

NUTS AND BOLTS OF MISSOURI APPELLATE PRACTICE AND PROCEDURE

Kansas City Metropolitan Bar Association
June 19, 2018

- Unofficial Rule #1: WIN AT TRIAL
- Unofficial Rule #2: ASK THE CLERKS

I. Pre-appeal considerations: raising and preserving errors

With few exceptions, errors must be both *raised* and *preserved* to be argued on appeal. Otherwise, an error generally only can be reviewed for plain error.

a. Raising errors (a non-exclusive list)

The general rule is that errors must be raised at the earliest opportunity or otherwise are waived. But *when* the “earliest opportunity” occurs can vary depending on the type of error alleged. It could be as early as in pre-trial proceedings, or as late as in post-judgment proceedings.

What follows is a nonexclusive list of when some commonly alleged types of error must be raised:

i. Errors in admitting or excluding evidence

Errors in admitting or excluding evidence must be objected to at the earliest opportunity, specifying the grounds of the objection, or else are waived.

If a motion *in limine* is denied, to raise allegations of error in admitting the evidence sought to be excluded in the motion, the evidence must be objected to again at trial. Continuing objections are permissible but must be sought.

A statement of “no objection” waives all allegations of error in admitting evidence, even if later discussed in a post-judgment motion. *D.R. Sherry Constr. Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899 (Mo. banc 2010).

If evidence is alleged to be erroneously excluded (including by motion *in limine*), at trial the party proffering the excluded evidence must make a detailed offer of proof for the evidence for the exclusion to be raised as error on appeal. *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 452 n.4 (Mo. banc 2014).

A limited and rare exception to the offer-of-proof rule exists where (1) there is “a complete understanding, based on the record, of the excluded testimony”; (2) the objection is “to a category of evidence rather than to specific testimony”; and (3) “the record reveals the evidence would have helped its proponent.” *Frank v. Env’tl Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 883-84 (Mo. banc 1985). Still it’s best not to rely on that, and instead make an offer of proof.

ii. Constitutional issues

Constitutional claims must be raised at the earliest opportunity or else are waived. *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007).

iii. Mistrials

If a party believes a mistrial should be granted due to any circumstance, it must immediately request a mistrial on the record. Otherwise, that issue is waived, even if later discussed in a post-judgment motion. *Woods v. Friendly Ford, Inc.*, 248 S.W.3d 699 (Mo. App. 2008); *Glasgow v. Cole*, 168 S.W.3d 511 (Mo. App. 2005).

iv. Jury instructions

Objections to jury instructions considered erroneous – or the lack of giving an instruction you request – must be “specific.” Rule 70.03. The objection must be made “before the jury retires to consider its verdict” and must “distinctly” state “the matter objected to and the grounds of the objection.” *Id.* “The objections must also be raised in” a motion for new trial. *Id.*

Functionally, this means you must state your specific objection to the instruction ***on the record*** at the instruction conference and then must restate it in writing in a post-judgment motion. Otherwise, the instructional error is not preserved. *Gomez v. Constr. Design, Inc.*, 126 S.W.3d 366, 371 (Mo. banc 2004).

v. Summary judgment

A denial of a motion for summary judgment generally is generally not appealable. *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454 (Mo. banc 2006). The one exception is “where the merits of that motion are intertwined with the propriety of an appealable order granting summary judgment to another party.” *Stone v. Crown Diversified Props.*, 9 S.W.3d 659 (Mo. App. 1999). Functionally, this requires “dueling” summary judgment motions, one of which has to be dispositive.

In responding to a motion for summary judgment, you must raise all counterarguments and factual contentions. Otherwise, you waive them on appeal if summary judgment is granted against you. *D.E. Props. Corp. v. Food For Less, Inc.*, 859 S.W.2d 197 (Mo. App. 1993). However, if the issue is whether, on undisputed facts, the summary judgment grantee was entitled to judgment as a matter of law, a legal reason based on an admitted fact why the grantee was not so entitled can be raised for the first time on appeal. *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761 (Mo. banc 2009).

b. Amendment to Rules 55.27, 78.07, and 84.13

Before 2012, it was possible to raise for the first time on appeal: (1) a defense of failure to state a claim upon which relief can be granted; (2) a defense of failure to join a party indispensable under Rule 52.04; or (3) an objection of failure to state a legal defense to a claim.

