

## APPELLATE COURT JURISDICTION IS GOVERNED BY UNITED STATES CONSTITUTION AND STATUTE

- Primary jurisdiction is appellate review of decisions of lower courts.
- Jurisdiction must exist by constitution or statute—it cannot be conferred by agreement of the parties.
- The Eighth Circuit includes the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

## APPELLATE COURT PROCEDURE GOVERNED BY RULES OF PROCEDURE

- Federal Rules of Appellate Procedure (FRAP) for all criminal, civil, and administrative appeals.
- Eighth Circuit Rules (8th Cir. R.) and Internal Operating Procedures (IOP).
- Eighth Circuit Bankruptcy Appellate Panel.

## PRELIMINARY CONSIDERATIONS

- Is there subject matter jurisdiction?
- Is there an appealable decision?
- What is the appeal deadline?
- Is there a pending motion listed in FRAP 4(a)(4)?
- Have the points of error been properly preserved?
- Does the proposed appeal have real merit or is it frivolous?

## APPELLATE COURT JURISDICTION IS INVOKED BY FILING APPEAL

- Perfection of appeal requires: (1) **timely** (2) **filing** of certain documents with the district court.
- Perfecting the appeal **transfers jurisdiction** to the appellate courts as to matters at issue in appeal.
- Trial court retains jurisdiction to **enforce** or **stay** its judgment.
- Make sure trial court has decided issues to be appealed.

## APPEAL CAN ONLY BE TAKEN FROM APPEALABLE ORDERS AND JUDGMENTS

- Policy favors a “unitary appeal” at end of trial court proceedings.
- Judgments: generally, the following are appealable:
  - ◆ Final judgments:
    - ❖ A judgment is final if it terminates the litigation as to all parties and claims.
    - ❖ A judgment is final even though ministerial tasks or collateral matters remain.
  - ◆ Judgments **properly certified as final under Fed. R. Civ. P. 54(b)** (no just reason for delay and court expressly directs entry of judgment).
  - ◆ **Amended final judgments** are appealable (but issues in earlier, unappealed judgment unaffected by the amendment will not be reviewed).
- **Orders:**
  - ◆ Certain interlocutory orders may be appealed pursuant to 28 U.S.C. § 1292. These include: (1) most orders involving injunctions; (2) certain orders regarding receivers and receiverships; and (3) certain admiralty matters.
  - ◆ District courts may also create appealability by properly and timely certifying that an order involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal will materially advance the ultimate termination of the litigation.
  - ◆ Orders may also be appealable under the collateral order doctrine, hardship, or death knell doctrines.
  - ◆ Fed. R. Civ. P. 23(f) allows discretionary appeal of orders regarding class certification.

## TIME TO APPEAL

- ## APPEAL BY PERMISSION
- File petition within the time specified by the statute or rule authorizing the appeal or, if no time is specified, within the time provided by FRAP 4(a) for filing a notice of appeal.
  - Petition for permission to appeal must be filed with the Clerk of the Circuit Court.
  - Pay fees within 14 days after entry of order granting permission.

An appellant has an uphill battle—numerous doctrines conspire to reduce the likelihood of obtaining a great result on appeal:

- Limited reviewability, deference to trial court rulings.
- In many cases, the costs of appeal are not justified by the prospects of success.
- The cost of obtaining a transcript may effectively rule out appeal.
- Stay may not be available or supersedeas bond may be too expensive.

- You must be admitted to practice in the Eighth Circuit in order to appear before the court and argue a case.
- You do not need to be admitted to submit briefs.

If no transcript is provided, affirmance will be virtually inevitable as to issues that would be reflected in the transcript.

### CONSIDER ENLISTING SUPPORT OF *AMICI CURIAE*

- An *amicus* may help present issues the party has difficulty, or limited standing, to raise.
- Court might find value in views on policy issues or broader impact of potential decision.
- Role of *amici* should be to inform the court, not to lobby or argue for a party. *Amici* must state the relevance of the matters briefed to the disposition of the case.
- *Amici* no longer need written consent of parties to file a brief. Brief should accompany motion for permission to file as an *amicus*.

