order your facts for maximum readability and clarity so long as your description of the facts remains correct, precise, and complete.

- Think carefully about how to label important people, things, and events. Is your client "John" or "Doe" or "Mr. Doe"? Is the complainant "the victim" or "the complainant" or "the student"? Did your client hold a "weapon" or a "pocket knife"? Did the police officer "pat him down" or "frisk him"? Words matter. Choose words consistent with your theme, and use them consistently.

c. Argument

There is no one way to structure a good argument section and, in fact, if the argument sections of all of your briefs are structured the same, you may want to consider whether your writing has become mechanical. But here are a few tips for making your argument more persuasive:

- Start your argument section with a summary or a road map. Just like a reporter, you do not want to bury your lead. When you are making a logical argument, it often takes many words to tie up the logical threads. By starting your argument section with a brief summary, you will help the reader follow your argument as it unfolds.

- Carefully craft your argument headings so the reader can easily follow your argument. Primary (usually roman numeral) headings should mirror your issues statements. With any complex argument (involving two or more prongs or logical steps), include as many sub-headings as necessary to clearly map out your argument.

- Eliminate excessive boilerplate. When describing the *Strickland* standard, the probable-cause standard, the-constitutional fact standard, or any number of other uncontroversial legal standards that the appellate courts know by heart, you can (and should) reduce your recitation of the standard to just one sentence or two or three. Avoid string cites, unless you have a reason to cite to multiple authorities.

- Acknowledge negative authority. While you may want to save some points for your reply brief, your brief-in-chief should usually note obvious negative authority and provide some explanation of how it is inapplicable, distinguishable, or unimportant.

- Acknowledge, and pay attention to, the standard of review applicable to each claim.

- Refute the circuit court's rejection of your client's claim – and, if applicable, address the circuit court's relevant factual findings – directly and fully. Do not act as if you are arguing on a blank slate.

- It is often better to avoid separating "the law" and "the application of the law" into entirely distinct segments. There are exceptions, but in most circumstances, an argument will develop more naturally, and be more engaging, if it weaves together facts and law.

- Do not only provide the court with the technical legal basis for providing your client relief, even if you believe the legal argument is air tight. It is always beneficial to explain why the error below harmed your client, negatively impacted the administration of justice, and/or set a dangerous precedent for future cases.

3. Resources

If you have the time and ability, we highly recommend you attend the National Legal Aid and Defender Association (NLADA)'s Appellate Defender Training, which usually is held annually.[282] The NLADA's curriculum includes three days of intensive, hands-on brief-writing instruction with a focus on storytelling. The training is not free but it is worth the cost; moreover, the NLADA gives out a limited number of scholarships each year.

The State Bar of Wisconsin's Appellate Practice Section periodically holds a one-day workshop that includes the opportunity to have a jurist or member of the section board read and critique a brief you have written (for a case already decided).[283] This is not a substitute for a more comprehensive training, but it can be a good learning opportunity.

The State Public Defender's Appellate Division holds a three-day appellate skills training program each year that includes some writing instruction, discussion, and critique.[284] This training is not solely focused on brief writing – it also includes instruction on appellate procedure, postconviction practice, and other matters – but it does include some brief-writing instruction.

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[282] The NLADA website is found at http://www.nlada.org/About/About_Home.
[283] The section website is found at http://www.wisbar.org/AM/Template.cfm?Section=Appellate_Practice_Section.
[284] For more information on this program, contact us at the numbers on the cover of this handbook.

As for written materials, our favorite little guide to brief writing (as well as oral argument) is MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, by Antonin Scalia and Bryan A. Garner. It is not as comprehensive as many others, but that is one reason we like it; you can find time to skim it (if not read it cover to cover) between cases. It is vastly more comprehensive than the brief-writing tips provided in this handbook. Of course, there are many other excellent legal writing guides available at most any law library; if you are interested, you can ask a reference librarian to help you find one.

We also recommend that you read briefs frequently, particularly ones written by attorneys you know to be strong writers,[285] read good books in your spare time, and attend writing workshops when possible.

V. Post-COA decision actions

a. Addressing a win in the court of appeals

If you are reading this section because you have won a case in the court of appeals, congratulations! Note that, if the court of appeals denied any portion of the relief requested, you will need to read on, regarding further steps as to the relief not granted.

If you won all of the relief requested, mark your calendar for the thirty-first day after the issuance of the court of appeals decision.

If, by the end of the thirtieth day, your opponent has not filed with the supreme court a petition for review, you will need to ensure that your client actually gets the relief granted. If any significant proceedings must be had in the circuit court (a new trial, a new sentencing hearing, etc.), contact the relevant SPD trial office (a directory is posted on the SPD website) to ask for the appointment of a trial attorney.[286] Once the court of appeals issues a remittitur for the case (returning jurisdiction to the circuit court),[287] you will need to either follow up with the circuit court or satisfy yourself that newly-appointed trial attorney is doing so. Depending on the relief granted, after the circuit

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[285] See the Wisconsin Law Library website, at http://wilawlibrary.gov/search/briefs.html, for links to online brief databases.

[286] As noted in Chapter Four, Section III.d.iii., above, appellate attorneys should not generally represent the client in further trial court proceedings. If the appellate attorney is a private bar attorney and is certified to take the trial case at issue, he or the client may ask the relevant trial office to appoint the appellate attorney to continue with the case. However, the trial office may have a policy that would defeat this request. Furthermore, the attorney should be aware that, if the case ends up on appeal again, the Appellate Division will not appoint an attorney to handle the appeal who represented the client at the trial level in the same matter.

[287] The remittitur should be issued on the thirty-first day after the court of appeals issues its decision "or as soon thereafter as practical." WIS. STAT. RULE 809.26(1).

court acts, you may need to additionally follow up with the Department of Corrections or some other entity, as discussed in Chapter Four, Section III.d.iii., above.

If the opposing party does file a petition for review, you will need to consider whether to file a response under WIS. STAT. RULE 809.62(3). The response, which would need to be filed within fourteen days after service of the petition, could address any of the following:

- Reasons for denying the petition,
- Defects that may prevent ruling on the merits of any issue in the petition,
- Material misstatements of fact or law in the petition,
- Alternative grounds supporting the result of the court of appeals' decision or a result *less* favorable to the petitioner, and/or
- Any other issues the supreme court would need to decide if it were to grant the petition.[288]

This response would have the same form, length, and filing requirements as a petition for review, discussed in Chapter Four, Section V.b.iv., below.[289] If the supreme court ultimately grants the opposing party's petition for review, see Chapter Four, Section IV, below, for further discussion.

b. Addressing a loss in the court of appeals

i. Overview

As noted in Chapter One, Section I.c.i., above, your SPD appointment continues through the filing of a petition for review or through supreme court review unless, at some earlier point, you win the case, a court permits you to withdraw from the case or your client knowingly and voluntarily asks you to close his file without action.

In the unusual case where you have litigated an arguably meritorious appeal to the court of appeals but later determine that any motion for reconsideration or petition for review would be frivolous, a situation described in Chapter Five, Section VI., below, you should discuss with your client the no-merit petition for review procedure outlined in that section.

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[288] WIS. STAT. RULE 809.62(3). As to the last matter, the response should address whether and how the other issues were raised in the court of appeals, and whether and how that court decided the issues. *Id.*

[289] WIS. STAT. RULE 809.62(4).

Otherwise, after a court of appeals loss, you will need to file a motion for reconsideration and/or a petition for review.

ii. Motion for reconsideration v. petition for review

If the court of appeals denies your client any portion of the requested relief, the first thing you must consider is whether the best course of action is a motion for reconsideration directed to the court of appeals or a petition for review directed to the state supreme court. This is a strategic decision for you, the attorney, rather than the client.

Generally, you can presume that a petition for review is the best course of action. If the court of appeals correctly stated the facts and the applicable law, even if – in your opinion – that court got the analysis and/or the result dead wrong, a motion for reconsideration would be pointless. A motion for reconsideration is not an opportunity to reargue points that you made in your brief or make new arguments. It is not a "rebuttal" argument.

On the other hand, if the court of appeals misstated a critical fact or misinterpreted an important legal authority not open to such interpretation, a motion for reconsideration may be a good idea. The state supreme court takes cases that will have statewide impact; it generally does not take cases simply because the court of appeals made a factual or logical error.