But now these rules no longer refer to raising these issues for the first time on appeal. Accordingly, these issues now ***are waivable*** on appeal. As Rule 55.27 now states, these issues now must be raised either in a pleading or by motion for judgment on the pleadings.

Generally, under these rules, the only issues that can be raised for the first time on appeal are: (1) lack of subject matter jurisdiction; (2) questions presented in a motion for judgment notwithstanding the verdict; or (3) questions relating to motions for directed verdict that are granted at trial.

In Missouri, subject matter jurisdiction now generally is limited to the question of whether a case was “civil” or “criminal.” *JCW ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). So, arguing that a court lacked “subject matter jurisdiction” over a case is now far different than it would be in federal court, and is functionally impossible except for arguments about standing.

c. Preserving errors

If you have raised an allegation of error, you generally must ***preserve*** it to re-raise it on appeal. Otherwise, the issue is waived.

Generally, errors are preserved for appellate review in a post-judgment motion. Three authorized post-judgment motions are available for this purpose: (1) a motion for new trial (Rules 78.01 and 78.07(a)); (2) a motion to amend the judgment (Rules 75.01 and 78.07(d)); and (3) a motion for judgment notwithstanding the verdict (Rule 72.01(b)). These motions must be filed within 30

days of the entry of a final judgment. Rules 75.01, 78.01, and 78.04. What constitutes a “final judgment” is discussed below in § III(c).

There is no such thing as a “motion to reconsider.” *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708 (Mo. banc 2011).

If the trial court *does* amend the judgment, the amended judgment “shall be deemed a new judgment for all purposes,” Rule 78.07(d), and the 30-day period (and the preservation process) starts anew. *Dangerfield v. City of Kan. City*, 108 S.W.3d 769 (Mo. App. 2003).

i. Bench trial

Cases of any type tried without a jury are the exception to the rules of preservation. Generally, “in cases tried without a jury or with an advisory jury, neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review.” Rule 78.07(b).

The one exception to this is any allegation of error “relating to the form or language of the judgment, including the failure to make statutorily required findings.” Rule 78.07(c). This includes the failure to make statutorily-required findings in a case involving child custody and child support. *Wilson-Trice v. Trice*, 191 S.W.3d 70 (Mo. App. 2006).

Except for that, raising an error in a bench-tried case is enough to preserve it for review. *Pickering v. Pickering*, 314 S.W.3d 822 (Mo. App. 2010). You do not have to file a post-trial motion. And if you do choose to file a post-trial motion, the errors you can raise on appeal are not limited to those in the motion.

That said, increasingly Rule 78.07(c) has been interpreted to bar any claim in any type of judge-tried case challenging either the making of or failure to make a finding. See, e.g., *Roberts Holdings, Inc. v. Becca’s Bakery, Inc.*, 423 S.W.3d 920 (Mo. App. 2014) (failure to make finding in contract case that party argued judge should have made was not preserved where not included in Rule 78.07(c) motion to amend judgment); *In re Marriage of Adams*, 414 S.W.3d 29 (Mo. App. 2013) (argument that finding was not supported by evidence was not preserved where not included in Rule 78.07(c) motion to amend judgment).

While there has been some pushback to this recently, ***the best policy is still to file a motion to amend the judgment in any judge-tried case***, preserving all issues you might want to raise on appeal and removing the question of preservation from the other side’s quiver.

ii. Jury trial

Generally, in “jury tried cases, ... allegations of error must be included in a motion for a new trial in order to be preserved for appellate review.” Rule 78.07(a). The only exceptions are addressed above at § I(b). One single further exception appears to be the plaintiff’s standing to sue, which courts have held is not waivable and can be raised for the first time on appeal. *CACH, LLC v. Askew*, 358 S.W.3d 58 (Mo. banc 2012).

d. Plain error

If an error is not properly raised or preserved, the appellate court still can review it for “plain error.” An error constitutes “plain error” when it “affected a substantial right and when the error resulted in manifest injustice or a miscarriage of justice.” *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007).