- Motions may be made at any time, and may address virtually any issue.
- Motions are filed and served electronically. See 8th Cir. R. 25A(b).
- If motion is for extension of time, send a letter to the clerk with one copy.
- The court has adopted a single-document approach combining the motion and grounds in one document. Always state grounds for the motion with particularity. Do not file a separate notice of motion, memorandum of law or proposed order. Any accompanying affidavit should include only facts, not argument.
- Give the court enough lead time to consider the motion.
- Procedural motions may be granted before there is time to file a response.
- Motions and responses must conform to type requirements of FRAP 32.

## PREPARE AN EFFECTIVE BRIEF (FRAP 28; 8TH CIR. R. 28A)

- Select only the strongest issues to raise on appeal.
- Most appeals should address only a small fraction of the possible issues.
- Keep the brief short and concise.
- Cite meaningful authority – not every conceivable case.
- Be specific (and realistic) about what relief you want – as appellant or appellee – reversal, remand, affirmation, etc.
- Briefs include (in this order):
  - ◆ Summary of the Case (one page limit and includes request for oral argument).
  - ◆ Corporate Disclosure Statement.
  - ◆ Table of Contents.
  - ◆ Table of Authorities.
  - ◆ Jurisdictional statement – be sure court has jurisdiction (28 U.S.C. § 1291, 1292):
    - ┆ final judgment;
    - ┆ injunctive relief granted or denied;
    - ┆ final in effect and collateral;
    - ┆ criminal judgment and commitment; and
    - ┆ certified under Fed. R. Civ. P. 54(b) or 28 U.S.C. § 1292(b).
  - ◆ Statement of Issues and Authorities (include up to four apposite cases, applicable statutes and constitutional provisions with the statement of each issue).
  - ◆ Statement of the Case (procedural history).
  - ◆ Statement of Facts.
  - ◆ Summary of Argument (mandatory requirement).
  - ◆ Argument:
    - ┆ Include standard of review for each issue.
    - ┆ Use real names (not appellant or appellee).
    - ┆ Include a conclusion specifying relief sought.
    - ┆ Don't incorporate other briefs by reference.
    - ┆ When citing unpublished opinions, follow requirements of 8th Cir. R. 28A(i) and include a copy with brief.
  - ◆ Conclusion.
- ◆ Be sure to know the length limitations. The length allowed depends on the number of pages, typestyle or number of words, and font. FRAP 32. See *also* Timeline ¶ 13 (below).
- ◆ Certificate of Compliance (page/word count) must be included when brief exceeds 30 pages. FRAP 32(a)(7). Also includes certification of word processing program. 8th Cir. R. 29A(c).
- ◆ Addendum. This is a shortened version of the appendix.
  - ┆ Include the district court's order or judgment.
  - ┆ Include up to 15 pages of record documents upon which you want the court to focus its attention.

- ## ORAL ARGUMENT
- Do not be late. Arrive 30 minutes early and report to the clerk's office.
  - Be prepared.
    1. Be familiar with the important cases.
    2. Be familiar with the record—have transcript or appendix cites for facts you intend to mention.
    3. Be familiar with the trial court decision.
    4. Be prepared to explain both appellate and trial court jurisdiction (even if not contested by the parties).

- Do not argue the case as if the court were a jury.
- Be rested—an “all-nighter” is not a great way to prepare.
- Introduce yourself to the court. (Your name and whom you represent—no matter how well you know the judges.)
- Introduce the major points you intend to make or areas you intend to cover. Organization will be helpful to the court.
- Questions are opportunities, not problems.
- **Always** answer any question you are asked immediately.
- **Answer** followed by **short explanation** is vastly superior to explanation that leads to eventual answer.
- Use questions to help focus the court on facts supporting your position.
- A well-prepared lawyer is never asked a question he or she has not already considered.
- Select a few issues to stress at oral argument. These may not be the strongest issues, but should be those that best benefit from the oral forum.
- Use issues to develop a **theme**.
- When you have made your point, sit down even if time remains.
- Consider using visual aids – blow ups, lists, outlines.
- Conclude with a specific request for the relief you want—i.e., reversal, affirmance, remand.
- Make use of the opportunity for **rebuttal**:
  - ◆ answer questions directed to appellee;
  - ◆ address and respond to any points made by the appellee; and
  - ◆ repeat your request for the specific relief needed in the case.