Note that you may not file a motion for reconsideration in a TPR appeal.[290]

[290] WIS. STAT. RULE 809.24(4).

iii. Moving the court of appeals for reconsideration

1. Applicable deadline

In a RULE 809.30 appeal, from the date of the court of appeals decision, you have twenty (20) days to file a motion for reconsideration.[291] *This deadline may not be extended.*[292]

In a TPR appeal, you may not file a motion for reconsideration.[293]

2. Discussion

If you have determined that the best course of action is a motion for reconsideration directed to the court of appeals, WIS. STAT. RULE 809.24 governs your motion. By the deadline noted above, you must file a motion that may not exceed five pages if a monospaced font (like Courier New) is used or 1,100 words if a proportional serif font (like Times New Roman) is used.[294] The motion "must state with particularity the points of law or fact alleged to be erroneously decided in the decision and must include supporting argument."[295]

Where there has been a motion for reconsideration, no party may file with the supreme court a petition for review until the motion for reconsideration has been resolved.[296] As outlined below, where there has been a motion for reconsideration, the deadline for filing a petition for review begins to run from the date that the motion is denied or, if granted, from the date that the court of appeals issues an amended decision.[297]

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[291] WIS. STAT. RULE 809.24(1).
[292] WIS. STAT. RULE 809.82(2)(e).
[293] WIS. STAT. RULE 809.24(4).
[294] WIS. STAT. RULE 809.24(1).
[295] WIS. STAT. RULE 809.24(1).
[296] WIS. STAT. RULE 809.62(1m)(b). This section also describes how the court and the parties deal with a petition for review that was filed prior to the filing of a motion for reconsideration. RULE 809.62(1m)(c)-(e).
[297] WIS. STAT. § 808.10(2).

iv. Petitioning the supreme court for review

1. Technical matters

a. Applicable deadline

From the date of the court of appeals decision, the petitioner has thirty (30) days to file the petition for review.[298]

If a motion for reconsideration was timely filed in the court of appeals and denied, from the denial of the motion, the petitioner has thirty (30) days to file the petition.[299] If a motion for reconsideration was timely filed and granted, from the date an amended decision is issued, the petitioner has thirty (30) days to file the petition.[300]

The petition for review deadline is not extendable and there is no mailbox rule or filing by fax; the petition must be physically filed in the supreme court clerk's office by 5:00 p.m. on the date it is due.[301]

In the unfortunate event that you miss the petition deadline, you must contact the SPD Appellate Division for the possible filing of a writ of habeas corpus.[302] If the court grants the writ, you will then be responsible for filing the petition and you may be responsible for litigating the case in the supreme court if the petition is granted.

b. Required contents

Pursuant to statute, the petition must contain:

- A table of contents;[303]
- A statement of the issues presented for review and how the court of appeals decided each issue;[304]

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[298] WIS. STAT. § 808.10(1).
[299] WIS. STAT. § 808.10(2).
[300] WIS. STAT. § 808.10(2).
[301] *State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶12, 247 Wis. 2d 1013, 1020. In an emergency, the court may accept a timely filed non-conforming petition (e.g. a letter or basic, but incomplete, petition) and permit you to later supplement the non-conforming petition with one that fully complies with the rules.
[302] *See State ex re. Schmelzer v. Murphy*, 201 Wis. 2d 246, 548 N.W.2d 35 (1996).
[303] WIS. STAT. RULE 809.62(2)(b). Although, unlike with a brief, the statutory section does not specify the need for page references for each section of the brief, including headings of each argument subsection, the table should include it. *Id.*

- A statement of the statutory criteria for granting review, discussed in Chapter Four, Section V.b.iv.2.a., below, or other substantial and compelling reasons for review;[305]

- A statement of the case, including a description of the nature of the case; the procedural history of the case, including the disposition of the trial court and the court of appeals; and a statement of facts not included in the court of appeals' opinion that are relevant to the issues presented, including appropriate citations to the record;[306]

- An argument amplifying the reasons relied on to support the petition, arranged in the order of the statement of issues;[307]

- An appendix containing, in the following order:

    - The decision and opinion of the court of appeals;

    - The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition;

    - Any other portions of the record necessary for an understanding of the petition; and

    - A copy of any unpublished opinion cited under RULE 809.23(3)(a) or (b).[308]

- A signed certification that the petition conforms to the formatting rules contained in RULE 809.19(8)(b), in the form described in RULE 809.19(8)(d).[309]

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[304] WIS. STAT. RULE 809.62(2)(a). Note that, if the supreme court takes the case, it ordinarily will not decide any issue not presented in this statement of issues. *Id.*
[305] WIS. STAT. RULE 809.62(2)(c).
[306] WIS. STAT. RULE 809.62(2)(d).
[307] WIS. STAT. RULE 809.62(2)(e). Note that any argument not raised in the petition may be deemed waived. *Id.*
[308] WIS. STAT. RULE 809.62(2)(f).
[309] WIS. STAT. RULE 809.62(4).

c. Filing and service

You must file ten copies of the petition and appendix with the supreme court.[310] You must also serve copies on opposing counsel (including, if applicable, any other parties and/or the GAL) and your client.[311]

As with briefs, you must file a copy of the petition in electronic form and you may, if you choose, also file a copy of the appendix in electronic form.[312] The rules governing e-filing of a petition are identical to those governing e-filing of a brief, which are discussed in Chapter Four, Section IV.b.ii.2.b., above.

d. Form and length

The rules governing the form of the petition and appendix are identical to those applicable to briefs, which are found at RULE 809.19(8)(b) and described in Chapter Four, Section IV.b.ii.2.b., above.[313] The petition and, if bound separately, the appendix, must have a front and back cover containing the caption, as described in RULE 809.19(9); unlike a brief, the covers should be white.[314]

As to length, if you use a monospaced font (like Courier New), the petition may not exceed 35 pages.[315] If you use a proportional serif font (like Times New Roman), the petition may not exceed 8,000 words.[316]

As noted in the petition content list, you must include with your petition a certification that you have complied with Rule 809.19(8)(b).[317]

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[310] WIS. STAT. RULE 809.62(4)(a).
[311] *See* WIS. STAT. RULE 809.62(4)(a).
[312] WIS. STAT. RULE 809.62(4)(b). A pro se litigant is not required to comply with this rule. *Id.* An attorney may file a motion seeking relief from the electronic brief rule but such motion must establish good cause for why the attorney is incapable of electronic filing. RULE 809.19(12)(g).
[313] WIS. STAT. RULE 809.62(4)(a).
[314] WIS. STAT. RULE 809.62(4)(a).
[315] WIS. STAT. RULE 809.62(4)(a).
[316] WIS. STAT. RULE 809.62(4)(a).
[317] WIS. STAT. RULE 809.19(8)(d).

2. Writing a persuasive petition

a. Statement of reasons for review

A critical but sometimes mechanically stated section of a petition for review is the statement of reasons for review, which is generally titled something like "Criteria for Review" or "Reasons for Granting Review."[318] This section should concisely place your client's legal issues in a broader legal context so the supreme court can quickly and clearly see that the case is worth their time and set the tone for your argument.

RULE 809.62(1r) lists five "criteria" for review – situations that can show that a case is appropriate for supreme court review. These criteria are:

- A real and significant question of federal or state constitutional law is presented.[319]
- The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.[320]
- A decision by the supreme court will help develop clarify or harmonize the law, *and*
    - The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation, or
    - The question presented is a novel one, the resolution of which will have statewide impact, or
    - The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.[321]
- The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the state supreme court or other court of appeals' decisions.[322]

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[318] *See* WIS. STAT. RULE 809.62(2)(c).
[319] WIS. STAT. RULE 809.62(1r)(a).
[320] WIS. STAT. RULE 809.62(1r)(b).
[321] WIS. STAT. RULE 809.62(1r)(c).
[322] WIS. STAT. RULE 809.62(1r)(d).

- The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.[323]

Before starting to write a petition for review, try to explain to someone (e.g., your assistant, your spouse, the mirror) in a few sentences why the supreme court should want to decide your case as a matter of discretion. Ideally, this brief explanation should evoke one of the criteria listed in RULE 809.62(1r), although it need not cite to it directly. This explanation, once reduced to a well-written sentence, can open your statement on reasons for review.

Here are a couple of examples (not taken from real cases):

- "The court of appeals' published decision in this case suggests that a defendant must prove that the sentencing court's reliance on inaccurate information was harmless, in conflict with *State v. Tiepelman*.[324] Unless this court reverses and clarifies the applicable law, trial courts will be left without clear guidance on how to resolve this fairly common sort of postconviction matter."

- "The court of appeals' decision to dismiss John Doe's appeal as moot left unresolved a legal question regarding the timeline for holding an emergency detention hearing that is likely to recur over and over again, yet always evading review. By granting review, this court can resolve the matter, clarifying the law for county departments and circuit courts and protecting the fundamental liberty interests of citizens subject to Chapter 51 proceedings."

If none of your issues fit within the criteria listed in RULE 809.62(1r), that does not necessarily mean that there is no arguable basis for a petition. The (1r) criteria are not exclusive; you may argue other reasons that a case presents "substantial and compelling reasons for review."[325] You should aim for something other than "the court of appeals was wrong."

Here are a couple of examples (again, not taken from real cases):

- "While the restitution question presented here is fact-specific, it is likely to recur in cases, like the present one, involving unusually high restitution awards; thus, this court's guidance would prevent similarly serious, and unlawful, deprivations of property."

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[323] WIS. STAT. RULE 809.62(1r)(e).
[324] 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1.
[325] WIS. STAT. RULE 809.62(2)(c).

- "This court has not decided a competency question in a criminal case in more than a decade. The lower courts' misapplication of what should have been considered well-settled law demonstrates the need for this court to reaffirm core principles and this case presents a perfect opportunity to do so."

After providing the supreme court with this sort of short, concise explanation why it should review your case, the statement of reasons for review should summarize the facts essential to understanding the reason for review and flesh out the primary authorities supporting your explanation. Remember, while the statement of reasons for review may be the most important section of a petition, it should be short and sweet – usually no more than a couple of pages – or you will lose your readers. You can provide the court with detail in the argument section.

b. Statement of the case

In large part, your statement of the case (and, if included, the statement of facts) can be lifted from your court of appeals brief-in-chief. However, you must include a description of the court of appeals' disposition of the case. In addition, if the court of appeals ignored or minimized a factual matter that you consider critically important, you may want to revise the statement in order to emphasize (or just improve your description of) the matter.

c. Argument

Your argument can use or revise much or all of the argument that you presented to the court of appeals. However, you will need to add additional argument addressing the court of appeals' decision and you will want to weave your reasons supporting discretionary review into the argument.

VI. Litigating an appeal accepted by the supreme court

Any time the supreme court accepts review of an SPD-appointed case, you should immediately notify the Appellate Division. If you are a private bar attorney, the Appellate Division has discretion to re-appoint the case to another attorney depending on your experience and workload, as well as your desire to litigate the case in the supreme court.

