

Perfecting Appeals in WI Public Defender Cases

The following summary is intended to provide trial attorneys with the information necessary to perfect appeals in the types of cases handled by the Wisconsin State Public Defender (SPD). In most cases, the trial attorney initiates the appeal by filing a Notice of Intent to Pursue Postconviction (or Postdisposition) Relief (NOI). Some cases, though, require an administrative appeal (followed by a writ of certiorari and then notice of appeal) or a Notice of Appeal (NOA), or, for permissive appeals, a petition for leave to appeal. No appeal can proceed until after a written judgment or order has been entered. A judgment or order is deemed “entered” when it is filed in the clerk’s office. Generally, the clerk’s file-stamp date is controlling. This may or may not be the same date that the judgment or order was signed by the judge. Note, too, that after an appeal has commenced, the circuit court retains jurisdiction for certain matters listed in Wis. Stat. § 808.075 (*e.g.* bail or sentence credit issues).

| Case Type | Method of Appeal | Procedure |
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| Criminal Convictions | NOI | <p>Appeal is commenced by filing NOI with the clerk of courts of the county of conviction within 20 days after the date of sentencing [or entry of final order in non-criminal NOI cases]. The prosecutor and any other party to the action must be served. <i>See</i> Wis. Stat. Rule 809.30 (2) (a). Content of the NOI must comply with Rule 809.30 (2) (b). The NOI must state whether trial counsel was appointed by the SPD and whether the person’s financial circumstances have materially changed since the initial eligibility determination. Trial counsel should send a file-stamped copy of the NOI, along with a completed SPD Appellate Questionnaire, to the SPD Appellate Intake Unit, P. O. Box 7862, Madison, WI 53707-7862 as soon as practicably possible but in all instances within a week after filing the NOI. If NOI is properly filed by trial counsel, the clerk of courts will supply the SPD Appellate Division with the rest of the information necessary to appoint appellate counsel.</p> <p>If a defendant timely requests an appeal, but trial counsel fails to file a NOI within the 20-day time limit, trial counsel must file a motion to enlarge the time for filing NOI. The motion must be filed in the court of appeals. <i>See</i> Rule 809.82.</p> |
| Sentencing After Revocation | NOI | <p>Same as above—NOI filed within 20 days of entry of sentencing order. Only sentencing issues may be raised on appeal. <i>See State v. Drake</i>, 184 Wis. 2d 396, 515 N.W.2d</p> |

923 (Ct. App. 1994).

**Ch. 938
Juvenile
Dispositions** NOI Rule 809.30 (2) (a) Notice of Intent to Seek Postdisposition relief should refer to “juvenile,” not “defendant.” Otherwise, same procedure as “Criminal Convictions” above.

**Juvenile
Waiver
(or reverse
waiver)** Petition for Leave to Appeal Appeal of a juvenile waiver is a permissive (interlocutory) appeal under § 808.03 (2). *See State ex rel. A.E. v. Green Lake County Cir. Ct.*, 94 Wis. 2d 98 (1980) (Per curiam S. Ct. opinion “urge[s]” the court of appeals to accept review in such cases). Same as other permissive appeals—Petition must be filed within 14 days after entry of the order you want to appeal.

CHIPS NOI *See* “Juvenile Dispositions” above—NOI within 20 days after entry of final order.

**Termination
of Parental
Rights** NOI Notice of Intent to Appeal must be filed within 30 days *after* the date of entry of judgment or order you want to appeal. § 808.04(7m). This time limit can be extended only if the petition to terminate was filed on or after April 21, 2006. *See* Wis. Stat. § 808.04 (7m) and Rule 809.82. NOI requirements for a TPR appeal are found in Rule 809.107 (2) (bm).

**Ch. 51 and 55
Commitments
or Orders for
Forced Meds.
or Treatment** NOI Rule 809.30 (2) (a) Notice of Intent to Seek Postdisposition relief. Otherwise, same procedure as “Criminal Convictions” above. Unless a commitment order and order for forced medication or treatment are imposed at the same time, they must be appealed separately.

