

JMK
NOTES

“The Life of An Appeal”

American Inns of Court, James E. Doyle Chapter

Presenters: District IV Court of Appeals Judges Kloppenburg,
Blanchard, Graham, Nashold, and Taylor

January 15, 2025

I. Motions

Judge Chris Taylor

II. First Reading of Briefs and Preparation for Conferences

Judge Jennifer Nashold

III. Conferences and Assignments

Judge Rachel Graham

IV. Drafting of Opinions

Judge JoAnne Kloppenburg

V. Internal Circulation and Public Release of 3-Judge Opinions and Summary Orders

Judge Brian Blanchard

Ideas to modify for DCBA:

- More stats
- Sample "good" and "not so good" motions, briefs, appx, etc.
- How much of your time is taken up with certain tasks (First reading / prep. for conferences, drafting op., addressing motions, etc.)
- More about decisions to recommend for publication
- * → Incl. how often non-parties file requests, the interesting reasons for those requests, and how often those requests end up swaying the publication decision.


I. Motions

Taylor

1. COA Staffing
 - a. 15 staff full-time attorneys and a chief staff attorney who works for the whole district.
 - b. In D4, 4 staff attorneys who work as 3.5 FTE.
 - c. Each COA judge has two personal appointees, typically as Judicial Assistant and law clerk.
2. COA Motions by the Numbers
 - a. As of September 2024, 12,761 total motions filed.
 - b. In 2023, 14,220 total motions filed.
 - c. In 2022, 13,041 total motions filed.
3. Types of Motions

Extensions	Waiving fees
Supplement/correct the record	Granting a request for fees/costs
Summary reversal/disposition	Allowing access to the PSI
Amending the caption	Allowing for bond pending appeal
Consolidating cases	Granting a stay of an order or judgment
Changing from 1-judge to 3-judge case	pending appeal
Changing venue (i.e., picking diff. district)	Remand
Appointing counsel	Reconsideration
Allowing counsel to withdraw	Reinstatement
Admitting counsel pro hac vice	Motion to strike
Allowing a non-party brief	Motion to seal
Allowing a party to intervene	Motion to advance disposition of an appeal
Allowing an oversized brief	Motion for clarification
Compelling the production of transcripts	Motion for miscellaneous relief

4. Filing Motions – Process
 - a. Electronic filing (eFiling) for motions is required of all attorneys.
 - i. The appellate eFiling system is separate from the circuit court eFiling system.
 - ii. **WE DON'T HAVE ACCESS TO THE CIRCUIT COURT DASHBOARD.**

- iii. Effective July 1, 2021, all attorneys representing parties in an appeal are required to participate in the eFiling system for the Court of Appeals. See WIS. STAT. § 809.801.
- iv. Each attorney must have the attorney's own eFiling account, and each attorney must opt into the case.
 - 1. If multiple attorneys are representing one party, each attorney must opt in.
- v. Parties can assume that attorneys for other parties have opted in to eFiling: they are not required to serve attorneys with paper copies of filings. "Paper parties" must be served with a paper copy, which includes pro se litigants who have not opted in to eFiling.
- b. Motions must be filed with the Clerk of the Supreme Court & Court of Appeals (Samuel Christensen).
 - i. Clerk's office open 8 a.m. - 5 p.m. Motions filed between 5 p.m. and 11:59 p.m. will be considered filed on that day, but they will not be reviewed until the next business day. Motions eFiled on a non-business day will be considered filed on the next business day.
 - ii. Do not mail or email motions directly to a judge's chambers or to a staff attorney.
 -  iii. Emergency or time-sensitive motions should be filed well before 5 p.m. on a business day.
 - 1. If seeking emergency relief, indicate that fact on page 1 of your motion and provide a date by which relief is needed.
 - 2. Notify the clerk's office via telephone in advance (preferably well in advance) that an emergency motion will be filed. If you do not alert the clerk and you eFile your motion after 5 p.m., it will not be reviewed until the next business day.
 - 3. But even if the clerk is alerted in advance, this does not guarantee court action outside of normal working hours. The judges and staff address urgent issues in a timely manner, which when merited can include evening and weekend attention to pressing motions and petitions.
- c. Motions accepted by the clerk's office are sent for review to one of each district's staff attorneys, who are the front lines of monitoring motions.
 - i. District IV staff attorneys rotate every one to two weeks for screening and reviewing motions. The staff attorneys assigned to other districts follow different rotations.
 - ii. Do not assume that the same staff attorney will review a subsequent motion, although often the same staff attorney will stay with a more complex matter or a set of interrelated matters.