Functionally, in civil appeals, arguments requesting “plain error” review seldom, if ever, succeed. But it can be less difficult to argue “plain error” for an unraised point *to the trial court* in a post-judgment motion. Plain error also more readily can exist for defendants in civil cases when, but for the error, the plaintiff obviously would receive a double recovery. *Senu-Oke v. Modern Moving Sys., Inc.*, 978 S.W.2d 426, 428 (Mo. App. 1998).

That said, in criminal appeals, where there are more “substantial rights” and more of possibility for a “manifest injustice” or “miscarriage of justice,” “plain error” review occasionally may be a viable option. *See, e.g., State v. January*, 176 S.W.3d 187 (Mo. App. 2003).

II. Should you appeal?

This is possibly the most important pre-appeal consideration. Step back and think about the following questions:

- What do you want out of the appeal?
 - A new trial?
 - An outright reversal?
 - Something more limited?
- Are any of these options realistically possible?

Bear in mind that appeals can create harmful precedent, and if a new trial is granted the result may be worse for your client. *See, e.g., Lopez v. Three Rivers Elec. Coop.*, 26 S.W.3d 151 (Mo. banc 2000). In *Lopez*, the first trial resulted in a

judgment for the plaintiff of \$5.5 million. The defendants appealed, and the Supreme Court of Missouri ultimately reversed and remanded for new trial. At new trial, the plaintiff obtained judgment for more than \$20 million, which the Missouri Court of Appeals, Eastern District, then affirmed. Similarly, in *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011), the first trial resulted in a sentence of 25 years in prison. The defendant appealed, and the Supreme Court reversed and remanded for new trial. After the new trial, the defendant was sentenced to life in prison, which the Western District then affirmed.

It also is important to remember that, if you are considering appealing a money judgment entered against your client, it generally will remain collectible during the appeal absent your obtaining and filing a supersedeas bond for the full amount of the judgment, plus interest (usually 9%) and damages for delay. Rules 81.09 and 81.10. Often, especially for individuals (as opposed to businesses) with large judgments against them, such a bond can be near-impossible to obtain.

Simply put, depending on your issues, the applicable standards of review, and the procedural posture of your case, an appeal may be a bad idea.

III. Judgment

a. Standing to appeal – who may appeal?

“Any party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by” law “may take his or her appeal to a court having appellate jurisdiction” § 512.020, R.S.Mo. So, you must be “aggrieved.” But that’s usually self-explanatory. The winner doesn’t appeal.

b. Is it appealable?

An aggrieved party may appeal from a “final judgment or ... any special order after final judgment.” § 512.020(5), R.S.Mo. A “judgment” means “a writing signed by the judge and denominated ‘judgment’ or ‘decree.’” Rule 74.01(a). It may be a separate document or an entry on a docket sheet.

Additionally, an aggrieved party can appeal from:

- (1) an “order granting a new trial;”
- (2) an “order refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers, or dissolving an injunction;”
- (3) an “order granting or denying class action certification provided that” the court of appeals, in its discretion, permits the appeal (*See* Rule 84.035, Western District Rule 12, and Eastern District Rule 411 governing the

process for permission to appeal from an order granting or denying class certification; *see also State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008)); and

- (4) interlocutory judgments in actions of partition which determine the rights of the parties.

§ 512.020(5), R.S.Mo. In addition to these, a few other types of orders can be appealed, as scattered throughout Missouri law and discussed below.

c. Is your judgment final?

Additionally, to be a “final” judgment that is appealable within the meaning of § 512.020(5), R.S.Mo., a judgment involving multiple claims or multiple parties must dispose of all claims and all parties. Rule 74.01(b).