NGI NOI Same as “Criminal Convictions” above except NOI to seek postdisposition relief filed within 20 days after entry of final order. The same applies for appeal from denial of petitions for conditional release or termination under §§ 971.17 (4) or (5).

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| Denial of Judicial Substitution | Petition, to Chief Judge; then writ. | Appeal must first be made by petition to the chief judge of the administrative district. Wis. Stat. § 801.58 (2) [§ 938.29 juvenile cases]. Review of an adverse decision by the chief judge is accomplished by supervisory writ filed in the court of appeals. <i>State ex rel. Mateo D.O. v. Circuit Court</i> , 2005 WI App 85, ¶¶ 1, 10, 15; 280 Wis. 2d 575. |
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Interlocutory Petition Appeals from all non-final judgments or orders require

or Permissive Appeals for Leave to Appeal permission from the court of appeals [Final orders - that can be appealed as a matter of right - are defined in § 808.03 (1)]. It is trial counsel's responsibility to file a Petition for Leave to Appeal in the court of appeals. *See* § 808.03 (2) and Rule 809.50. The Petition must be filed within 14 days after the entry of the order you want to appeal. Oral orders must be reduced to writing. An order is not "entered" until it is signed and filed. Requirements for PLA are found in Rule 809.50.

If the Petition is denied, the decision is not subject to review. If the Petition is granted, you should **contact the Madison Appellate office Intake Unit immediately**. Ordinarily, a permissive appeal is litigated by the trial attorney unless the appellate division agrees to take the case.

Probation or Parole Revocations Admin. Appeal; Certiorari; NOA Trial counsel is responsible for representation through final hearing, administrative appeal, and Writ of Certiorari in the circuit court. If a Writ is denied, the appeal is governed by the rules of civil procedure [NOI does *not* perfect a civil appeal]. NOA must be filed within 90 days of the entry of the final, written order determining the petition for the Writ (unless Written Notice of Entry of Final Judgment is entered within 21 days of the final order, in which case NOA must be filed within 45 days). This deadline is non-extendable.

There is no right to counsel in certiorari appeals. **Do not file a Notice of Appeal from the order denying a revocation certiorari petition unless you are directed by the Appellate Division to do so** or you are handling the appeal yourself. Requests to appoint counsel to appeal in Milwaukee County cases should be sent to the FA in the Milwaukee Appellate Office, all others should be sent to the Madison Appellate Office Intake Unit. Because of the short time limits, trial counsel whose client wants to appeal should immediately forward to the appropriate appellate office all documents relevant to the appointment decision, including: the Revocation Warrant and Summary, the decision of the ALJ, the decision of the administrator on administrative appeal, the writ of certiorari, any brief filed on the writ, the circuit court order deciding the writ, and any other information helpful to the appointment decision. Trial counsel should also inform the Appellate Office whether a Written Notice of Entry of Final Judgment was

entered.

Extended Supervision (ES) Revocation (TIS cases)

NOI or Admin. Appeal; Certiorari; NOA

Because ES revocation results in entry of an amended judgment, Truth-in-Sentencing Extended Supervision revocation **sentences** are appealed by filing a NOI under Rule 809.30. *See* “Criminal Convictions” above—NOI filed within 20 days of entry of amended judgment. This procedure applies to sentences from revocation actions **commenced after February 1, 2003**. Appeal of the revocation itself or appeal of sentences from ES revocation actions commenced prior to that date, occurs by means of administrative appeal, writ of certiorari, and NOA—same as “Parole or Probation Revocations” above.

Ch. 980 SVP Proceedings

NOI for cases with petitions filed on or after 8-1-2006; NOA (Refer to Appellate Division) for cases in pipeline on that date.