Brief and Addendum [FRAP 31(b); 8th Cir. R. 28A(a)]..... 10 copies

Appendix [FRAP 30(a)(3); 8th Cir. R. 28A(b)] ..... 3 copies

One copy of brief and one copy of appendix must be served on each unrepresented party and on counsel for each separately represented party.

8th Cir. R. 25A(b) lists all the documents that must be filed electronically, including any motions and petitions for rehearing.

Brief and Addendum when hearing *en banc*  
[8th Cir. R. 35A(1)]..... 21 copies

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## BIBLIOGRAPHY

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HON. DONALD P. LAY, *LAW: A HUMAN PROCESS*, ch. 7, *The Appeal* (1996).

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Judge Myron H. Bright, *The Ten Commandments of Oral Argument*, 67 A.B.A.J. 1136 (1981).

Mark Herrmann & Katherine B. Jenks, *Great Briefs and Winning Briefs*, 19 LITIGATION, Sum. 1993, at 56.

Hon. Marianne D. Short, *Tips for Successful Appellate Practice*, PRACT. LITIGATOR, Jan 1996, at 25.

Many good manuals on written advocacy and oral advocacy are omitted; they can be located by consulting American Academy of Appellate Lawyers Bibliography of Appellate Practice Books, Manuals, and Articles (2008), also available at <http://www.appellateacademy.org>.

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# Timelines and Deadlines

Because the jurisdiction of the court of appeals is entirely statutory, time periods specified in statutes are deemed to be jurisdictional.

Except for hard copies of briefs and appendices, documents must be e-filed within the time fixed for filing. Hard copies of briefs and appendices are timely if mailed within the time fixed for filing.

8th Cir. R. 25A(b) lists all the documents that must be filed electronically, including any motions and petitions for rehearing.

These deadlines apply to civil appeals:

1. **File post-trial motion** within 28 days after entry of judgment. Fed. R. Civ. P. 59(b); *see also* Fed. R. Civ. P. 50(b) & 52(b).

2. **Commence appeal** within 30 days after judgment or order **entry** unless the United States or an agency is a party, then the appeal period for all parties is 60 days.

- Filing within 30 days after entry of an order or judgment doesn't mean 30 days after "notice." If you receive notice of filing by mail, don't add three days to the period.
- Timely filing certain kinds of motions in the district court (e.g., to amend findings, judgment as a matter of law, new trial) will toll the period for appeal until the motions are decided. FRAP 4(a)(4).
- File early. The Eighth Circuit Clerk will notify you of any defects that come to the court's attention but it takes a week or two before the clerk receives the appeal from the district court. By that time, it might be too late to file a timely appeal.

Perfecting an appeal requires **each** of the following:

- E-file Notice of Appeal with **Clerk of District Court**, not Eighth Circuit Clerk. The court will serve the opposing parties with the notice of appeal and "docket the appeal" by sending a copy of the notice of appeal and the docket entries to the Eighth Circuit Clerk. The appeal is "docketed" when notice and docket entries are received by the Eighth Circuit Clerk.
- The notice must identify the party or parties taking the appeal, designate the judgment or order being appealed and name the court to which the appeal is taken.
- Multiple parties may file a joint notice of appeal and proceed as a single appellant; if related appeals are filed separately, the court is likely to consolidate them.
- Pay required filing fee to Clerk of District Court.

3. **Bonds**: Appellant is not required to file a cost bond unless the district court orders otherwise.

4. If stay of trial court order or judgment is sought, **appellant must file a motion for stay**. FRAP 8.

- The appellant should ordinarily bring the motion first in the district court. If the stay is denied, the motion may be renewed in the Eighth Circuit.
- If stay of trial court order or judgment is sought, the court may condition relief on the filing of the appropriate security in the district court.

5. **Docketing**. When an appeal is docketed, the Eighth Circuit clerk will send the parties a docketing statement that contains the official case caption, file number, and specific due dates for all significant events that will take place in the appeal. This order supersedes conflicting dates calculated based on the rules, except that parties' briefs are due in accordance with FRAP 31 if any party files its brief before it is due pursuant to the scheduling order.