- iii. Staff attorneys review a high volume of motions each day. The staff attorney monitors a dashboard that shows when motions are transmitted to the court from the clerk.
- iv. The motions staff attorney communicates with the appropriate judge or panel as necessary and prepares a draft order for the judge or panel to review.
 - 1. If the case has already been assigned to a judge or panel, that judge or panel will decide the motion.
 - 2. If the case hasn't been assigned, the motion will be decided by the "motions judge" or "motions panel" for that month. In some districts, the presiding judge of the district decides motions in unassigned cases.
 - 3. One judge with a panel of two other judges serve as "motions judges" each month.
- v. Motion decisions by 1 judge vs. 3-judge panel.
 - 1. Procedural issues are generally decided by a 1-judge order (e.g., a motion for an extension of time).
 - 2. An order that terminates an appeal in a 3-judge panel case, such as an order to dismiss, is decided by the 3-judge panel.

See 60a.
next pg





5. Motion Content



- a. Provide sufficient details/information. We are reviewing a lot of motions, so clarity and conciseness help expedite deciding your motion!
 - i. WIS. STAT. § 809.14(1) requires that the motion state the relief sought and the grounds on which the motion is based.
- b. A motion may be supported by a memorandum, which should be filed with the motion, not as a separate document.
- c. Generally, no affidavit is needed in support of a motion because the COA does not engage in fact finding. For various propositions, we rely on the unsworn representations of counsel.
- d. Do not submit a proposed order with your motion (although of course it's wise for movants, and potential opponents, to envision precisely what an order should or should not say, especially in more complicated scenarios).
 - i. The COA drafts and formats all of its own orders, although the more routine orders contain "stock" language that fits the routine situation.
- e. If the circuit court record has not been transmitted to the COA, include copies of any documents necessary for us to understand and resolve the motion.
 - i. COA does not have access to the circuit court dashboard or any materials that have been filed with the circuit court outside of the "record on appeal" that is prepared by the circuit court clerk

after the appeal is initiated and transmitted to us pursuant to WIS. STAT. § 809.15. If the record has not been transmitted to us, we don't have any of the documents that have been filed with the circuit court.

- f. If the record on appeal has been transmitted to the COA, and contains the documents you wish to reference, you do not need to resubmit these documents, but include the record number for each such reference.
- g. If the motion is unopposed, please tell us!
- h. In requesting an extension, include specific reasons for the relief you seek, especially if this is not your first extension request. We must find good cause for granting the relief you seek.
 - i. When seeking an extension, ask for an extension to a date certain.
- i. **Criminal and other specified categories of appeals.** For appeals under WIS. STAT. § 809.30 (most criminal appeals, and appeals in cases from 971.17 proceedings and ch. 48, 51, 55, 938 and 980 cases), there are many deadlines that we can extend by court order (e.g., extending the time for the circuit court to decide a postconviction motion or extending the deadline to file a notice of appeal). Ask for an extension before the deadline.
 - i. If extensions are not granted, the COA might lack jurisdiction, and not obtaining an extension could slow down your appeal.
 - ii. Although we can grant some extensions retroactively, there is no guarantee we will do so.

  Be aware that some extensions cannot be granted (e.g., the time for filing a notice of appeal or cross-appeal of a final judgment or order in a civil case, other than specified in WIS. STAT. § 809.30; the 20-day time limit for filing a motion for reconsideration of the COA's written decision under WIS. STAT. § 809.24(1)).

6. Responses to a Motion

-  a. A procedural motion may be acted on without waiting for a response. WIS. STAT. § 809.14(2). "Procedural" is not defined in the appellate rules, but is generally applied to modifications of the briefing schedule; enlarging the size of a brief; consolidating cases; supplementing the record; appointing counsel; or allowing counsel to withdraw, among other requests.
 -  i. If planning to object to a procedural motion, you should consider contacting the clerk's office to alert the court that a response is forthcoming.
- b. If the court grants a procedural motion before you have had an opportunity to respond and you have an objection, you may file a motion for reconsideration.