Wis. Stat. § 980.038 (4) brings Ch. 980 cases within the appeal process of Rule 809.30. Thus, in Ch. 980 cases where the petition is filed after the effective date of the 2005 WI Act 434 (i.e. on or after August 1, 2006), an appeal is commenced by filing a notice of intent within 20 days after entry of the final order. *See* Criminal Convictions above.

Chapter 980 appeals in cases where the petition was filed prior to August 1, 2006, remain governed by civil rules of appellate procedure. Do not file a NOI. If a Ch. 980 client decides to appeal, **trial counsel should contact the Madison Appellate Intake Unit immediately after the verdict or the court’s decision in a case tried to the court.** Trial counsel should provide the following information: name, number and county of the case; client’s DOB; client’s address; the SPD appellate questionnaire; financial eligibility information; date verdict was rendered; judgment date and name of judge; commitment order, date of filing and whether Written Notice of Entry of Judgment was entered; any materials received from the clerk’s office, and dates and court reporters for court hearings (if known).

Because the pre-August 1, 2006 petition Ch. 980 cases are civil appeals, in jury cases trial counsel must file a post verdict motion raising all issues to be raised on appeal. Failure to include an issue in a post verdict motion could result in waiver of that issue for appeal, even with an on-the-record objection at trial. A post verdict motion must be filed and served within 20 days after the verdict, although the court may enlarge this time. *See* Rule 805.16

(1). This time limit is jurisdictional. In cases tried to the court, the equivalent of the post verdict motion is a motion to reconsider. *See* Rule 805.17 (3). A motion to reconsider must be filed no later than 20 days after the court renders its judgment. Motions not decided within 90 days of the verdict or court's decision are deemed denied and judgment is entered. *See* Rules 805.16 (3) and 805.17 (3).

Trial counsel should contact the Madison Appellate Intake Unit immediately after any motion is decided and provide a copy of the motion, date of filing and copy of any order entered.

In the pre-August 1, 2006 petition cases, a NOA must be filed within 90 days after entry of the final order (45 days if Notice of Entry of Judgment is properly filed and served). **This deadline can not be extended.** *See* § 808.04. **Once a post verdict motion has been decided or judgment or final order is entered, trial counsel should *immediately* contact the Madison Appellate Intake Unit. Trial counsel should not file a NOA unless the deadline is imminent or unless directed to do so by the Appellate Division FA.**

Persons committed under ch. 980 have the right to appellate counsel to appeal from the denial of a petition for supervised release [§ 980.08] and of the first petition for discharge [§ 980.09]. Appointment for appeal of subsequent petitions under § 980.10 is discretionary. In all supervised release or discharge appeals, forward the order denying discharge or release to the appropriate appellate office *immediately*. The same time limits listed above apply.

State's Appeal

NOA
(Refer to Appellate)

Under circumstances listed in § 974.05 and Chs. 48 and 938, the state must file a NOA within 45 days after the entry of the order or judgment it wants to appeal. *See* § 808.04(4). In all state appeals, trial counsel should **contact the Madison Appellate office Intake Unit immediately**, and fax or send a copy of the state's NOA and the order being appealed.

Section 974.06 Motions

NOA

Appeals from orders denying motions under § 974.06 are civil appeals. NOA must be filed within 90 days of entry of the order (45 days if Notice of Entry of Judgment is properly filed and served). This deadline is non-extendable. Ordinarily, both the motion and appeal are

handled by a lawyer appointed by the SPD Appellate Division. There is no right to counsel for § 974.06 motions or for appeals from their denial. The Appellate Division makes a discretionary decision to appoint in each case. Requests for discretionary appointment should be sent to the FA in the appropriate appellate office (Milwaukee Appellate for Milwaukee County cases and Madison Appellate for all other cases).

