

## **Initiating a Direct Appeal: What to File & What to Do When It's Too Late**

The vast majority of public defender case types are appealed by filing a Notice of Intent to Pursue Postconviction Relief (NOI).<sup>1</sup> If you are uncertain about what document must be filed to initiate an appeal please consult the [“Perfecting Appeals in WI Public Defender Cases”](#) and/or consult with SPD appellate management. This memo only addresses filing notices of intent and what to do if you miss the deadline.

### **I. The Notice of Right to Seek Postconviction Relief form is not the same as a Notice of Intent to Pursue Postconviction or Postdisposition Relief form.**

The Notice of Right to Seek Postconviction Relief<sup>2</sup> (NOR) that you complete with your client after sentencing or disposition does **NOT** initiate the appeal. This form provides the client notice of their right to appeal and provides your client the opportunity to check a box stating they: (1) want to appeal, (2) don't want to appeal, or (3) are undecided.

After filing the NOR, if your client wants to appeal, you **must still timely file the NOI**. If your client is undecided, you should follow up with your client prior to the NOI deadline to determine whether they want to appeal. **There is no appeal unless the NOI is timely filed or filed with a court-approved extension**. When you sign the NOR form in a criminal case you certify the following (emphasis added):

I have counseled the defendant about the decision to seek postconviction relief. I have informed the defendant that this decision must be made and communicated to me within 20 days of sentencing. I believe the defendant understands the right to postconviction relief and the 20-day time limit. **I understand that it is my duty to file the Notice of Intent to Pursue Postconviction Relief on behalf of the defendant** if that intent is timely communicated to me.

Mixing up the NOR and NOI is a common mistake when seeking to initiate an appeal for SPD case types. If you made this mistake and need to extend the NOI deadline, don't panic, see Section III below.

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<sup>1</sup> Appeals under s. 971.17, criminal cases, or in ch. 48, 51, 55, 938, or 980 cases, other than a termination of parental rights case under s. 48.43, a guardianship proceeding under s. 48.9795, or a parental consent to abortion case under s. 48.375 (7), are governed by Wis. Stat. § 809.30. TPR appeals are governed by Wis. Stat. § 809.107. Appeals in parental consent for an abortion cases are governed by Wis. Stat. § 809.105.

<sup>2</sup> The court's forms are CR-233 (criminal cases) and JC-1644 (TPR cases).

## II. Notice of Intent requirements.

**Content:** The notice of intent must comply with the requirements listed in Wis. Stat. § 809.30(2)(b)<sup>3</sup>. Form NOIs can be found on the [SPD website](#). The court also has form NOIs: CA-100 (TPR cases), CA-110 (criminal, chs. 48, 51, 55, 938).

### The NOI must include:

1. The case name and number.
2. An identification of the judgment or order from which the person intends to seek postconviction or postdisposition relief and the date on which the judgment or order was entered.
3. The name and address of the person and his or her trial counsel.
4. Whether the person's trial counsel was appointed by the state public defender and, if so, whether the person's financial circumstances have materially improved since the date on which his or her indigency was determined.
5. Whether the person requests the state public defender to appoint counsel for purposes of postconviction or postdisposition relief.
6. Whether a person who does not request the state public defender to appoint counsel will represent himself or herself or will be represented by retained counsel. If the person has retained counsel to pursue postconviction or postdisposition relief, counsel's name and address shall be included.

**\*\* Signature requirement – TPR.** In termination of parental rights cases your client must also sign the NOI. It must be an actual client signature, not an electronic signature. The attorney must sign it too, and can do so electronically, but cannot sign in lieu of the TPR client. Wis. Stat. § 809.107(2)(bm)6.

**Deadline:** The NOI is due **within 20 days** after the date of sentencing or final adjudication. Wis. Stat. § 809.30(2)(b). **Exception:** In **TPR cases**, the deadline is **within 30 days** after the date of entry of the judgment or order appealed from. Wis. Stat. § 809.107(2)(bm). For information on what to do if the deadline is missed, see Section III below.

**Filing:** The NOI must be electronically filed **in the circuit court**. Wis. Stat. §§ 809.30(2)(bm); 809.107(2m)(bm).

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<sup>3</sup> The requirements for TPRs are found in Wis. Stat. § 809.107(2)(bm). The requirements are the same except the client's signature is required on the NOI in a TPR case.

**Notifying SPD appellate:** Please email a copy of the file-stamped NOI to [madisonappintake@opd.wi.gov](mailto:madisonappintake@opd.wi.gov). The clerk is required to send the NOI and other materials to the SPD within 5 days, but mistakes happen and you letting appellate intake staff know about the appeal ensures your client's appeal rights are protected in the not uncommon event the clerk's office fails to forward materials. Emailing the NOI also ensures SPD Appellate knows the client wants counsel appointed. It is helpful if you include the trial attorney questionnaire which can be found on the SPD website at this [link](#).

### III. You missed the NOI deadline – here's what to do.

The SPD is prohibited from appointing appellate counsel for a direct appeal if the NOI is not timely filed. Wis. Stat. § 977.05(6)(f). But, the SPD can appoint counsel if the deadline is extended. *Id.*

If you filed a late NOI, you must also file a motion to extend the deadline. The motion to extend the deadline must be e-filed **in the court of appeals**. Wis. Stat. § 809.82. Form motions to extend can be found on the [SPD website](#).

**How to file a motion to extend the NOI deadline:** You electronically file the motion to extend the NOI deadline **in the court of appeals**. A motion to extend the NOI deadline is a “pre-appeal motion” and directions on how to file a pre-appeal motion can be found at: <https://www.wicourts.gov/ecourts/efileappellate/docs/fileapreappealmotion.pdf>.

**Content:** The standard the court of appeals will apply when deciding a motion to enlarge appeal deadlines is “good cause shown,” meaning you must explain why the NOI was not timely filed from which the court can find good cause to grant an extension. Wis. Stat. § 809.82(2). Examples of “good cause” might be an innocent mistake or miscalculation of the deadline, or communication barriers (e.g. DOC mail or scheduling issues) prevented your client from being able to timely communicate their desire to appeal. Don't just say the client changed their mind after the deadline.

**Very late NOI:** If the deadline for filing the NOI has long passed (6 + months) or the court denied your request for an extension, don't panic, but please contact an SPD appellate manager as soon as possible so they can help sort out what, if anything, can be done to assist your client.

#### **RECAP: If the deadline to file the NOI has passed:**

- ✓ E-file the motion to extend the NOI deadline in the **court of appeals** asking for new deadline (today's date).
- ✓ E-file the NOI in the **circuit court** on that same date.
- ✓ Once the court of appeals grants the motion to extend, inform Madison Appellate (email [madisonappintake@opd.wi.gov](mailto:madisonappintake@opd.wi.gov))