They all read hard copies in prep. for

II. First Reading of Briefs and Preparation for Conferences

1. A case is submitted to the court for review when the final reply brief in the case has been filed. (For cases with expedited deadlines, such as TPRs, the case is submitted to the court on the filing of the appellant's initial brief to facilitate prompt adjudication once the reply brief is filed.) Most cases are randomly assigned to panels of three judges. Although there are discrete types of cases that are randomly assigned to a single judge pursuant to WIS. STAT. § 752.31, our discussion centers on the three-judge cases.
2. Each month, District 4 reviews five panels of up to six cases each, with each judge on three panels. That means up to eighteen three-judge cases per judge for preliminary review each month. (Each month, Districts 1 and 2 review four panels of up to six cases each, and District 3 reviews three panels of up to six cases each.)
3. Assignments of cases to panels are random.
4. The panels come together to jointly review the cases at decision conferences, sometimes referred to as "screening," which Judge Graham will discuss in more detail.
5. To prepare for the decision conferences, the judges read all of the briefs assigned to their panels, as well as the relevant circuit court decisions in each case. The judges may also read key parts of the record and relevant statutory and case law in preparation for conferences.
6. Because we are a high volume court, in reviewing the briefs at this preliminary stage we are trying to quickly distill what the circuit court decided and what the crux of the parties' dispute is. Keep that in mind as you are drafting your briefs:
 - a. Eliminate anything from your briefs that is unnecessary to the issues the court is deciding on appeal.
 - b. Make sure the background summaries are accurate and factual, saving all argument for the argument sections.
 - c. Include cites from the record. *See* WIS. STAT. § 809.19(1).
 - d. Include a statement of the case with an overview of key points and without unnecessary detail.
 - e. Briefs should contain thoughtful organization that separately addresses separate issues.
 - f. Include plenty of concise headings and subheadings.

Brief Tips:

7. The judges prepare pre-screening memos for all of the cases on their panels. The District 4 judges generally do not involve their law clerks at this preliminary stage. The pre-screening memos are prepared by the judges themselves.
8. Although the pre-screening memos vary in detail depending on the nature of the appeal and the briefing, at a minimum they typically state the reviewing judge's tentative decision on whether the case will be an affirm or a reverse, whether it should be assigned for drafting to a chambers or a staff attorney, and whether it should be considered for publication or should receive different treatment, such as a per curiam or summary disposition. The pre-screening memos will generally state which arguments the judge did or did not find convincing, typically qualified by the need for a more close review of the facts and the law.
9. Some common characteristics that make a case relatively straightforward and therefore a good candidate for staff attorney assignment:
 - a. Legal issues not complex
 - b. Failure to develop an argument
 - c. Forfeited arguments
 - d. Standard of review
 - e. Harmless error

III. Conferences and Assignments

1. On decision conference days, the panels meet with the goal of reaching a preliminary decision in each case. These preliminary decisions are not official or even presumptive, and are instead the tentative collective understandings of the panel based on our initial review of the briefs and any extra research any of the judges have done to date.
2. Discussion of the facts and law can be lengthy and substantive:
 - a. We routinely reference specific sections in the briefs and our pre-screening memos.
 - i. Tip – one reason we care so much about WIS. STAT. RULE 809.19(8)(bm), the rule that addresses the pagination of appellate briefs and appendices, is that we will refer to arguments in the briefs and documents in the appendix by page numbers. Compliance with the rule literally helps keep to us on the same page during discussions.
 - b. We may pull key items from the record (for example, the complaint or motion, the circuit court decision that is being appealed).
 - i. Tip – this is one of the reasons that WIS. STAT. RULE 809.19(1)(d) and (e) require briefs to contain appropriate reference to the record.
 - c. We may also pull the key statutes and cases.
 - i. Tip – the reason we like short cites to the Wisconsin Reporter is because that's the book set we have in our conference room and also our offices.
3. Discussion at conference tends to turn on three questions:
 - a. Do we have a tentative decision and rationale that we can articulate, or do we have a lot of unanswered questions that need to be researched and considered by a judge in consultation with their law clerk?
 - b. Are all of the judges on the panel generally in agreement on the rationale and result as to each issue?
 - c. Is there potential value in publishing? → If so, it can't be assigned to a staff attorney; has to be published under a judge's name.
4. These questions inform one key decision we make at conference—whether the opinion will be assigned to a judge's chambers or to staff attorney.
5. We also consider whether there is any particular time sensitivity that would warrant the assigned drafter to prioritize resolving the case more quickly, before other appeals that have already been conferenced and assigned.

i.e., so you don't have ap. 7 and ap. vii. ←

They use books →

6. For some cases, we also consider the possibility of ordering oral argument (fairly rare) or supplemental briefing (even rarer).
 - a. Oral argument can be valuable if we have questions that are not addressed in the briefing, or if the context is one that is unfamiliar to the judges.
 - b. But oral argument is quite time intensive, both for the court and for the parties, and we are aware that it can add significant expense for parties.
 - c. When we do order oral argument, we often issue an order with key questions we have to help focus the parties' arguments.
7. At the end of the discussion of each case, we dictate a post-screening memo:
 - a. Dictated by one judge in the presence of the panel.
 - b. If a case will be assigned to a staff attorney, we endeavor to provide detailed instructions so as to make the drafting process as straightforward as possible.
 - c. If assigned to chambers, we endeavor to memorialize the reasons for the assignment, our unanswered questions and specific areas of focus or inquiry for the assigned chambers, and any concerns or potential areas of disagreement among the judges.
8. At the end of conference, the assignments (both to staff attorneys and to chambers) are made by our administrative staff.
 - a. All assignments are random.
 - b. The dictated post-screening memo and the pre-screening memos from all three judges on the panel are routed to the assigned judge or staff attorney.