If you litigate a case in the supreme court, the court sets the briefing schedule in its order granting review. This schedule is generally shorter than the one in the court of

appeals. The rules regarding motions and briefs are the same as in the court of appeals (and are governed by the same statutory sections), as discussed in Chapter Four, Section IV.b.ii., with a couple of exceptions. First, you must file with the court twenty-two, not ten, copies of your brief(s).[326] Second, you must add a "petitioner" party designation to the caption.[327]

Note that you are strongly urged to file your brief(s) by the court's imposed deadline and not request any extensions. The supreme court disfavors extensions and does not grant them as freely as does the court of appeals.

The biggest difference between litigating in the court of appeals and the supreme court is usually the oral argument. Oral argument is very rarely held in the court of appeals but always held in the supreme court. The same book we recommended in Section IV.b.iii.3., above, regarding brief-writing, is also helpful for preparing for oral argument: MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, by Antonin Scalia and Bryan A. Garner. We also recommend attending several oral arguments in the months or weeks leading up to your argument, to get a feel for the room, the justices, and the procedure. If you cannot make it to Madison, at a minimum, you can watch oral arguments on the Wisconsin Eye online channel.[328] Finally, put together a panel of other attorneys for a moot court or brainstorming session. If you are looking for volunteers, feel free to contact the Appellate Division.

[326] WIS. STAT. RULE 809.19(8)(a)1.
[327] WIS. STAT. RULE 809.19(9).
[328] Archived oral arguments are found at http://www.wiseye.org/Programming/VideoArchive.aspx. Wisconsin Eye also airs oral arguments live on its homepage, at http://www.wiseye.org/. To see a schedule of upcoming oral arguments, check out the supreme court calendar on On Point, at http://www.wisconsinappeals.net/.

VII. Appendix to Chapter Four

a. Criminal Appeals Under RULES 809.30 & 809.32: A Procedural Guide in Checklist Form

b. Court Form – Order to Produce/Transport (GF-190)

c. Form – Admission of Service

d. Form – Proposed Order Determining Post-Judgment Motion

e. Form – Notice of Appeal (RULE 809.30)

f. Form – Notice of Appeal (TPR)

g. Form – Statement on Transcript (RULE 809.30 or TPR)

h. SPD Form – Request for Transcripts

i. Form – Certification by Court Reporter

j. Form – Motion to Remand to the Circuit Court for Fact Finding (TPR)

CRIMINAL APPEALS UNDER RULES 809.30 & 809.32[1]
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 add a time log;
- ☐ Calculate the first deadline and enter the case and deadline into your 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 case-management system.

c. Throughout this period:

- ➢ As you receive each transcript and 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.

[1] 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. <u>Within 60 days</u> 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 your 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, be sure to 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.

  [Note: The best practice is to maintain an honest and professional relationship with the trial attorney, both as a matter of courtesy and to encourage him to be forthcoming with you and to discourage him from (improperly) aligning himself with the prosecutor.]

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 a 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 it would be appropriate to negotiate with the prosecutor for some sort of stipulated relief; 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 fact witness, prepare your witness(es) for testifying; and/or, if you think the prosecutor will be calling any fact witness, contact the state's 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 your questioning of a witness – 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
- ☐ Hold the case open until it is clear the state will not appeal; at that point, close your case 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 appropriate order or amended judgment to the relevant 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.

  [Note: If further communication proves difficult or impossible, unless there are new risks to further appeal that you have not previously discussed, you may presume that your client intends to continue with 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 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 further 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 your file and, if applicable, submit billing information to the SPD.

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 court of appeals; 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 or she 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 need to cite is not listed or not complete, promptly contact the clerk of circuit court so that he or she can complete the record and correct the index prior to transmitting the record to the court of appeals.

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 with the court of appeals within 20 days of the decision. In that event, the petition for review would be due within 30 days of the court of appeals' order denying reconsideration or issuing an amended decision.

- ➢ If your client has decided *not* to further 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 your file and, if applicable, submit billing information to the SPD.

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 your case file and, if applicable, submit billing information to the SPD.

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 your case file and, if applicable, submit billing information to the SPD.

VI. FROM COMPLETION OF 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 your case file and, if applicable, submit billing information to the SPD.

c. *If your client tells you that he has decided to proceed pro se or with the help of retained counsel:*

i. <u>Within 60 days</u> 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 unnecessarily divulging confidential information, such as 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 your case file and, if applicable, submit billing information to the SPD.

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 (at any point in this process), 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 the circuit court's 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 no-merit report, filing them by the merit deadline (or as close to that date as possible) is the better practice because it permits the circuit court to transmit the record to the court of appeals so that you can properly cite to the record.]

- Within 180 days of receipt of the last transcript or the court record or 60 days after the circuit court's 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 your case file and, if applicable, submit billing information to the SPD.

- *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.

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

For Official Use

Caption:

_____
Name

_____
Date of Birth

Order to:

☐ **Produce**
☐ **Transport**

Case No. _____

THE COURT FINDS:

1. The above entitled action is scheduled for a hearing and the above named person, ☐ or (name and date of birth) _____ is currently being held at _____, and must be transported for said hearing.

☐ 2. The person subject to this order has allegations or convictions for:

Charge(s)	**Wis. Statute(s) Violated**

THE COURT ORDERS:

☐ 1a. The warden/superintendent with physical custody of the person subject to this order at the time of its execution shall make that person available to the sheriff of _____ County. The sheriff shall convey that person to _____ for proceedings in Branch _____ of the Circuit Court of _____ County on _____ 20_____ at _____ ☐ a.m. ☐ p.m.

☐ 1b. The sheriff shall transport the person subject to this order from _____

To: _____

_____

_____

☐ 2. Special transport needed: _____

IT IS FURTHER ORDERED, at the conclusion of the hearing/proceeding/appointment/event, the sheriff shall either:

1. Return the person subject to this order to the institution/center of pick-up, **OR**
2. Release the person subject to this order if the institution from which has been conveyed no longer may confine him, **OR**
3. Other: (Will follow order of the court) _____

BY THE COURT:

_____
Circuit Court Judge/Court Commissioner

_____
Name Printed or Typed

_____
Date

GF-190, 01/08 Order to Produce/Transport §§59.27, 59.29, and 757.01, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. _____

_____,

Defendant

ADMISSION OF SERVICE

I admit service of a subpoena requiring my appearance at a hearing in the above-captioned case to be held at the _____ County Circuit Court, located at *[address of court]*, on _____, 20____, at *(a.m.) (p.m.)*.

Dated this ____ day of _____, 20___.

_____

[Name of witness]
[If applicable, professional title of witness]

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. _____

_____,

Defendant

ORDER

For the reasons stated on the record at the hearing held on _____, 20___, it is ordered that the defendant's motion for *(postconviction) (postdisposition)* relief is hereby *(GRANTED) (DENIED)*.

[*If the motion is granted, include an additional statement of the relief to be provided to your client. For example: "It is further ordered that the defendant's judgment of conviction is hereby vacated."*]

Dated this ___ day of _____, 20___.

BY THE COURT:

_____
[Full name of judge]
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

_____,

(Plaintiff) (Petitioner),

v. Case No. _____

_____,

(Defendant) (Respondent).

NOTICE OF APPEAL

TO: *[Name of Clerk of Circuit Court]*
Clerk of Circuit Court
[Address of clerk]

[Name of opposing counsel]
[Title of opposing counsel]
[Address of opposing counsel]

NOTICE IS HEREBY GIVEN that the *(defendant) (respondent)* in the above-captioned case appeals to the Court of Appeals, District ___, from the final *(judgment) (order)* entered on _____, 20___, in the Circuit Court for _____ County, the Honorable _____, presiding, in which *[describe the judgment or order, e.g. "the defendant was convicted of . . ."]*. *[If applicable, add: The* (defendant) (respondent) *also appeals from the order denying* (postconviction) (postdisposition) *relief entered on _____, 20___.]*

This *(is) (is not)* an appeal within Wis. Stat. § 752.31(2).

This *(is) (is not)* an appeal to be given preference pursuant to statute.

[State one *of the following:*

- *The* (final transcript) (court record) *was served on the undersigned on _____, 20___.*
- *The order determining* (postconviction) (postdisposition) *relief was entered on _____, 20___.*
- *By order of _____, 20___, the court of appeals set the deadline of _____, 20___, for filing the notice of appeal.]*

Dated this ___ day of _____, 20___.

_____
[Attorney's name]
State Bar No. _____

[Attorney's address]
[Attorney's phone number]

cc: Diane M. Fremgen
Clerk of Court of Appeals
[If a felony criminal case, Wisconsin Attorney General]

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

In re the Termination of Parental Rights to _____, a Person Under the Age of 18:

_____,

Petitioner,

v. Case No. _____

_____,

Respondent.

NOTICE OF APPEAL

TO: *[Name of Clerk of Circuit Court]*
Clerk of Circuit Court
[Address of clerk]

[Name of Guardian ad Litem]
Guardian ad Litem
[Address of Guardian ad Litem]

[Name of opposing counsel]
[Title of opposing counsel]
[Address of opposing counsel]

Diane M. Fremgen
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

NOTICE IS HEREBY GIVEN that the respondent in the above-captioned case appeals to the Court of Appeals, District ___, from the final dispositional order terminating *(his) (her)* parental rights, which was entered on _____, 20___, in the Circuit Court for _____ County, the Honorable _____, presiding.

This is an appeal within Wis. Stat. § 752.31(2).

This is an appeal to be given preference pursuant to statute.

[State one *of the following:*

- *The* (final transcript) (court record) *was served on the undersigned on _____, 20___.*
- *By order of _____, 20___, the court of appeals set the deadline of _____, 20___, for filing the notice of appeal.]*

Dated this ___ day of _____, 20___.

