

THE WISCONSIN STATE PUBLIC DEFENDER APPELLATE DIVISION

The Right to Counsel on Appeal

The Wisconsin Constitution and statutes guarantee the right to a direct appeal from a criminal conviction and other final judgments. The United States Constitution guarantees the right to the assistance of an appointed attorney where a corresponding right to appeal exists. *Douglas v. California*, 372 U.S. 353, 357-58 (1963); *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 648, 579 N.W.2d 698 (1998). The State Public Defender (SPD) Appellate Division (AD) provides post-judgment legal representation to the indigent in the trial and appellate courts in criminal, civil commitment, sexual predator commitment, protective placement, children in need of protection or services, juvenile delinquency and termination of parental rights cases. Appellate Division cases comprise less than 2.5% of the SPD's total case openings for FY 2009-10.

Appeal Procedures

The Rules of Appellate Procedure are set forth in chapters 808 and 809, Wis. Stats. These Rules contain the time limits within which each step of an appeal must occur. An attorney is appointed if a financially eligible person files a Notice of Intent to Pursue Post-Conviction or Post-Disposition Relief and requests a public defender-appointed attorney. The attorney confers with the client regarding potential issues for appeal and reviews the transcripts of the trial court proceedings and the rest of the trial court record for legal error. The attorney conducts further fact development and/or investigation if necessary, and researches any potential legal issues. Then the attorney discusses his or her legal conclusions with the client.

If arguably meritorious grounds for appeal exist, and the client wishes to pursue them, the attorney will either file a post-judgment or post-conviction motion in the trial court or proceed directly to the court of appeals on briefs, depending upon the issues presented in the case. A trial court motion is not required if the appeal raises only a sufficiency of the evidence claim or an issue that was adequately preserved by the trial attorney and upon which the trial court has already ruled. A trial court motion is required whenever the client seeks modification of the sentence or dispositional order, wants to raise a claim of ineffective assistance of counsel, or to raise an issue the trial court has not had an opportunity to decide. The court of appeals may decide the appeal on the briefs or may schedule the appeal for oral argument. Appointed attorneys are obligated to file a Petition for Review in the Wisconsin Supreme Court if the court of appeals decision is adverse to the client and the client so requests. Review by the Supreme Court is discretionary, but the right to an appointed attorney continues if the Supreme Court grants review.

If the appointed attorney concludes that no arguably meritorious grounds for appeal exist and the client disagrees with that conclusion, the client can require the appointed attorney to file a no merit report in the court of appeals. If the court of appeals agrees with the attorney's conclusion, the court will affirm the judgment and discharge the attorney. If the court disagrees, it will reject the no merit report and order further proceedings in the appeal.

If the client agrees with the appointed attorney's conclusion that there are no arguably meritorious grounds for appeal, or if the client decides not to pursue an appeal for other reasons, the attorney may close the file without any court action.

SPD Appeal Case Dispositions (2005-2010)

Case closed without court action	49%
No merit report	15%
Relief granted	13%
Relief denied	23%

Staffing

The division's two local offices, at 17 S. Fairchild, P. O. Box 7862, Madison 53707-7862 and 735 N. Water Street, #912, Milwaukee 53202-4116, provide representation in all 72 counties of the state.

All financial eligibility determinations and attorney appointments are handled in the Appellate Intake Unit, located in the Madison Appellate office. Intake staff generates the requests for transcripts and the court record for both staff and private attorneys in every case. The Intake Unit also processes the case closing information and reviews the non-electronic bills submitted by the appointed private attorneys.

The AD employs 27.5 FTE staff attorneys as Assistant State Public Defenders. Staff attorneys were appointed to handle 1,276 of the 3,146 appeal cases appointed in FY 2009-10 (about 41%). Cases are appointed to private attorneys when staff attorneys have a conflict of interest (for example, where other staff represented a co-defendant) or when appointment of additional cases to staff will exceed their capacity to provide ethical and competent representation.

In addition to supervising AD staff, the division's managers typically handle more than 1,500 non-case matters each year. Specifically, they 1) receive and respond to all requests for post-judgment information from the public, requests for constituent assistance from the legislature or executive branch agencies, and requests for counsel from or on behalf of prison inmates; 2) act upon complaints about appointed appellate attorneys from clients, their families, prosecutors and the courts; and 3) receive and respond to circuit court and court of appeals' orders requesting case information or the appointment of successor appellate counsel for SPD clients. The attorney managers also answer questions from staff and private attorneys about substantive law, the rules of appellate procedure, and agency and division policy and procedure. They review all staff briefs and participate in all staff oral argument preparation panels. They also edit briefs and schedule oral argument panels for private attorneys upon request in SPD cases. They are members of, and staff, the State Bar Board of Governors and Appellate Practice Section Board, the Judicial Council Appellate Procedure Committee, and justice system and local bar committees. The division director is a member of the agency leadership team and is the Public Defender's designee to the Wisconsin Judicial Council. All managers participate in recruitment efforts and employment interviews for the entire agency.

The AD also provides same-day or next-day case law summaries and analysis in ***On Point, the Wisconsin Public Defender Appeals Blog*** at <http://www.wisconsinappeals.net/>. On Point distills the latest decisions and tracks issues pending before the United States and Wisconsin Supreme Courts.

The AD pages on the SPD public web site, www.wisspd.org, also contain other appeal resources, such as archived case summaries, appellate procedure outlines, time limit charts, issue-spotting checklists, how to appeal checklists, performance standards, and forms. Most useful to trial level attorneys are "Duties of Trial Counsel at and after Sentencing" and "Appeal Info for SPD Trial

Attorneys,” both found in the Appellate and Trial Practice Guides section on the website.

Private Bar Attorney Certification

The Appellate Division certifies private attorneys for appointment in appellate cases. As of March 2011, 392 attorneys were on the Appellate certification lists. Attorneys are certified in two experience levels in criminal appeal cases, and in four specialty appeal areas (sexually violent person commitments, termination of parental rights cases, cases under the children’s and juvenile codes, and mental commitments and protective placements). Appellate certification criteria are set forth in Wis. Admin. Code § PD 1.04 (13). Certification applications are available from the Assigned Counsel Division and the Intake Unit in the Madison Appellate office.

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