**Sentence
Modification
or Sentence
Adjustment
Motions**

NOA

SPD-appointed counsel may file a sentence modification or sentence adjustment motion only if it is timely filed as part of the direct appeal under Rule 809.30. Consequently, such motions are ordinarily handled by appellate counsel. NOA must be filed within 20 days of entry of the order denying the motion. *See* Rule 809.30 (2) (j).

Sentence modification motions filed at any other time are civil appeals—NOA filed within 90 days of entry of final order (45 days if Notice of Entry of Judgment is properly entered and served). *See* § 808.04.

Note: A sentence modification motion filed under § 973.19 waives a defendant’s right to a direct appeal of the conviction and sentence, and there is no right to counsel to file the motion—it is difficult to imagine a scenario where this would be a wise course of action.

Contempt

NOI
or
NOA

Contempt that is “prosecuted by the state” may be appealed by filing a NOI under Rule 809.30 within 20 days of entry of the contempt order. *See* § 785.03 (3).

Summary contempt (a punitive sanction imposed by the court for contempt occurring in the court’s presence) is not “prosecuted by the state.” Appeals from summary contempt orders are civil appeals governed by the non-extendable deadlines of § 808.04 (NOA filed within 90 days of entry of final order; 45 days if Notice of Entry of Judgment is properly filed and served). For summary contempt appeals where the client is the subject of the contempt order, you should forward a copy of the contempt order to the Madison Appellate Office as soon as practicably possible. If *you* are the subject of the contempt order, you should inform your supervisor and work with the Office of Legal Counsel in the Madison Administration office.

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| Sentence Credit | NOI | If sentence credit was requested, the credit issue was properly preserved and credit was denied before the entry of the judgment of conviction, the credit issue can be raised on direct appeal by filing NOI within 20 days after sentencing. <i>See</i> “Criminal Convictions” above. If sentence credit is sought at any other time under § 973.155, appeal is commenced by filing NOI to Pursue Postdisposition Relief within 20 days of entry of the order denying relief. <i>See</i> § 973.155(6). |
| Review of Release Pending Appeal Order | Motion | It is trial counsel’s responsibility, in appropriate cases, to request release pending appeal from the circuit court and to seek review of orders denying release in the court of appeals. Review is accomplished under Rule 809.14 by filing a motion and supporting memorandum in the court of appeals within 21 days after the entry of the circuit court order regarding release. A detailed list of filing requirements is found in Rule 809.31 (5). Trial counsel must order and provide necessary transcripts. Transcripts must be ordered within 7 days of the entry of the order regarding release. |
| Appeal to Wisconsin Supreme Court | PFR | An appeal to the Wisconsin Supreme Court from an adverse court of appeals decision is a permissive appeal, accomplished by filing a Petition for Review (PFR) in the supreme court. The PFR must be filed within 30 days of the date of the decision of the court of appeals. <i>See</i> Rule 809.62. This is deadline can not be extended. It is the responsibility of counsel who provided representation in the court of appeals to file the Petition for Review. If no issue of arguable merit exists that fits the review criteria [<i>See</i> Rule 809.62], counsel must inform client of the no-merit petition for review option and file the petition if the client so requests. <i>See</i> Rule 809.32 (4). |
| Appeal to United States Supreme Court | Certiorari | Appeal to the United States Supreme Court is accomplished by filing a Writ of Certiorari in the U.S. S. Ct. within 90 days after the entry of the Wisconsin Supreme Court decision to be appealed. There is no right to counsel for such writs. The Appellate Division makes a discretionary decision to appoint in each case. Requests for discretionary appointment should be sent to the FA in the appropriate appellate office (Milwaukee Appellate for Milwaukee County cases and Madison Appellate for all other cases). |

**Collateral
Review**

The types of extraordinary writs and collateral review procedures available in certain circumstances are too numerous and diverse to cover in detail in this document. All such litigation in SPD cases requires a separate discretionary appointment of counsel. Questions should be directed to the Trial or Appellate Division First Assistants.

JNE 9-06