_____
[Attorney's name]
State Bar No. _____

[Attorney's address]
[Attorney's phone number

cc: *[If applicable, the name of the other parent or the attorney for the other parent.]*

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT ____

_____,
(Plaintiff) (Petitioner)-Respondent,

v. _____ County
Case No. _____

_____,
(Defendant) (Respondent)-Appellant.

STATEMENT ON TRANSCRIPT

TO:	Diane M. Fremgen Clerk of Court of Appeals P.O. Box 1688 Madison, WI 53701-1688	*[Name of Clerk of Circuit Court]* Clerk of Circuit Court *[Address of clerk]*
	[Name of opposing counsel] *[Title of opposing counsel]* *[Address of opposing counsel]*	*[If applicable, name of add'l party]* *[Title of add'l party]* *[Address of add'l party]*

Pursuant to Wis. Stat. Rule 809.11(4)(a), the following transcripts which the appellant believes are necessary for prosecution of this appeal are already on file with the clerk of the circuit court:

Date of Proceeding	Type of Proceeding
[Use as many lines as necessary in this area]	

[If applicable, add: "Additionally, a transcript of the (postconviction) (postdisposition) *hearing, held on _____, 20___, has been ordered, as certified by the court reporter (see attached)."]*

Pursuant to Rule 809.11(4)(b), arrangements have been made with the court reporters for service of transcript copies on opposing counsel. The State Public Defender is responsible for transcript costs, pursuant to Wis. Stat. § 967.06.

Dated this ___ day of _____, 20___.

_____
[Attorney's name]
State Bar No. _____

[Attorney's address]
[Attorney's phone number]

STATE PUBLIC DEFENDER
REQUEST FOR TRANSCRIPTS OF IN-COURT PROCEEDINGS

Case Caption: _____

Court Reporter:
Name: _____ Court Case #: __ __-__ __-__ __ __ __ __
Street Address: _____
City, State, Zip: _____ SPD Case #: __ __ __-__ __-__-__ __ __ __ __ __
Phone: _____

Send transcripts to:
☐ Requesting counsel
☐ Opposing counsel

Requesting Counsel:
☐ SPD Staff ☐ Private Bar
Name: _____
Street Address: _____
City, State, Zip: _____
Phone: _____

Case type:
☐ Pending circuit court case
☐ Appellate case

Opposing Counsel:
Name: _____
Street Address: _____
City, State, Zip: _____
Phone: _____

I request that you prepare and transmit transcripts of the following proceedings (provide dates of proceedings requested).

Signed: _____ Date: _____

To the court reporter: Pursuant to s. 967.06, Stats., the named attorney requests that you prepare the transcript(s) of the proceeding(s) indicated above, provide a copy to the attorney, and file the original in the court record. Any filing of the original constitutes certification that you have already served the requesting attorney with a copy. s. 801.14(4). If the original transcript was previously prepared, please consider this to be a request for a copy. S. 967.06 has been amended to provide that the State Public Defender will pay for the original and the client's counsel's copy in all cases where the State Public Defender has appointed counsel. Any mailing or delivery fee over $5 requires a receipt be attached to the transcript invoice.

Effective May 1, 2003 – Transcript invoices must be submitted as follows:

Requests for transcripts in pending circuit court cases: For pending trial cases, court reporters must send invoices for both staff and private bar attorneys to the local SPD office that appointed the attorney who ordered the transcript. Reporters must send or hand - deliver the invoices to the applicable SPD office. Do not give the invoice to the individual attorneys.

Requests for transcripts in appellate cases: For appellate cases assigned to SPD staff attorneys, the reporters must send the transcripts with the invoice to the SPD attorney's office. For appellate cases assigned to the private bar, court reporters must send the transcripts to the private bar attorney indicated on the request. Private bar attorney invoices must be sent to the SPD Administration Office, PO Box 7923, Madison, WI 53707-7923.

Addresses for all SPD offices are available under "Agency Directory" at www.wisspd.org

---

I certify that the attached invoice requests payment for the transcripts requested and no others, and that the transcript complies with SCR 71.04 (8).

Signed: _____ Date: _____
Court Reporter

The original request form must accompany your invoice.

FIS201-Tri (5/06/2013) For SPD use only OK to Pay: Sign: _____ Date: _____

CERTIFICATION BY COURT REPORTER

Re: _____ v. _____

_____ County Case No. _____

I certify that the appellant, by letter dated _____, 20___, made satisfactory arrangements with me for the preparation of a transcript of the *(postconviction) (postdisposition)* proceedings, and that, pursuant to Wis. Stat. § 809.30(2)(g)2., the original transcript will be filed with the clerk of the trial court and copies of the transcript will be served upon the appellant and opposing counsel within 20 days.

Dated this ___ day of _____, 20___.

_____
[Name]
Circuit Court Reporter-Branch ___
_____ County Courthouse
[Address]

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT ___

Appeal No. _____

In re the Termination of Parental Rights to _____,
a Person Under the Age of 18:

_____,

Petitioner-Respondent,

v.

_____

Respondent-Appellant,

MOTION TO REMAND THIS CASE TO THE CIRCUIT COURT FOR POSTDISPOSITION FACT FINDING

The appellant, _____, by undersigned counsel, moves this court for an order retaining jurisdiction over this appeal and remanding the case to the circuit court for fact finding pursuant to Wis. Stat. § 809.107(6)(am). The grounds for this motion are as follows:

1. On _____, 20___, after a *(jury trial) (plea of no contest to the grounds for termination) (admission to the grounds for termination)*, the circuit court terminated _____'s parental rights to her child, _____. _____ filed a timely notice of intent to pursue postdisposition relief and a timely notice of appeal. The circuit court filed

the court record with the court of appeals on _____, 20___; thus, this motion for remand is timely under § 809.107(6)(am).

2. Undersigned counsel has identified meritorious issues for appeal that first require fact finding in the circuit court.

> *[Here,* either *provide a detailed summary of the claims that you propose to raise in a postdisposition motion to the circuit court and describe the fact finding necessary for the circuit court to resolve those claims – in as many paragraphs as appropriate –* or *refer the court to a thorough proposed postdisposition motion that is attached to this motion.]*

FOR ALL OF THESE REASONS, _____, by undersigned counsel, respectfully asks this court to enter an order in accordance with § 809.107(6)(am) retaining jurisdiction of this appeal and remanding the case to the circuit court to hear and decide the issues *(set forth above) (described in the attached proposed postdisposition motion)*.

Dated this ___ day of _____, 20___.

Respectfully submitted,

_____
[Attorney's name]
State Bar No. _____

[Attorney's address]
[Attorney's phone number]

cc: *[Opposing counsel]*
[Guardian ad litem]
[If applicable, other parent or other parent's attorney]
[Clerk of Circuit Court]
[Client]

CHAPTER FIVE
REPRESENTATION IN A NO-MERIT CASE

I. Introduction

If your review of the record, conversations with your client and factual and legal inquiries reveal no issues of arguable merit for appeal, you are presented with what this handbook calls a "no-merit case." In a no-merit case, your responsibilities – the conversations that you must have with your client and the actions that you must take – are prescribed by statutory and case law. If you have not already carefully read WIS. STAT. RULE 809.32, you should do so now.

Note that it is impossible to reach a no-merit conclusion simply based upon your review of the transcripts and court record. As a practical matter, because appeals in Wisconsin can involve matters outside the record or can challenge matters of record that the client did not know or understand, you can never conclude that a case is meritless until you have fully discussed with your client all aspects of his case. And as a technical matter, the no-merit statute requires that "the attorney shall discuss" with the client "all potential issues identified by the attorney and the person, and the merit of an appeal on these issues."[329] The statute requires a discussion, not a written exchange, and when filing a no-merit report you must certify to the court that you have had this discussion.[330]

II. Client consultation and counseling regarding no-merit options

After you determine that a case does not present any arguably meritorious issues for appeal, you must give your client a detailed explanation of his no-merit options, as required by RULE 809.32. You must first explain that your client has three options: (1) ask you to close his case without further action, waiving his right to direct appeal; (2) ask you to withdraw from the case so he can appeal pro se or with the help of retained counsel; or (3) proceed with filing a no-merit report with the court of appeals.[331]

You must explain that filing a no-merit report is the default action.[332] In other words, if your client does not choose an option, you are statutorily required to file a no-merit report.[333]

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[329] WIS. STAT. RULE 809.32(1)(b)1.
[330] WIS. STAT. RULE 809.32(1)(b)2.
[331] WIS. STAT. RULE 809.32(1)(b)1. In explaining this, although the statute presents these as "three" options, you may choose to discuss with your client "four" options – so that you can clearly distinguish between your client's right to proceed pro se and his right to proceed with retained counsel. *Id.*
[332] WIS. STAT. RULE 809.32(1)(b)2.
[333] WIS. STAT. RULE 809.32(1)(b)2.

You should inform your client that, if he chooses (actively or by default) a no-merit report, upon his request, you will send him a copy of the court record and transcripts within five days of receipt of his request.[334] If he chooses either of the other options, upon his request, you will send him a these materials as soon as you have closed the case, if not before.[335]

You must further explain the basics of the process applicable to no-merit reports, in order to help your client decide if he would like a no-merit report. Specifically, you must explain that after you file the no-merit report, the client will have the opportunity to file a response to that report.[336] If a response is filed, you "may file a supplemental no-merit report and affidavit or affidavits containing facts outside the record, possibly including confidential information, to rebut allegations made in the [client's] response to the no-merit report."[337]

You should inform your client that the court will review the no-merit report, as well as any response filed by the client, any supplemental no merit report that you file, and the record and transcripts. If the court agrees with your no-merit conclusion, the court will affirm the judgment. If the court disagrees with your no-merit conclusion, it will reject the report and order further action or proceedings.