IV. Drafting of Opinions

1. So, the result of the process so far is that after each month's conference, each judge's new assignments include:
 - a. The three-judge cases randomly assigned to a judge's chambers, and three-judge cases randomly assigned to a staff attorney and supervised by the judge; in addition to one-judge cases assigned over the course of the month by seniority.
 - b. The judge again reviews the new three-judge and one-judge assignments to determine whether any are time-sensitive (e.g., TPR, reversal and remand for trial, review for oral argument).
2. Drafting of opinions by assigned judge (where the rubber meets the road!)
 - a. Involvement of judge, judicial assistant, and law clerk varies by chambers.
 - b. In some chambers, the law clerk writes the initial draft of an opinion after discussion with the judge; in other chambers, the judge and law clerk alternate taking assignments for the purpose of writing the initial draft. Regardless of who does the most detailed, initial research and writes the initial draft, the other then reviews that draft and makes edits, and the review goes back and forth until the judge and law clerk are satisfied that the draft opinion is suitable to be circulated to the two other judges on the panel (if a three-judge opinion) or to be released (if a one-judge opinion).
 - c. Typical concerns include consistency of use of terms, clarity, accuracy, flow, shortening long sentences, striking balance between saying too little and too much, ensuring that all issues and arguments by the losing party have been addressed.
 - d. The authoring chambers reads the briefs multiple times to suss out nuances and ensure no aspects of the arguments have been missed. While we've emphasized conciseness, it's also important that arguments be fully made. Arguments not fully developed may be rejected for that reason.
 - e. A circulated draft includes a recommendation regarding whether to release opinion as a per curiam or authored, and if the latter whether recommended to be published or unpublished.
 - f. A draft opinion for circulation includes, in addition to legal citations that are included in final opinion, record citations for all statements of fact and citations to the parties' briefs for all statements of what the parties argue. These record and brief citations are not included in the final opinion. Before circulation or release, law clerk and judicial assistant review all record citations, brief citations, and legal citations for accuracy and (as to legal citations) proper formatting.

- g. Judge, judicial assistant, and law clerk each become familiar with the record and briefs to differing degrees as required to ensure that the opinion accurately states all relevant facts, accurately represents parties' arguments, and addresses all arguments by losing party.

3. Drafting of opinions by staff attorney

- a. Staff attorney consults with supervising judge when close review of record, law, or briefing suggests analysis or outcome different from that outlined by panel at decision conference.
- b. Once differences, if any, among judges are resolved, the staff attorney writes an initial draft of a per curiam opinion or summary disposition order. The supervising judge reviews a draft and makes edits for the staff attorney's further review. Once the supervising judge is satisfied that the draft opinion is suitable to be circulated to the two other judges on panel, before circulating the opinion the judicial assistant reviews the opinion and checks record and brief citations and legal citations as above. The law clerk may also do some of this review depending on the chambers.

Not all per curiam are drafted by staff atty.

4. Preparation of questions for oral argument

- a. Assigned chambers (judge and/or law clerk) can summarize the issues and potentially prepare questions for oral argument for review by the other two judges on the panel. This may follow or include an outline or rough draft of an initial opinion, which can help to identify questions that could arise only on close review of briefs, record, and law. If warranted, a set of questions are set forth in an order to the parties before the oral argument, with the goal of helping counsel to use their preparation time efficiently and effectively.

5. Miscellaneous

- a. Inclusion in opinions of footnotes when a party does not comply with rules of appellate briefing, including pagination, references to parties, citations to record, contents of appendix. See WIS. STAT. § 809.19. These rules allow us to work more efficiently.
- b. Use of initials that do not correspond to actual names to refer to victims and others (family members, witnesses) whose identification might lead to identification of victims. See WIS. STAT. RULES 809.19(1)(g) and 809.86 (2021-22).

Super helpful!

★ They do look at per curiam op. a lot. Just can't cite. So, we should consider per curiam decisions, too, knowing they'll review them → Just don't cite!

