

**PERMISSIVE OR INTERLOCUTORY APPEALS**

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**PERMISSIVE OR INTERLOCUTORY APPEALS** (*i.e.*, court of appeals has discretion in deciding whether to hear the appeal.)

The procedure for pursuing a permissive appeal is governed by Wis. Stat. §§ (Rules) 809.50 and 809.52. The criteria the court of appeals applies when deciding whether to entertain a permissive appeal are found in Wis. Stat. § 808.03(2).

**A. Criteria/Entitlement.**

1. Both the State and the defendant are entitled to pursue a permissive appeal. See *State v. Rabe*, 96 Wis. 2d 48, 59-60, 291 N.W.2d 809 (1980).

2. Permissive appeals are strongly disfavored, especially in criminal prosecutions. See *State v. Jenich*, 94 Wis. 2d 74, 80, 288 N.W.2d 114 (1980); *State ex rel. A.E. v. Circuit Court for Green Lake County*, 94 Wis. 2d 98, 101, 288 N.W.2d 125 (1980); *State v. Borowski*, 164 Wis. 2d 730, 735, 476 N.W.2d 316 (Ct. App. 1991).

3. Wis. Stat. § (Rule) 808.03(2) sets forth the criteria for permissive appeals:

Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

- (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
- (b) Protect the petitioner from substantial or irreparable injury; or
- (c) Clarify an issue of general importance in the administration of justice.

4. Case law pertaining to appeals of preliminary hearing decisions:

Appellate review of a preliminary hearing is limited to determining whether the record contains competent evidence to support the examining magistrate's exercise of judgment. Although motive is not an element of any crime and does not of itself establish guilt or innocence, evidence of motive may be given as much weight as the fact finder deems it is entitled to at the preliminary hearing or trial. *State v. Berby*, 81 Wis. 2d 677, 260 N.W.2d 798 (1978).

Standard of Review: If any reasonable inference supports a conclusion that the defendant probably committed a crime, the magistrate must bind over the defendant. *State v. Dunn*, 117 Wis. 2d 487, 345 N.W.2d 69 (Ct. App. 1984); *aff'd*. 121 Wis. 2d 389, 359 N.W.2d 151 (1984).

The state has the right to appeal a dismissal when it believes an error of law was committed. An uncorroborated confession alone was sufficient to support a probable cause finding. *State v. Fry*, 129 Wis. 2d 301, 385 N.W.2d 196 (Ct. App. 1985).

A defendant claiming error at a preliminary examination may obtain relief only prior to trial; the defendant may seek interlocutory review from the court of appeals under s. 809.50. *State v. Webb*, 160 Wis. 2d 622, 467 N.W.2d 108 (1991).

If a bindover decision is made by a court commissioner or circuit judge, review must be by a motion to dismiss brought in circuit court. Habeas corpus is not available to review a bindover. *Dowe v. Waukesha County Circuit Ct.* 184 Wis. 2d 724, 516 N.W.2d 714 (1994).

## **B. Procedure for Seeking Permissive Appeal.**

See generally Wis. Stat. §§ (Rules) 809.50 and 809.52.

1. Leave to appeal must be sought by filing a petition and supporting memorandum in the court of appeals. Filing occurs when the clerk receives the document. Service upon a party occurs when the document is placed in the regular US mail, properly addressed, with adequate postage. Wis. Stat. § (Rule) 801.14 (1), (2) and (4), and 809.80 (2)(a).

2. To be appealable under this procedure, a judgment or order must first be entered (i.e., filed) in accordance with Wis. Stat. § 806.06(1)(b) or Wis. Stat. § 807.11(2).

3. The petition must include “[a] copy of the judgment or order sought to be reviewed,” Wis. Stat. § (Rule) 809.50(1)(d).

4. 14-day time limit. An appeal from a nonfinal judgment or order must begin “within 14 days after the entry of the judgment or order” appealed from, Wis. Stat. § (Rule) 809.50(1). You do count Saturdays, Sundays, or holidays. Wis. Stat. § 801.15(1)(b).

5. The petition and supporting memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. Wis. Stat. § (Rule) 809.50(1).

6. A statement must be appended to the petition attesting to the type of font used (monospaced or proportional serif). If a proportional serif font is used, the statement must include a word count. Wis. Stat. § (Rule) 809.50(4).

7. The petition or memorandum must contain:

- a. a statement of issues presented;
- b. a statement of the facts necessary to understand the issues;
- c. a statement showing that an immediate appeal will materially advance the termination of the litigation or clarify further proceedings, protect a party from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice; and
- d. a copy of the judgment or order sought to be reviewed.

See Wis. Stat. § (Rule) 809.50(1).

8. The opposing party must file any response and supporting memorandum within 14 days of service of the petition. Wis. Stat. § (Rule) 809.50(2). The response and memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. Wis. Stat. § (Rule) 809.50(2). Attach a statement on font and length as described in subsection 6 above.

9. The petitioner may seek temporary relief from the court of appeals pending disposition of the petition. See Wis. Stat. § (Rule) 809.52. Generally, relief should be sought from the circuit court first.

10. The order granting leave to appeal has the effect of the filing of a notice of appeal. Wis. Stat. § (Rule) 809.50(3).

**C. Suggestions on Content of Petition for Permissive Appeal.**

As a practical matter, the petition should contain everything the court would need to decide the case on appeal. Include a discussion of the merits (legal and factual) sufficient to demonstrate to the court that the petitioner is likely to prevail on appeal. Also, emphasize why an appeal later is an insufficient remedy.

In addition, because the court will have no record before it, relevant portions of the transcripts, motions, orders, exhibits, etc., must be attached to the petition or response. If the petition is inadequate in this regard, the court is likely to deny it rather than order supplementation. If necessary portions of the record cannot be obtained in time, set forth the essential facts in an affidavit.