In the process of explaining these statutorily-mandated points, you should describe how each of the options would operate and the risks and benefits of each. Although these options may seem fairly straightforward to you, they can be confusing to clients, who often need help understanding the difficulties of proceeding pro se, the unusual nature of the attorney-client relationship in a no-merit appeal, and/or the effect of waiving the right to appeal.

The explanation of the mechanics of the no-merit process can be done in writing,[338] and it is advisable to put it in writing, but you should always discuss the client's no-merit options orally as well in order to answer his questions and dispel any misconceptions.

If, after presenting your client with his no-merit options, your client declines to have you file a no-merit report, it is important that you send the client a letter confirming his decision. This will help you avoid any misunderstanding and will provide documentation if later there is a disagreement about what decision your client made.

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[334] WIS. STAT. RULE 809.32(1)(b)2. You should generally make and send a copy, rather than the original, because you will need your copy for drafting the report and/or supplemental report, or for taking action if the no-merit report is rejected. Private bar attorneys will be reimbursed for copy and postage costs.

[335] WIS. STAT. RULE 809.32(1)(b)2.

[336] WIS. STAT. RULE 809.32(1)(b)2. It is advisable to explain to your client that his response need not be formal; indeed, usually it is filed in the form of a letter.

[337] WIS. STAT. RULE 809.32(1)(b)2. It is advisable to explain to your client when and why a supplemental no-merit report containing confidential information might need to be filed. These matters are discussed in Chapter Five, Section V.d.iv., below.

[338] *State ex rel. Flores v. State*, 183 Wis. 2d 587, 614, 516 N.W.2d 362 (1994).

III. Closing the case without action

a. Applicable deadline

There is no specific deadline in regard to closing a case without court action; the client can choose to do this any time. Even if some court action has previously been taken, your client can choose to end the appeal.[339]

However, you should always ascertain your client's decision regarding moving forward with, or closing, his appeal while the appeal deadlines are still running. You should never let a deadline lapse under the assumption that your client will probably choose to close the case and, if not, you can revive the case by filing an extension motion. Any time an extension motion is warranted, the motion should be filed before the deadline that is to be extended has lapsed, as discussed in Chapter One, Section IV., above.

b. Discussion

A client's decision to close the case without appellate action will have the effect of waiving his right to a direct appeal. This is a significant waiver and must be one your client makes knowingly and intelligently.[340] Yet there are sound reasons for a client to choose this option, particularly if he trusts your opinion that there is no non-frivolous issue that could be raised on appeal.

If your client chooses this option, you should send him a closing letter describing his decision to not appeal, the conversation(s) that led to his decision, and the fact that you are closing your client's case at his direction.[341] An example of such a closing letter is included in the appendix to this chapter. In a RULE 809.30 case, there is no need to file any document with a court or take any other action. In a TPR case, you are required to inform the circuit court of your client's decision not to proceed with an appeal.[342]

If your client authorizes you to close his case without court action, because a client may change his mind, as a practical matter you should wait until his appeal deadlines lapse before you formally close the case and, if you are a private bar attorney, submit billing information to the SPD.

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[339] Where the case is in the court of appeals, your client would terminate his appeal by having you file a Notice of Voluntary Dismissal. *See* WIS. STAT. RULE 809.18.
[340] *State ex rel. Flores v. State*, 183 Wis. 2d 587, 617, 516 N.W.2d 362 (1994).
[341] *See State ex rel. Flores v. State*, 183 Wis. 2d 587, 623, 516 N.W.2d 362 (1994).
[342] WIS. STAT. RULE 809.107(5)(am).

IV. Withdrawing for your client to appeal pro se or with retained counsel

a. Applicable deadline

The motion to withdraw, along with a motion to extend the time for filing the post-judgment motion or notice of appeal, must be filed by the deadline for filing a post-judgment motion or notice of appeal in order to preserve the right to appeal.

See Chapter Four, Section III.a., above, for the relevant deadline.

b. Filing the motion to withdraw

If your client chooses to discharge you in order to appeal pro se or with the help of retained counsel, you should file a motion to withdraw from the case.[343] If a notice of appeal has not yet been filed, you must file this motion with the circuit court.[344] If a notice of appeal has been filed, you must file this motion with the court of appeals.[345] In the no-merit context, this would arise if your client previously decided to file a no-merit appeal and then changed his mind after the filing of the no-merit notice of appeal.

Whether you file the motion in the court of appeals or the circuit court, you should inform the court of your client's decision to proceed pro se or with the help of retained counsel. You should also inform the court that you have explained to your client – as you should have – the difficulties and disadvantages of self-representation and that, once you have withdrawn from the case, the SPD will not appoint another attorney to represent your client on appeal. A form for filing a motion to withdraw is found in the appendix to this chapter.

Given that your client has a right to appeal pro se or with retained counsel of his choice, there is no need to say anything more regarding the circumstances that led to your client's decision. *As an ethical matter, you* should *generally not say anything more and you should not tell the court that you have determined that the case presents no issues of arguable merit for appeal*.[346]

At the same time you file the motion to withdraw, you should file a motion with the court of appeals for an extension of time for filing the post-judgment motion or notice of appeal, with the requested date either tied to the circuit court's decision on the motion to withdraw or set far enough in the future to ensure that, once the motion to withdraw is decided, your client has sufficient time to take whatever action he deems appropriate.

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[343] WIS. STAT. RULE 809.30(4)(a); *State v. Thornton*, 2002 WI App 294, 259 Wis. 2d 157.
[344] WIS. STAT. RULE 809.30(4)(a).
[345] WIS. STAT. RULE 809.30(4)(a).
[346] *See State ex rel. Ford v. Holm*, 2004 WI App 22, ¶25, n.7, 269 Wis. 2d 810, 676 N.W.2d 500.

You must serve a copy of the motion to withdraw and motion for time on the opposing party (including, if applicable, any other parties and/or the GAL), your client, and the SPD's Appellate Division.[347]

c. Actions after the court decides the motion to withdraw

Upon entry of the circuit court's order granting your motion to withdraw, you should promptly:

- Inform your former client (and, if applicable, newly retained counsel) of the court's decision and the deadline for filing a postconviction motion or notice of appeal,
- Send all of your case materials to your former client or, if he is represented, his new attorney, and
- Close the case and submit billing information to the SPD.

Courts usually grant motions to withdraw. Generally, the only basis for denying the motion (so long as your client confirms with the court that he actually wants you to withdraw) would be a finding that your client is incompetent to proceed pro se, if it is his intent to appeal pro se.

If you do face a court order denying your motion to withdraw, you will need to consider whether there is a basis for appealing that decision. If so, and your client wants to appeal the decision, you may request a stay of the applicable appellate deadlines and proceed with an appeal of the decision denying the motion to withdraw.

If there is no basis for appealing the judge's decision, because there is no non-frivolous argument that you can make challenging the determination that your client is incompetent to appeal pro se, your duties are less clear. If you find yourself in this situation, we would urge you to contact an Appellate Division attorney manager to discuss the matter.

[347] WIS. STAT. RULE 809.30(4)(a). After receiving a copy of this sort of motion, the Appellate Division will submit a notice to the court as to whether it will appoint successor counsel. *Id.* As noted, except in extraordinary circumstances, the Appellate Division will not appoint successor counsel.

V. Litigating a no-merit appeal in the court of appeals

a. Applicable deadlines

In a no-merit appeal, you must file the no-merit notice of appeal, no-merit report, and statement on transcript by the later of: one hundred and eighty (180) days of service of the record or the last transcript (whichever is served later) or sixty (60) days from entry of the circuit court's order denying a post-judgment motion.[348]

If your client chooses to respond to the no-merit report, he must do so within thirty (30) days of service of the report.[349] If you file a supplemental no-merit report, you must do so within thirty (30) days of receipt of your client's response.[350]

In a TPR appeal, from the service of the record or the last transcript, whichever is later, you have thirty (30) days to file the no-merit notice of appeal.[351] You must file a statement on transcript within five (5) days of that.[352] Then, from the date the court record is filed with the court of appeals (which should be within fifteen days of the filing of the notice of appeal), you have fifteen (15) days to file the no-merit report.[353]

If your TPR client responds to the no-merit report, he must do so within ten (10) days of service of the report.[354] If you file a supplemental no-merit report, you must do so within five (5) days of receipt of your client's response.[355]

b. Ethical note

If your client chooses to pursue a no-merit appeal, it is important to remember that you continue to represent him unless and until the court of appeals releases you from representation. Thus, throughout the no-merit process, you have a continuing ethical responsibility to respond to his communications, maintain confidentiality unless required by law to do otherwise, and otherwise represent his interests to the extent possible.

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[348] WIS. STAT. RULE 809.32(2).
[349] WIS. STAT. RULE 809.32(1)(e).
[350] WIS. STAT. RULE 809.32(1)(f).
[351] WIS. STAT. RULE 809.107(5)(a).
[352] WIS. STAT. RULE 809.107(5)(d).
[353] WIS. STAT. RULE 809.107(5m).
[354] WIS. STAT. RULE 809.107(5m).
[355] WIS. STAT. RULE 809.107(5m).

c. Initiating the appeal

i. Timing

As you can see from the above deadline summary, in a RULE 809.32 appeal, the no-merit notice of appeal, statement on transcript, and no-merit report are all due on the same day.[356] That does not mean that you *should* file them on the same day. In fact, if you do file them on the same day, the court of appeals may ask you to re-file your report at a later time – after the circuit court record is filed – so that you can properly cite to the record.