V. Internal Circulation and Public Release of 3-Judge Opinions and Summary Orders

1. Internal Circulation of a draft opinion produced by a chambers
 - a. When the authoring judge is satisfied that a draft opinion in a three-judge case is suitable to be circulated to the two other judges on the panel, a clean electronic version is forwarded to the reviewing judges. (Of course, there are no circulations of one-judge opinions.)
 - b. The two reviewers have several options, which commonly fall into the following two categories:
 - i. Respond with emailed approval and only minor suggestions, shown in tracked changes, on typos and style/clarity points.
 - ii. Respond with substantive points – made by email, a tracked changes return, or some combination – sometimes with a request for recirculation by the author.
 - c. Less often, one or both reviewing judges raise a concern that they think might not be resolved through a recirculation, raising the prospect of a possible concurrence or dissent, or a complete change in outcome. As the issues come into better focus, the other panel members may have additional questions for the authoring judge in what is a highly collaborative process. The ultimate need for an actual concurrence or dissent is exceedingly rare.
 - d. Typical concerns:
 - i. Nomenclature, framing, or other clarity suggestions or questions (*e.g.*, “Does the second reference in paragraph 13 of the circulation correctly state the standard of review?”)
 - ii. One example of a framing issue: “I agree with the rationale and the result to resolve this appeal. But I’m concerned about how the language in the circulation might be applied in a hypothetical future case – if for instance fact X in this case changes to fact Y in the future case.”
 - iii. Possible differences of opinion about how to interpret a case, statute, or other text (*e.g.*, “I wonder if the contract, when construed as a whole, might be ambiguous; does the circulation focus too narrowly on one provision?”)
 - iv. Varying views on the scope of what we should or need to address, now that the authoring judge has clarified for the panel our feasible options. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we generally resolve appeals on the narrowest possible grounds, unless unusual circumstances call for a different approach).

- e. There is also discussion about what appear to be the pros and cons of authoring judge's recommended mode of release: for publication; authored but not for publication; per curiam; or summary order. *See* WIS. STAT. RULE 809.23(1). This discussion can be extensive or brief, depending on how obvious the best mode seems to be.
 - f. As to all suggestions and questions from reviewers, most often the authoring judge is able to accommodate these without the need for additional in-person meeting, although follow up emails are common.
 - g. It's quite common for an authoring judge to drop or add paragraphs or footnotes, and to at least tweak structural aspects of an opinion, based on the helpful suggestions and questions by the two reviewing judges.
2. Internal circulation of a draft opinion or summary order by a staff attorney already tentatively approved by the supervising judge
- a. The two reviewing judges review and make suggested edits or comments/questions on circulations of opinions drafted by our highly capable and experienced staff attorneys.
 - b. The supervising judge works with the staff attorney to take into account all suggestions and questions by the two reviewing judges.
 - c. Most often, suggestions and questions are accounted for without the need for a recirculation.
3. Public release and beyond
- a. The chambers assigned to draft or supervise an opinion or order is responsible for making final reviews for clarity, cite-checking, flyspecking for typos, etc.
 - b. After public release, if there is a motion for reconsideration or anyone raises an issue about a typo or other possible glitch, the authoring judge takes the lead in reviewing and addressing, with the entire panel considering a motion for reconsideration. (*See* WIS. STAT. RULE 809.24(1) ("Except as provided in sub. (4), a party may file a motion for reconsideration in the court of appeals within 20 days after the date of a decision issued pursuant to s. 752.41(1). 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. No separate memorandum in support of the motion is permitted unless subsequently ordered by the court."))
 - c. When this "error correcting" court makes an error in an opinion (whether we learn of the error through a motion for reconsideration or otherwise) of the type that can be corrected by issuing an erratum or errata, then we issue that, with the parties getting notice.

we are open to motions for reconsideration

- d. We also have the option of withdrawing the opinion and reissuing, which occurs on rare occasions. Withdrawal of an opinion renders the opinion a nullity.
- e. Post-release publication decision: Every month, our court's "publication committee" (all judges serve on this committee on a rotating basis) reviews all authored opinions released the month prior. The committee decides whether to follow the recommendations of the originating panels to publish or not publish each opinion. *See* WIS. STAT. RULE 809.23(2). Disagreements among committee members regarding panel recommendations, and among committee members in general, are rare. But every so often the vote of the committee on a particular recommendation is not unanimous.
- f. "[A]ny person," *not just a party to the appeal*, "may at any time file a request that an opinion not recommended for publication or an unreported opinion be published in the official reports." WIS. STAT. RULE 809.23(4)(a).
- g. Petitions for review of our decisions filed with our supreme court are forwarded to us for our information, but of course we take no action on those.