6. Appellant must order all or a portion of the transcript, in writing, within 14 days after filing the notice of appeal and file a copy of the order with the district court or file a certificate stating that no transcript will be ordered. FRAP 10(b). If no transcript or a partial transcript is ordered, appellant must file a statement of the issues within the 14-day period. Appellant must also arrange for payment of the transcript cost.

7. Corporate parties must file a **Corporate Disclosure Statement** within 7 days of being notified that the appeal has been docketed and must include a Corporate Disclosure Statement in their briefs. FRAP 26.1; 8th Cir. R. 26.1A.

8. **File Notice of Appearance**. Appearance forms can be downloaded from the court's website.

9. **Cross-Appeal**. An appellee who seeks review must separately file a timely notice of appeal. FRAP 4(a)(3). The appellee's notice of appeal may be filed within 14 additional days after the appellant's appeal was filed (even if the appellant's appeal is filed on the 29th day). There is no "notice of review" or "notice of related appeal" procedure in the Eighth Circuit.

10. **Delivery of Transcript**: FRAP 11(b). The reporter is required to deliver the transcript within 30 days after date the transcript was ordered or request additional time. The reporter must file the transcript with the district clerk and notify the circuit clerk of the filing.

11. Appellant must specify a method of appendix preparation:

- Methods of preparation include: agreed statement of the record, joint appendix, separate appendices.
- If you choose to file a separate appendices, file a Notice of Preparation of Separate Appendices (8th Cir. R. 30A(b)(3)) within 14 days of filing the Notice of Appeal.
- Separate appendices must be fully indexed and consecutively paginated. They must also comply with the form requirements of FRAP 32.

- Include an addendum—it is useful to the court.
- Appendices are not e-filed. If an appendix is being filed, 3 hard copies must be filed with the Clerk and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. 8th Cir. R. 30A(b).

12. **Docket**. If trial exhibits are not retained by the district court, the appellant must prepare and submit a separate appendix containing all trial exhibits. Copies are acceptable. 8th Cir. R. 10A(a).

13. **Briefing**:

- The time for filing the briefs is controlled by the court, except when a party files a brief early. Notice of the briefing schedule will be provided to the parties when the appeal is docketed. Appellant's brief is due approximately forty days after the district court files a certified copy of the docket entries with the Eighth Circuit. Appellee's brief is due thirty days after service of appellant's brief and appellant's reply is due 14 days after appellee's brief is served. *See* FRAP 31. **Keep Court's Briefing Schedule at hand! Extensions of time for good cause are available, but should be the exception to the rule.**
- Cross-appeals will have a 4-brief schedule established (see box below).
- In all cases handled by an attorney, or registered CM/ECF user, a brief (and addendum) must be timely submitted for filing electronically. The Clerk's office then reviews for compliance with the rules, and either accepts each document as filed or directs the filing within 5 days of a complying document. 8th Cir. R. 28A(a).
- Upon receipt of notice that brief and addendum is accepted and filed, 10 paper copies must be filed (21 copies for cases heard *en banc*). 8th Cir. R. 28A(a). One paper copy must be served on each unrepresented party and on counsel for each separately represented party. FRAP 31(b). The copying, color, binding and typeface of the brief must comply with FRAP 32.
- Comply with page limitations (generally 13,000 words for main briefs, 6,500 for a reply or amicus brief. Shorter is better.
- Pointers on Preparing Briefs** are available on the court's website.

14. **Notice of Oral Argument**. Typically at least a month prior to the argument, the Clerk notifies parties of the date and place of argument. Arguments are usually 10–30 minutes in length.

15. **Decision**. There is no requirement that the court decide the case within any particular time frame. Decisions are typically rendered in 60 to 90 days, and longer in more complex cases.

16. **Mandate**:

- The decision is not final until the mandate issues. It will issue 7 days after the time to file a petition for rehearing expires or 7 days after entry of an order denying a panel rehearing, rehearing en banc or motion for stay of the mandate.
- On motion, the court may issue a stay of mandate for 90 days to permit filing a petition to the Supreme Court for Certiorari. Mandate is automatically stayed upon filing of a petition for rehearing or petition for rehearing en banc.

17. **Taxation of Costs and Disbursements**. 8th Cir. R. 39A.