Generally, you should file your notice of appeal well before the no-merit deadline – preferably by the deadline for filing an ordinary appeal – and your statement on transcript soon thereafter. By doing this, you will permit the clerk of circuit court to transmit the record to the court of appeals well ahead of the deadline so you can properly cite to the record in your no-merit report. If you have to file your no-merit notice of appeal at or close to the deadline, you may want to file a motion to extend the time for filing the no-merit report in order to accommodate the filing of the record.

ii. The no-merit notice of appeal

A notice of appeal filed in a no-merit case is substantially similar to an ordinary notice of appeal, governed by WIS. STAT. RULE 809.10, as discussed in Chapter Four, Section IV.a.ii.2., above.[357] However, the notice of appeal should be labeled a "No-Merit Notice of Appeal."[358] Additionally, it must state the date when the no-merit report is due and specify whether the deadline is calculated from the service of the last transcript or the court record or from the denial of a post-judgment motion.[359]

With a no-merit notice of appeal, you do not need to file a docketing statement, regardless of the case type.[360]

As with an ordinary notice of appeal, you must file the original no-merit notice of appeal, along with the order appointing counsel, with the clerk of circuit court.[361] You must serve copies of these documents on the clerk of the court of appeals, as well as the

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[356] WIS. STAT. RULE 809.32(2). The same is not true in a TPR no-merit appeal. Wis. Stat. RULE 809.107(5) & (5m).
[357] *See* WIS. STAT. RULES 809.10(1) & 809.32(2).
[358] WIS. STAT. RULE 809.32(2).
[359] WIS. STAT. RULE 809.32(2).
[360] WIS. STAT. RULE 809.10(1)(d).
[361] WIS. STAT. RULE 809.10(1)(a).

opposing party (including, if applicable, any other parties and/or the GAL), and your client.[362]

iii. The statement on transcript

A statement on transcript filed in a no-merit case should contain the same information as in a regular appeal, as discussed in Chapter Four, Section IV.a.ii.4.d., above, complying with WIS. STAT. RULE 809.11(4), except that it need not state that you have arranged for service of transcripts on the opposing party.[363] And, as you might guess, you do not need to arrange for service of transcripts on the opposing party.[364]

However, when you file the original statement on transcript with the clerk of the court of appeals, you must still serve a copy of that statement on any parties to the case, in addition to the clerk of circuit court and your client.[365]

d. The no-merit report

i. Form and required contents

RULE 809.32 specifies that the no merit report "shall identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit." Generally, the original no-merit report need not, and should not, contain factual assertions about confidential matters outside the record.

As for the structure, RULE 809.32 does not specify the precise form that the no-merit report should take. Appellate Division staff attorneys use a template that substantially complies with the form specifications of RULE 809.19(8)(b), but we do not include a table of contents or table of cases. We do include a statement of issues, a statement of the case (and, particularly for a trial case, a statement of facts), a modified argument section, and a conclusion.

The statement of issues may be titled something like, "Statement of Issues that Might Support an Appeal," and addresses such issues as:

- Was the defendant's (or respondent's) plea knowing and voluntary?

[362] WIS. STAT. RULES 809.10(1)(c).
[363] WIS. STAT. RULE 809.32(2).
[364] WIS. STAT. RULE 809.32(2).
[365] WIS. STAT. RULES 809.32(2) & 809.11(4)(b).

- Was the evidence presented at trial sufficient to support to jury verdict?

- Was the trial procedurally defective?

- Was the sentence (or disposition) illegal, an abuse of discretion, or otherwise improper?

The statement of the case and, if separated, statement of facts, are generally the same as this section (or these sections) in an arguably meritorious appeal, as discussed in Chapter Four, Section IV.b.iii.2.b., above.

The modified argument section may be titled "Issues that Might Be Raised on Appeal and Why They Are Without Merit," or something to that effect. Its subsections should mirror the statement of issues.

Finally, the conclusion should reiterate to the court that counsel has found no arguably meritorious issues that may be raised on appeal and ask the court to relieve counsel of further representation.

ii. Writing the no-merit report

The purpose of a no-merit report is to inform the court that you have considered all possible appellate issues and describe for the court your basis for concluding that each possible issue is not arguable in the present case.

In any case, you will have to address the sentence or disposition. You should describe the substantive law governing the ultimate sentence or disposition and the law governing the hearing and the exercise of the court's discretion. You should cite to portions of the record showing that the ultimate sentence or disposition imposed was lawful and that there would be no arguable merit to any argument that the procedure was inappropriate or that the court erroneously exercised its discretion.

In a plea case, the expectations for the no-merit report's discussion of plea procedure are also fairly clear. You should cite to law describing the circuit court's duty to conduct a colloquy regarding your client's understanding of the nature of the case and his rights and then cite to portions of the record showing that the court discharged this duty. If the plea colloquy was defective in some way but the client has informed the appellate attorney that he understood the information not conveyed at the plea hearing, such that the attorney cannot file a *Bangert* motion in good faith,[366] there is no clear rule for ethically addressing this in a no-merit report. Some attorneys conclude that they cannot address the matter at all, unless and until the client raises it in a response to the

[366] See Chapter Four, Section III.b.ii.1., above, for a discussion of *Bangert* motions.

report. Many others reference, in the report, an inability to allege that the client did not understand the matter at issue, without explicitly describing confidential communications.

In a plea case, once you have discussed the plea and sentencing, there is usually nothing else to address because a valid plea waives all non-jurisdictional defects. However, the court's decision on any suppression motion would be appealable, so, if there was a suppression motion litigated prior to the plea, you would need to address your determination that any appeal of the suppression issue would be frivolous.[367]

In a trial case, the court of appeals' expectations about what aspects of the trial should be addressed in a no-merit report is less clear. There is no doubt that you must address the sufficiency of the evidence and any significant issues raised by the trial attorney. Beyond that, the range of potential, but unpreserved, issues that would have no arguable merit is nearly limitless. While some appellate attorneys may simply inform the court of appeals that they have investigated the case and found no arguably meritorious, but unpreserved, issues, the court of appeals has occasionally indicated that it wants a more specific accounting. As such, it may be wise to enumerate categories of common claims, noting that you found none that would present an arguable basis for appeal, including defects in the jury selection process, errors related to the opening and closing arguments, the admissibility of material evidence, etc.

iii. Filing and service of the no-merit report

The court of appeals will only accept a no-merit report for filing if the attorney includes two certifications: the no-merit certification required by RULE 809.32(c) and the electronic filing certification required by RULES 809.32(1)(fm) & 809.19(12)(f). The electronic filing certification is discussed in Chapter Four, Section IV.b.ii.2.a., above.

There is no requirement that a no-merit report contain an appendix or an appendix certification.[368] In cases presenting discrete potential issues, like plea cases or sentencing-after-revocation-of-probation cases, the court of appeals would surely find it helpful if you append your report with the particularly relevant hearing or portion of hearing. In a trial case, theoretically, any portion of the record could reveal an arguable issue, which makes it difficult or impossible to compile a reasonable appendix.

You must file three copies of the no-merit report, including the necessary certifications, with the clerk of the court of appeals by the applicable deadline.[369] You must also serve the report on opposing counsel (including, if applicable, any other parties and/or the GAL) and your client.[370]

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[367] *See* WIS. STAT. § 971.31(10).
[368] *See* WIS. STAT. RULES 809.107(5m) & 809.32(1)(d).
[369] WIS. STAT. RULE 809.32(1)(a).
[370] WIS. STAT. RULE 809.32(1)(d).

As for the court records and transcripts, in a TPR case, you must always serve copies these on your client and should do so as the same time you serve the report, if you have not previously done so. [371] In any other kind of case, you are to serve copies of these materials on your client upon his request – and within five days of that request. [372]

You must notify the court of appeals that you have served your client with the report and provide the court of appeals with the client's mailing address.[373] Whenever you serve your client with the court record and transcripts, you must also notify the court of appeals that you have done so.[374] These notifications may be given via letter to the clerk of the court of appeals.[375] A form for this sort of letter is found in the appendix to this chapter.

iv. Addressing a client response to your no-merit report

Your client is not required to file a response to your no-merit report and, in practice, many clients do not respond. When a client does respond, the court of appeals will send you a copy of the response.[376]

Prior to filing the original no-merit report, you should have counseled your client that, if he responded to the no-merit report, you could file a supplemental no-merit report and affidavits rebutting the client's response "containing facts outside the record, possibly including confidential information, to rebut allegations made in the person's response to the no-merit report."[377]

This does not mean that you are required to file a supplemental no-merit report or other document with the court of appeals any time a client files a response to your original no-merit report. The provision for a supplemental no-merit report addresses the attorney's potential need to "rebut allegations" of "facts outside the record."[378] This is likely related to the attorney's ethical duty of candor toward the tribunal.[379]

Thus, if your client has alleged a material factual matter in his response to the no-merit report that you know to be false, you may have to file a supplemental report. For example, if your criminal client has alleged that his trial counsel provided ineffective

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[371] WIS. STAT. RULE 809.107(5m).
[372] WIS. STAT. RULE 809.32(1)(d).
[373] WIS. STAT. RULE 809.32(1)(d).
[374] WIS. STAT. RULE 809.32(1)(d).
[375] *See* WIS. STAT. RULE 809.32(1)(d).
[376] WIS. STAT. RULE 809.32(1)(e).
[377] *See* WIS. STAT. RULE 809.32(1)(b)2.
[378] WIS. STAT. RULE 809.32(1)(f).
[379] *See* WIS. SCR 20:3.3. Under this rule, if your client has offered a tribunal material evidence and you know of its falsity, you must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." *Id.*

assistance by neglecting to present evidence of an alibi, namely that he was working at the time of the crime, and you investigated this matter and found that he was *not* working at the time of the crime, you would probably need to reveal this information to the court.

However, if your client has alleged a factual matter that is irrelevant to any legal question, you may not need to respond. And if your client makes only legal arguments, again, you may not need to respond. You are not your client's legal opponent; you are his attorney. Therefore, in many cases where the client responds, there may be no need for you to file anything else.