A court may enter an appealable judgment as to fewer than all the claims or all the parties, but only on an express determination that there is “no just reason for delay.” Rule 74.01(b). But even if a court determines so, the appellate court can determine otherwise. *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997) (for there to be “no just reason for delay” under Rule 74.01(b), the interlocutory judgment must “dispose of a distinct ‘judicial unit’”). Allowed appeals under Rule 74.01(b) are rare.

d. “Orders”

While generally, a decree or order must be entered and denominated “Judgment” or “Decree” to be appealable, there are a few “special orders” that are appealable, as noted above at § III(b). In addition to those, courts or the legislature have made the following “special orders” appealable:

- Order quashing writ of garnishment, *Hamilton v. Hamilton*, 278 S.W.3d 730 (Mo. App. 2009);
- Order setting aside or refusing to set aside a default judgment, Rule 74.05(d); *Brungard v. Risky’s Inc.*, 240 S.W.3d 685 (Mo. banc 2007);
- QDROs, *Brooks v. Brooks*, 98 S.W.3d 530 (Mo. banc 2003);
- Order denying motion to compel arbitration, *Hershewe v. Alexander*, 264 S.W.3d 717 (Mo. App. 2008);
- Certain orders in probate cases, § 472.160, R.S.Mo.; *Harriett Brams Trust v. Haydon*, 266 S.W.3d 300 (Mo. App. 2008);
- Orders denying intervention as a matter of right, *State ex rel. Reser v. Martin*, 576 S.W.2d 289 (Mo. banc 1978), though this may no longer be true, *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397 (Mo. banc 2016); and

- Certain interlocutory orders in criminal cases can be appealed by the State, § 547.200, R.S.Mo.

Even more are listed below in § IV(e).

It is still necessary to denominate many of these a “judgment or decree” to appeal them. *Brooks v. Brooks*, 98 S.W.3d 530 (Mo. banc 2003). Do your research beforehand to be certain. **A *nunc pro tunc* amendment is *not* effective to denominate an order as a judgment.** *Id.*

e. Civil contempt

A contempt judgment is not final until it is “enforced.” *Crow v. Gilmore*, 103 S.W.3d 778 (Mo. banc 2003). “Enforcement” depends on the remedy: if the remedy is a fine, it is enforced when the contemnee executes on the fine; if it is imprisonment, it is enforced when the contemnor is incarcerated. *Id.* Even if the contempt is enforced, if enforcement is stayed by order it negates the enforcement requirement. *Eaton v. Bell*, 127 S.W.3d 690 (Mo. App. 2004).

f. Writs

If your judgment or order is not appealable, it only can be reviewed by extraordinary writ in either the Court of Appeals or the Supreme Court. Mo. Const. art. V, § 4. Missouri is one of only four states that does not have a general, federal-style interlocutory appeal mechanism either by rule or by common law (the others are Kentucky, Louisiana, and Nevada). Instead, writs of prohibition, mandamus, and habeas corpus (and some others) can be sought, depending on the situation.

A writ petition seeking interlocutory appellate review of an unappealable trial court order usually is styled as *State ex rel. [your party] v. [name of trial judge]*, and is filed directly in the appellate court. See Rule 84.24, *et seq.* Prohibition orders the trial court not to do something. Mandamus orders it to do something. Habeas corpus retrieves a person wrongfully convicted or held.

Generally, file your writ petition in the lowest available court. Usually, this will be the appropriate district of the Court of Appeals. If the Court of Appeals denies your petition, you cannot seek transfer to the Supreme Court but rather must re-file your petition anew in the Supreme Court. Only if the Court of Appeals issues a preliminary writ can review be had by transfer. Rule 84.24(n). Your Court of Appeals district may have local rules regarding writ petitions. See, e.g., Eastern District Rule 410; Western District Rule 24.

IV. Timeframes for appealing

a. Regular Notice of Appeal

A notice of appeal must be filed within **ten days** after a judgment becomes final. Rule 84.01(a). All days are counted; as usual, if the tenth day falls on a weekend or holiday, go to the next day that is not a weekend or holiday. Rule 44.01.

b. Finality of judgment

A true “judgment” becomes final 30 days after its entry if no timely, authorized, after-trial motion is filed. Rule 81.05. If an authorized after-trial motion is timely filed, the judgment becomes final either (a) if the motion is not ruled on, 90 days from the date the last timely motion was filed; or (b) if the motion is ruled on, the date of disposition of the motion or 30 days after entry of judgment, whichever is later. *Id.*

An interlocutory order from which an appeal lies merely by statute or rule – those listed above in § III(d) – is final immediately upon entry, so the notice of appeal is due within ten days of that entry. *Sanford v. CenturyTel of Mo., LLC*, 490 S.W.3d 717 (Mo. banc 2016).