- The prevailing party must file a verified and itemized bill of costs within 14 days after entry of judgment or will be deemed to have waived costs.
- Some appellate court costs must be taxed in the district court including the cost of the transcript, bond premiums, transmission of the record, and filing fee.

18. **Petition for Panel Rehearing** (FRAP 40) and petition for rehearing en banc (FRAP 35) must be filed within 14 days after entry of judgment unless United States or agency is a party. No answer is permitted.

19. **Petition for Certiorari**:

- Must generally be filed within 90 days from date of entry of judgment or order (not mandate) or from denial of timely filed petition for rehearing. S. Ct. R. 13.

20. **Clerk's Office**:

- The court's main administrative offices are located in St. Louis, Missouri. Generally, when paper copies are required, filings should be made with the clerk's office in St. Louis. Attorneys and registered CM/ECF users should consult 8th Circuit Rules 25A and 28A for guidance on electronic filing. The vast majority of documents in the Eighth Circuit are now required to be filed electronically.
- There is a divisional facility in Saint Paul, Minnesota. This office will accept filings requiring immediate attention, including applications for stays or extraordinary writs.
- District Court Fees**. When filing the notice of appeal, appellant pays the following fees to the district court clerk:
  - \$5.00 filing fee; and
  - \$500.00 appellate docketing fee (can be in single check).A bond for costs on appeal, if required by the district court under FRAP 7, must be filed at this time.

# Preparing for Appeal in the Trial Court

## RAISE ANY POTENTIAL ISSUE IN THE TRIAL COURT

- Failure to raise issue generally precludes review on appeal.
- Only matters actually presented to trial court can normally be reviewed.

## RAISE ISSUE ON RECORD

- If not apparent from record, review will be denied.
- Record is limited to matters filed with court or appearing in a transcript.

## MAKE CERTAIN DISCOVERY MATERIALS NECESSARY TO MOTIONS ARE FILED

- Obtain leave to file discovery or attach to affidavit.

## REQUEST JURY INSTRUCTIONS

- Requests **must** be written—oral requests do not preserve issue.
- Be sure that judge's disposition of requests for instructions (given, refused, modified) is preserved.
- Object to any instructions judge gives (and that you contend are not justified). Objections must be made before the jury begins its deliberations.

- Note: Merely requesting another instruction does **not** constitute an objection to the instructions used. Ask for what you want and object to what is used.

## REQUEST AN APPROPRIATE VERDICT FORM

- Object to special verdict form (or refusal to submit case on special verdict) if court does not use your form.
- Note: Merely requesting another verdict form does **not** constitute an objection to the form used. Object to the special verdict form before the jury begins deliberations.

## PRESERVE ALL EVIDENTIARY OBJECTIONS

- Object before the evidence is received or revealed to jury.
- Be sure to object on the record.
- State specific grounds for objection and state **all** available objections.
- Insist on a ruling from the judge (again, make sure ruling is on record).
- If ruling excludes evidence, make an **offer of proof**.
- Offer of proof is required by Fed. R. Evid. 103(a)(2).
- Offer consists of a description of the witness's proposed testimony **or** presentation of actual evidence on the record but outside the hearing of the jury.

- Include all evidentiary ruling errors in motion for new trial. Fed. R. Civ. P. 59.

- Motion gives trial judge opportunity to correct errors and is sometimes even granted!

## FOLLOW TWO-STEP PROCEDURE UNDER FRCP 50 TO SEEK JAML

- Under FRCP 50(a), a party may seek "judgment as a matter of law" (JAML) after the opposing party has been fully heard and before submission of case to jury.

- Under FRCP 50(b), a movant may **renew** request for JAML by filing motion within 28 days after entry of judgment.

- Failure to make FRCP 50(b) motion precludes a challenge on appeal to sufficiency of evidence. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006).

## REVIEW DOCKET TO VERIFY THAT ALL NECESSARY DOCUMENTS ARE PROPERLY FILED

## Website

The Eighth Circuit Court of Appeals has an informative website located at: <http://www.ca8.uscourts.gov/>. The court's website contains many helpful links relating to: forms, fee schedule, rules and publications, opinions, court calendar, briefs, oral arguments, reports, etc.