Where you have determined that you do need to file a supplemental no-merit report to rebut a factual allegation, file and serve it just as you did the original no-merit report. You do not need to include an additional no-merit certification. However, you should electronically file the supplemental report and include an electronic filing certification with the supplemental report.[380]

Where you have determined that you will not file a supplemental report, you do not need to take any additional action. However, as a courtesy, you may want to inform the court of appeals, by letter, that you do not intend to file a supplemental no-merit report unless the court orders you to do so. You should also serve this letter on opposing counsel (including, if applicable, any other parties and/or the GAL) and your client.

e. Post-no-merit-decision actions

i. Final steps where the court of appeals accepts the no-merit report

If the court of appeals accepts your no-merit report, it will release you from further representation. In this circumstance, you will have two remaining obligations: (1) notifying your client of the court of appeals' decision and (2) notifying your client of his right to petition the state supreme court for review.[381] It is good practice to inform your client of his specific deadline for filing a petition for review and send him a copy of RULE 809.62.

Then, you may close the case and submit billing information to the SPD.

[380] WIS. STAT. RULE 809.32(1)(fm).
[381] WIS. STAT. RULE 809.32(3).

ii. Next steps where the court of appeals rejects the no-merit report

In the event that the court of appeals rejects the no-merit report, your obligations will depend on the particulars of the court of appeals' order. Often, the court of appeals will identify an arguably meritorious issue and instruct you to consult with the client about whether he would like to pursue it and report back. Sometimes, it requires other actions. If you are in this situation and have any question as to how to proceed, please do not hesitate to call the Appellate Division; an attorney manager can help you determine what to do next.

As a matter of division policy, where the court of appeals has rejected a no-merit report, the Appellate Division will in some cases entertain a client's request for the appointment of new counsel. Therefore, if your client asks you whether he can have another attorney handle the appeal, you should instruct him to contact our office or you can contact our office yourself. We will make a decision whether to appoint new counsel on a case-by-case basis. If the court rejected a no-merit report because of a relatively trivial matter (e.g. failure to challenge a DNA surcharge), it is unlikely the SPD would grant a request for appointment of new counsel. However, when an attorney has missed a critical issue such that the client can no longer have confidence in his attorney's ability to effectively represent him, the SPD may appoint new counsel.

VI. Filing a no-merit petition for review in the state supreme court

a. Applicable deadline

The deadline for filing a no-merit petition for review is the same as the deadline for filing an ordinary petition for review: thirty (30) days after the date of the court of appeals' decision.[382] *Just as with an ordinary petition for review, this deadline is jurisdictional and cannot be extended.*[383]

b. When this procedure is used

The no-merit procedure in the state supreme court is infrequently used. It applies to a case in which the attorney previously determined that there was an arguably meritorious issue but, after the court of appeals denied relief, decides that it does not present an arguably meritorious issue for the state supreme court. Given that the court of

[382] WIS. STAT. RULE 809.32(4)(b).
[383] *See State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶12, 247 Wis. 2d 1013, 1020.

appeals does not make factual findings, the only thing that will be different about a case after the court of appeal issues its decision will be the existence of the court of appeals' adverse legal determination.

Therefore, some attorneys take the position that a no-merit petition for review is never appropriate. Even if the case does not present an issue that would arguably have statewide impact, as discussed in Chapter Four, Section V.b.iv.2.a., above, the statutory criteria for review are not exhaustive.[384]

Most appellate attorneys find that no-merit petitions for review are occasionally appropriate. For instance, in a case in which the attorney argued a highly fact-specific, and perhaps minimally arguable, issue to the court of appeals, the attorney may find it impossible to argue in good faith that there is any "special and important" reason for review.[385] Or an attorney may simply realize, after reading the court of appeals' decision, that the issue was never arguable in the first place.

An attorney should carefully consider the appropriateness of filing a no-merit petition for review in any case. But if, after consideration, the attorney determines that this is the only way to ethically protect the client's right to petition for review, he should not hesitate to do so.

c. Form and contents of the no-merit petition for review

A no-merit petition for review is quite different from no-merit report filed with the court of appeals. The caption informs the supreme court that you have determined the case presents no non-frivolous basis for supreme court review but you do not actually explain to the court the basis for your determination that there is no basis for review.[386]

The no-merit petition for review has only two sections: a statement of the case and facts and an appendix.[387] In drafting the statement of the case, you can copy the statement of the case from your court of appeals brief and add a description of the court of appeals' opinion.[388] The appendix requirement is identical to the requirement applicable to an ordinary petition for review, as discussed in Chapter Four, Section V.b.iv.1.b., above.[389]

This filing really just preserves the client's right to take action to ask the supreme court for review. As discussed below, the client is responsible for filing all of the other required contents of an ordinary petition for review.[390]

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[384] WIS. STAT. RULE 809.62(1r).
[385] WIS. STAT. RULE 809.62(1r).
[386] *See* WIS. STAT. RULE 809.32(4)(a).
[387] WIS. STAT. RULES 809.32(4)(a) & 809.62(2)(d) & (2)(f).
[388] *See* WIS. STAT. RULE 809.62(2)(d).
[389] *See* WIS. STAT. RULE 809.62(2)(f).
[390] WIS. STAT. RULE 809.32(4)(a).

d. Filing the no-merit petition for review

You should file the no-merit petition for review in the same manner as an ordinary petition for review, as discussed in Chapter Four, Section V.b.iv.1.c., above.

e. Arranging for your client to file a supplemental petition for review

Unlike with a no-merit appeal to the court of appeals, when you file a no-merit petition for review, your client *must* file a supplemental petition in order for it to be considered. The attorney's portion of the no-merit petition for review and the client's supplemental portion are due on the same day.[391]

This procedure is challenging. Once the court of appeals issues its decision, you will need to consult with your client on his options for seeking review in the supreme court. By the time you determine that you will have to file a no-merit petition for review, it may be difficult for both you and your client to file the parts of the petition that you are each responsible for on time.

The most critical thing is that you file *your* portion of the no-merit petition for review on time. This will comply with the jurisdictional deadline and protect your client's ability to provide the supreme court with reasons for reviewing his case. If you file your portion by the deadline but believe that your client will want additional time to review your portion as well as the court record and transcripts, you may also file a motion to extend the time for your client to file his supplemental petition for review.

The statute does not specify the procedure for transmitting the client's record and transcripts to him. However, it is good practice to send your client copies of the court record and transcripts at the time you send him your portion of the no-merit petition for review, if you have not previously sent them, unless the client does not want them.

f. Following up on the supreme court's decision on the no-merit petition

If the supreme court denies review of your client's case, your client's direct appeal is concluded and you are relieved of further representation. If the supreme court accepts review of your client's case upon a no-merit petition for review, immediately notify the Appellate Division. We will likely assign new counsel to the case.

Either way, once you are done, you can close the case and, if you are a private bar attorney, submit billing information to ACD.

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[391] WIS. STAT. RULE 809.32(4)(b).

VII. Appendix to Chapter Five

a. Sample – Letter Advising Client of No-Merit Options

b. Sample – Letter to Client Re Closing File Without Action

c. Form – Motion to Withdraw as Postconviction/Appellate Counsel

d. Form – No-Merit Notice of Appeal

e. Form – No-Merit Statement on Transcript

f. Sample – Letter to Client Accompanying No-Merit Report

g. Sample – Letter to Court of Appeals Accompanying No-Merit Report

h. Sample – Letter to Client Accompanying Court of Appeals' Decision Accepting the No-Merit Report

SAMPLE – LETTER ADVISING CLIENT OF NO-MERIT OPTIONS

Attorney Jane Doe
300 Maple Street
Madison, WI 53703

January 1, 2013

Mr. John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

Dear Mr. Doe:

I am writing to summarize your options for appeal, which we discussed on the phone yesterday, in order to help you reach a decision on how to proceed.

When we spoke yesterday, I told you that, unfortunately, there is no arguable basis for appeal. As I explained, I researched your idea of a motion for sentence modification based on the recent reduction in the maximum sentence for your crime, which we discussed when we met last month, but found that this very issue has previously been rejected by the court of appeals and therefore we cannot raise it in your case.

In this situation, as we discussed, you have three options:

(1) The first option is to tell me to close your file without action. This would end my work on your case and, once the deadline for filing a postconviction motion or notice of appeal passes next week, it would mean that you will have lost your right to appeal.

(2) The second option is to ask me to withdraw from your case so you can pursue an appeal of your sentence on your own ("pro se") or hire a private attorney to review your file and potentially pursue an appeal. If you want to take this option, I would file a motion with the trial judge asking to withdraw so that you could appeal your case without me.

(3) The third option is a "no-merit" appeal. If you choose this option, I would file a no-merit notice of appeal with the court of appeals and then, later, a report explaining the facts of the case and my opinion that there is no basis for appeal. If you ask for the court records and transcripts, I would send those to you within five days of your request. I would send you a copy of the report when filed, and you could respond to it, bringing anything to the court of appeals' attention that you would like. If you file a response, it is possible that I would have to file a supplemental no-merit report in order to rebut allegations that you make. That supplemental report could include affidavits containing facts outside the record, which could address otherwise confidential information. Regardless of whether you file any response, the court of appeals would review everything filed in your case. If it were to find that I missed an arguable issue, it would send the case back to me. If not, its decision will end my representation in this case.

You should be aware that if you do not tell me to do something else, I am required to file a no-merit notice of appeal and report with the court of appeals.

I know these options can be confusing. I will set up another phone call with you to take place next week, so you can ask me any additional questions that you have and let me know what you would like to do.

I look forward to speaking with you soon.

