

APPELLATE RESPONSIBILITIES OF TRIAL COUNSEL AND
PRESERVING THE RECORD FOR APPEAL

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A. APPELLATE RESPONSIBILITIES OF TRIAL COUNSEL AFTER
ENTRY OF TPR ORDER

1. Client had right to direct appeal from order terminating his/her parental rights -- TPR appeals are governed by 809.107, et seq.
2. Trial counsel must continue representing the parent until the notice of intent is filed. § 48.43(6)(a) and 809.107(2).
3. Appeal is initiated by filing a notice of intent to pursue post dispositional relief – deadline is 30 days of the entry of the judgment. Wis. Stat. § 809.107(2)(bm).
4. Notify client of right to appeal
 - i. Must discuss the right and any potential merit of appeal.
 1. ultimately it is the client's decision whether to pursue an appeal
 - ii. If client fails to appear at dispositional hearing, must timely notify in writing of right to appeal and 30-day deadline for filing notice of intent.
5. Notice of Intent - § 809.107 (2)(bm)
 - i. Required contents of notice Wis. Stat. §809.107(2)(bm) 1-5
 1. verify current address with client
 2. inform client that they must inform SPD Appellate Intake of any changes in their address.
 - ii. File original notice of intent with the clerk of circuit court where judgment was entered
 - iii. Must be filed within 30 days of entry of order
 1. If filed before written order entered, will be treated as though filed on date of the entry of the order - § 809.107(c).

- iv. You must serve a copy of the notice of intent on the other parties (i.e., the D.A. or corporation counsel, the guardian ad litem, and social services).
6. Send a copy of the file-stamped notice of intent to SPD Appellate Division Intake Unit, P.O. Box 7862, Madison, WI 53707.
 - i. Include a completed SPD Appellate Questionnaire
 - ii. Include any transcripts obtained during your representation (e.g., depositions or motion hearings) – the Intake Unit will forward these transcripts to appointed appellate counsel.
 - iii. Include any contact information for the client including alternative contacts (e.g. mother, cousin, neighbor).
7. TPR appeals are subject to an accelerated process.
 - i. Inform client to contact their appellate attorney when they receive the appointment order.
 1. Inform the client that if they do not receive an order appointing counsel within 25 to 30 days of filing notice of intent they should call SPD Intake at 608/266-3400.
 2. Inform client that they must contact SPD intake if their address changes
 - ii. Deadline for appointment of counsel and ordering transcripts is 15 days from receipt of the order and a list of each proceeding in the case. § 809.107(4)(a).
 - iii. Deadline for court reporter to provide the transcripts and the clerk to provide the record is 30 days. § 809.107(4m).
 - iv. Appellate counsel has 30 days from service of last transcript and court record to file notice of appeal. § 809.107 (5).
 - v. Postdisposition motions and briefing can take several more months.
8. Wisconsin State Public Defender minimum attorney performance standards require trial counsel to fully cooperate with appellate counsel, as they are “successor

counsel” when a client decides to appeal. Supreme Court rules and ethics opinions say that the file you maintained during trial representation belongs to the client, and you must provide it to appellate counsel if appellate counsel asks for it.

9. Motion to vacate default judgment on grounds phase
 - i. Court can enter a default finding against the parent on the grounds phase as a sanction for failing to comply with court-ordered discovery, fails to appear at their deposition and fails to comply with court orders – including orders to appear in court.
 - ii. Entry of default requires a finding of egregious conduct by the client and requires the state to prove grounds at an evidentiary hearing by clear and convincing evidence.
 - iii. If the court enters a default judgment on grounds phase:
 1. must notify the client of the default judgment and their right to appear and present evidence at the dispositional hearing
 2. Client’s right to counsel continues to dispositional hearing even if the parent is defaulted at the grounds phase. *See State v. Shirley E.*; 2006 WI 129, 298 Wis. 2d 1
 - a. This means your representation continues during the dispositional hearing. You can object, cross-examine and present testimony if you can determine what your client’s objective are.
 - iv. If a default judgment is entered for your client’s failure to appear in court and client contacts you soon after the court hearing –
 1. if there are factual grounds, file a motion to vacate default finding as soon as possible
 2. if client notifies you before disposition hearing or before notice of intent is filed – as counsel of record, it is your responsibility to file a motion to vacate default judgment

B. PRESERVING THE RECORD FOR APPEAL

1. Objections
 - i. Make your objections as specific as possible – tell the trial court what you want it to do and explain why the error matters to your client’s case.
 - ii. If there are multiple grounds for objecting,
 1. argue each grounds specifically
 2. insist on a ruling on the record on each one
 3. “Continuing objections” – be wary of these!! If the problem becomes worse than you originally foresaw, reraise and reargue the objection based upon the additional impact.

2. Try to keep everything on the record.
 - i. Supreme Court Rule 71.01(2) provides that “[a]ll proceedings in circuit court shall be reported,” with only limited exceptions.
 - ii. Request and insist that all sidebars be contemporaneously recorded. Later recitations of off-the-record sidebars tend not to be as detailed or sharp, and sometimes are forgotten altogether.
 - iii. A lot of things happen in a courtroom that are nonverbal – put those nonverbal matters of importance on the record. E.g., describe for the record a judge’s or witness’s tone or facial expression.

3. Motions
 - i. In writing where possible
 1. state all grounds with specificity and include statutory grounds and common law grounds with caselaw if applicable.
 - ii. It is your responsibility to assure that the court issue a decision on each of your motions
 - iii. Thoroughly review the record, including the CHIPS file (if Continuing CHIPS TPR or otherwise relevant) to determine if there any grounds for the motion:
 1. Did the court order place child outside of home

2. Does the order contain requisite TPR warnings

iv. Research:

1. On Point: <http://www.wisconsinappeals.net/> - search by topic
2. Case Summaries on SPD website (<http://www.wisspd.org/html/980case/casesum/casesum2.asp>) for cases before 2/11/10
3. Subscribe to On Point

4. Offers of proof

- i. Use an offer of proof if the judge excludes your proffered testimony or other evidence.
- ii. Need to be as detailed and factually specific as possible, and preferably in writing – but even handwritten on a legal pad is fine if you're in court and don't have access to a computer.
- iii. You can then submit the document to the court for the record as an offer of proof to preserve the issue for appeal.

6. Ineffective Assistance of Trial Counsel

- a. Many issues, if missed or not argued by trial counsel or if trial counsel make missteps, must be brought by post disposition motion claiming ineffective assistance of trial counsel otherwise the issues are deemed to be waived for purposes of an appeal
- b. Everyone makes mistakes or misjudgments – be honest about what you did and why.
- c. Avoiding an ineffective assistance claim is largely a matter of knowing the legal choices (and whose choices they are); doing any necessary research and a thorough investigation; making deliberate strategic choices; consulting with your client and documenting what you did and why in your file.
- d. Explain things as clearly as possible in language your client can understand.
- e. Keep file notes of major strategic decisions that you make, even if you have to sit down and write them out later.

- f. Make your own file record of major decisions you make with clients and date these. Send written confirmation of major decisions to the client by letter.