A Notice of Appeal can be filed prematurely, and simply becomes effective when the judgment becomes final for the purposes of appeal. Rule 81.05(b).

c. Notice of Appeal Out of Time – Rule 81.07

To appeal out of time, a party must file a motion with the appellate court for leave to file a notice of appeal out of time and must notify the adverse parties. A copy of the final judgment must be attached to the motion.

In civil cases, the motion must be filed within six months of the date the judgment became final for purposes of appeal. In criminal cases, it must be filed within twelve months of that same date.

In either case, an order allowing leave to appeal out of time may be granted only upon a verified (i.e., by affidavit) showing that the delay was not due to the appellant’s “culpable negligence.” This is the only question that matters.

If leave is granted, the notice of appeal must be filed in the trial court within ten days after that notification, or as otherwise specified in the Court’s order.

However, no special order for a late notice of appeal is available in an appeal that is governed by a statute (i.e., many listed in §§ III(d) and IV(e)), rather than the Supreme Court’s rules.

d. Cross-appeals

If a party has filed a notice of appeal, any other aggrieved party may file its own notice of appeal within ten further days (called a cross-appeal). Rule 81.04(b). Thereafter, unless the parties agree otherwise, the plaintiff is designated as the appellant/cross-respondent and the defendant is designated the respondent/cross-appellant. Rule 84.04(i). Unlike the federal system, this is true regardless of which party “appealed first.”

e. Atypical timeframes

There are a few special proceedings with special appeal timeframes:

- Orders denying or granting class action certification: parties must file a petition for permission to appeal with the court of appeals within ten days of the entry of the order. Rule 84.035
- Appeal from a judgment confirming or disapproving a sheriff’s sale must be taken within 20 days after the date of judgment. § 141.590, R.S.Mo.
- Appeal from a judgment of foreclosure must be taken within 20 days after the date of judgment. § 141.510, R.S.Mo.
- Interlocutory appeal by State in criminal case must be filed within five days of entry of the order. § 547.200.4, R.S.Mo.
- A party can appeal to the Supreme Court within ten days after a decision is rendered in a challenge to a ballot title or fiscal note for a proposed constitutional amendment. § 116.200.3, R.S.Mo.
- Notice of Appeal from a decision of the Labor & Industrial Relations Commission in a workers’ compensation case must be filed within 30 days of the Commission’s decision. §§ 287.495.1 and 287.480.1, R.S.Mo.
- Decision of the Employment Security Commission in an unemployment case becomes final 10 days after mailing of the decision to the parties; a notice of appeal must filed within 20 days of finality. §§ 288.210 and 288.240, R.S.Mo.

f. To which court do you appeal?

The Supreme Court of Missouri has *exclusive* appellate jurisdiction in *all* cases involving:

- the validity of a federal statute or treaty;

- the validity of a Missouri state statute (not a municipal ordinance) or constitutional provision;
- the construction of Missouri’s revenue laws;
- the title to any statewide office; and
- where the punishment imposed is death.

Mo. Const. art. V, § 3.

If your case fits one of these categories, you may appeal directly to the Supreme Court. Attach a detailed jurisdictional statement to the notice of appeal explaining how your case fits the category. Rule 81.08(a). Your opponent can file an opposition to it within 15 days. *Id.* If the Supreme Court disagrees that it has exclusive jurisdiction (including if it does but if it believes that your question giving it exclusive jurisdiction is merely “colorable” but not “substantial”), it will transfer your case to the appropriate district of the Court of Appeals. Mo. Const. art. V, § 11.

If your case does not fall into one of these categories, you must appeal to the appropriate district of the Missouri Court of Appeals, as based on the county in whose circuit court your case was. The Court of Appeals sits in three districts: Western (Kansas City), Eastern (St. Louis), and Southern (Springfield). Sections 477.050 through 477.070, R.S.Mo., list the counties in each district.

V. The Process on Appeal

a. Motions

Motions in the Court of Appeals and Supreme Court are governed by their own time schedule and formatting requirements.