Sincerely,

JANE DOE
Attorney at Law

SAMPLE – LETTER RE CLOSING FILE WITHOUT ACTION

Attorney Jane Doe
300 Maple Street
Madison, WI 53703

January 1, 2013

Mr. John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

Dear Mr. Doe:

I am writing to confirm that I have closed your file. When we spoke yesterday, I told you that, unfortunately, there is no arguable basis for appeal. As I explained, I researched your idea of a motion for sentence modification based on the recent reduction in the maximum sentence for your crime, which we discussed when we met last month, but found that this very issue has previously been rejected by the court of appeals and therefore we cannot raise it in your case.

We further discussed that you had three options for how to proceed: (1) you could ask me to close your file without further action, waiving your right to appeal; (2) you could ask me to withdraw from your case so you can appeal on your own ("pro se") or hire a private attorney to assist you with an appeal; or (3) you could ask me to proceed with a "no merit" appeal, in which I would file a report with the court of appeals describing your case and my conclusion that there are no arguable issues for appeal. I explained that the "default" option is a no-merit appeal; in other words, if you did not choose another option, I would have to initiate a no-merit appeal.

After I explained these options, you told me to close your file. You said that you understood that there was nothing to appeal and want to move on with your life. Therefore, I have closed your file.

If I misunderstood your intentions, please contact me right away – by letter or by collect call to (555) 555-5555. I am sorry that I was not able to take any other action on your behalf, and I want to wish you the best in all your future endeavors.

Sincerely,

JANE DOE
Attorney at Law

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. _____

_____,

Defendant.

MOTION TO WITHDRAW AS POSTCONVICTION COUNSEL

Undersigned counsel hereby moves to withdraw as postconviction/appellate counsel in the above-captioned case pursuant to Wis. Stat. Rule 809.30(4). The grounds for the motion are as follows:

1. On _____, 20___, the defendant was convicted of _____. The _____ County Circuit Court, the Honorable _____ presiding, sentenced the defendant to _____.

2. The defendant filed a timely notice of intent to pursue postconviction relief, after which undersigned counsel was appointed to represent him on appeal. Counsel has spoken with _____ regarding *(his) (her)* case and options for appeal. On _____, 20___, _____ informed counsel that *(he) (she)* wishes to proceed on appeal *(pro se) (with retained counsel)*, and asked counsel to withdraw from the case.

3. Undersigned counsel has informed _____ that, if this motion is granted, the State Public Defender will not appoint another attorney to represent him in this matter.

4. On the same date of the filing of this motion, undersigned counsel has filed with the court of appeals a motion for an extension of _____'s deadline for filing a postconviction motion or notice of appeal under Rule 809.30(2)(h).

5. A copy of this motion is being served on the defendant, the State Public Defender's Appellate Division, and opposing counsel.

THEREFORE, counsel respectfully asks this court to enter an order permitting counsel to withdraw in accord with _____'s request.

Dated this ____ day of _____, 20___.

Respectfully submitted,

_____

[Attorney's name]

State Bar No. _____

[Attorney's address]

[Attorney's phone number]

cc: SPD – Appellate Division

[Opposing counsel]

[Defendant]

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

_____,

(Plaintiff) (Petitioner),

v. Case No. _____

_____,

(Defendant) (Respondent).

NO-MERIT NOTICE OF APPEAL

TO: *[Name of Clerk of Circuit Court]*
Clerk of Circuit Court
[Address of clerk]

[Name of opposing counsel]
[Title of opposing counsel]
[Address of opposing counsel]

NOTICE IS HEREBY GIVEN that the *(defendant) (respondent)* in the above-captioned case appeals to the Court of Appeals, District ___, from the final *(judgment) (order)* entered on _____, 20___, in the Circuit Court for _____ County, the Honorable _____, presiding, in which *[describe the judgment or order, e.g. "the defendant was convicted of . . ."]*. *[If applicable, add: The* (defendant) (respondent) *also appeals from the order denying* (postconviction) (postdisposition) *relief entered on _____, 20___.]*

This *(is) (is not)* an appeal within Wis. Stat. § 752.31(2).

This *(is) (is not)* an appeal to be given preference pursuant to statute.

[State one *of the following:*

- *The* (final transcript) (court record) *was served on the undersigned on _____, 20___. A no-merit report will be filed on or before _____, 20__, which is 180 days from the date of service, under Wis. Stat. Rule 809.32(2)(a).*

- *The order determining* (postconviction) (postdisposition) *relief was entered on _____, 20___. A no-merit report will be filed on or before _____, 20__, which is 60 days from the date of entry of the order, under Wis. Stat. Rule 809.32(2)(b).]*

Dated this ___ day of _____, 20___.

_____
[Attorney's name]
State Bar No. _____

[Attorney's address]
[Attorney's phone number]

cc: Diane M. Fremgen
Clerk of Court of Appeals

[If a felony case, Wisconsin Attorney General; or, if applicable, any other party(ies)]

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT ____

_____,
(Plaintiff) (Petitioner)-Respondent,

v. _____ County
Case No. _____

_____,
(Defendant) (Respondent)-Appellant.

NO-MERIT STATEMENT ON TRANSCRIPT

TO: Diane M. Fremgen
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

[Name of Clerk of Circuit Court]
Clerk of Circuit Court
[Address of clerk]

[Name of opposing counsel]
[Title of opposing counsel]
[Address of opposing counsel]

[If applicable, name of add'l party]
[Title of add'l party]
[Address of add'l party]

This statement is to satisfy Wis. Stat. Rule 809.11(4)(a) and (b).

All transcripts that the *(defendant) (respondent)* -appellant believes are necessary for prosecution of this appeal have already been prepared by the appropriate court reporters and have been filed with the clerk of the circuit court. Since counsel will be filing a no-merit report in this case, no provision has been made for service of transcripts on opposing counsel.

Dated this ___ day of _____, 20__.

_____
[Attorney's name]
State Bar No. _____

[Attorney's address]
[Attorney's phone number]

SAMPLE – LETTER TO CLIENT ACCOMPANYING NM REPORT

Attorney Jane Doe
300 Maple Street
Madison, WI 53703

January 1, 2013

Mr. John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

Dear Mr. Doe:

Enclosed with this letter is a copy of the no-merit report that I filed with the Wisconsin Court of Appeals on today's date. We have previously discussed the fact that I saw no arguable legal grounds to further challenge your case.

Also enclosed with this letter are copies of the transcripts and court records associated with your case, as you requested. The court records do not include the presentence investigation report, because I am not permitted to give you a copy of that document under Wis. Stat. § 972.15(4). *[Note: If the client had requested these documents earlier, they would have already been sent – within five days of the request.]*

Please read the no-merit report carefully. You have the right to comment about it and to bring anything to the attention of the Court of Appeals that you would like. If you wish to respond to the report, write to:

Diane Fremgen, Clerk
Wisconsin Court of Appeals
P.O. Box 1688
Madison, Wisconsin 53701-1688.

Any response to the no-merit report is due within 30 days of today's date, which means that it is due on January 31, 2013. If you find that you require additional time to prepare the response, let me know, and I will file a motion with the Court of Appeals to extend the time for you to file the response.

Whether or not you respond to my report, the court will independently review your case to determine if there would be any arguable merit to an appeal.

I am sorry that I was unable to take any other action in your behalf.

Sincerely,

JANE DOE
Attorney at Law

Enclosures

SAMPLE – LETTER TO COA ACCOMPANYING NM REPORT

Attorney Jane Doe
300 Maple Street
Madison, WI 53703

January 1, 2013

Diane Fremgen, Clerk
Wisconsin Court of Appeals
P.O. Box 1688
Madison, Wisconsin 53701-1688

Re: *State of Wisconsin v. John Doe*
Court of Appeals Case No. 2013AP0000 CRNM

Dear Ms. Fremgen:

Attached for filing in the above-referenced case are three copies of a no-merit report pursuant to Wis. Stat. Rule 809.32(1). On today's date a copy of the no-merit report has been mailed to the defendant, John Doe. For the court's information, Mr. Doe's address is:

John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

Also, pursuant to Rule 809.32(1)(d), I inform the court that I have sent Mr. Doe the transcripts and a copy of the circuit court case record, excepting the presentence investigation report, along with the no merit report. *[Note: If the attorney sent the record at an earlier date, he should specify the date that the record was actually sent. If the client has not requested the record, the attorney may note that.]*

A copy of the no-merit report has been served on opposing counsel.

Sincerely,

JANE DOE
Attorney at Law

Attachments

cc: Wisconsin Attorney General

SAMPLE – LETTER TO CLIENT ACCOMPANYING COA DECISION ACCEPTING THE NO-MERIT REPORT

Attorney Jane Doe
300 Maple Street
Madison, WI 53703

January 1, 2013

Mr. John Doe # 01010
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

Dear Mr. Doe:

Enclosed with this letter is an opinion in which the Wisconsin Court of Appeals has accepted the no-merit report that I filed in your case and denied you relief. This decision releases me from further representation in this case.

You have the right to petition the Wisconsin Supreme Court to further review your case. You may do that by filing a petition for review within 30 days of the date of the Court of Appeals decision. If you choose to take this action, you would need to send ten copies of your petition to:

Diane Fremgen, Clerk
Wisconsin Supreme Court
P.O. Box 1688
Madison, Wisconsin 53701-1688.

A copy of your petition would also have to be sent to:

Wisconsin Attorney General
P.O. Box 7857
Madison, Wisconsin 53707.

The rules governing petitions for review, which are found in Wis. Stat. Rule 809.62, are enclosed.

Because the Court of Appeals relieved me of further representation, I am closing your file with my office. If you have questions regarding the procedure for filing a petition for review, you may contact me. Otherwise, I wish you well in the future.

Sincerely,

JANE DOE
Attorney at Law

Enclosures
1. Opinion
2. Copy of Rule 809.62