Suggestions in opposition to any motion are due within five days after the date of service. Rule 84.01(b). Because this is less than seven days, under Rule 44.01(a) Saturdays, Sundays, and legal holidays are excluded from computing this.

Functionally, that means you have at least seven total days to respond. The Western District almost always will wait the full five business days to decide any motion unless it is a joint motion or the other side files a consent to it. In the Supreme Court, Eastern District, and Southern District, routine motions (e.g., for extension of time, pro hac vice admission, leave to file an appeal bond, etc.) usually are decided quickly, often the same day as filed. If you intend to oppose a motion in one of those courts, you should call the clerk’s office quickly to let them know that, so that it is not decided in the interim.

Motions must be on 8½ x 11-size paper with one-inch margins, double-spaced completely (including headings and footnotes), paginated at the bottom, and with the text “no smaller than 13 point, Times New Roman”. Rule 81.18. (Though that doesn’t mean you have to use Times New Roman itself. **Never use Times New Roman.** Use a size-13 TrueType font, such as Century Schoolbook, which is what this is written in.) And all motions must be in text-searchable Adobe PDF files. *Id.*

Overall, avoid “motion practice” on appeal. It usually seems petty and beneath the dignity of an appellate court. Do not oppose routine extensions of time. Generally, if you don’t like the other side’s brief, file your own brief saying so. *Do not* move to strike the other side’s brief. (Though, if something is included in a record on appeal or appendix to a brief that is not actually in the record, certainly move to strike that.) Only move to dismiss an appeal if it’s demonstrably untimely or otherwise truly, demonstrably legally improper (i.e., it is moot, the other side impermissibly acquiesced in the judgment, etc.). Do not move for frivolous appeal damages under Rule 84.19. If the Court believes the appeal is frivolous, it will handle the sanctions itself.

If your opponent files a motion you do not like, do not “move to dismiss” their motion. File suggestions in opposition to it.

b. Basic schedule

- Record on Appeal (Rule 81.19):
 - Due 90 days after Notice of Appeal if there is a transcript
 - Due 30 days after Notice of Appeal if there is no transcript
 - Transcript must be ordered within 10 days of filing Notice of Appeal (Rule 81.12(c))
- Briefs (Rule 84.05(a)):
 - Brief of the Appellant: Due 60 days after Record on Appeal is filed
 - Brief of the Respondent: Due 30 days after Brief of the Appellant is filed
 - Reply Brief: Due 15 days after the Brief of the Respondent is filed

NOTE: In certain cases, all three Court of Appeals districts have shortened time periods. *See* Western District Rule 30 (child custody and similar matters); Eastern District Rule 348 (termination of parental rights); Southern District Rule 17 (termination of parental rights).

c. Pre-submission settlement conference

In certain cases, the appellate court may require the parties to appear for a pre-submission settlement conference and provide a short statement explaining the case. The parties mutually can opt not to undergo the process. Otherwise, they must appear or else may be sanctioned. The conference will take place before a retired or senior judge acting as mediator, at an appointed time and place.

d. Record on Appeal

In Missouri, unlike the federal system and most other states (including Kansas and Illinois), the appellant is responsible for providing the record on appeal to the appellate court before the briefs are filed. Rule 81.12(c).

The record consists of two main parts (Rule 81.12(a)):

- The **legal file** – a consecutive collection of all the relevant documents from the trial court’s record, transferred electronically into a PDF portfolio and assigned document numbers (Rule 81.12(b)); and
- If your appeal comes after a trial or other relevant court hearing, **the transcript** – prepared either by the court reporter or, if the case was recorded by audiotape without a court reporter, by the Central Transcribing Department of the Office of State Court Administrator in Jefferson City.

The transcript must be ordered within ten days of filing the Notice of Appeal. Rule 81.12(c). It helps to provide the appellate court a copy of the correspondence requesting this.

The legal file can be compiled at any time before the record’s due date. Click the “file electronic legal file” link on the top left of your appeal after logging into CaseNet and opening your case. Follow the directions to “check the boxes” and compile all the relevant documents. Include “the pleadings upon which the action was tried, the verdict, the findings of the court or jury, the judgment or order appealed from, motions and orders after judgment, and the notice of appeal” Rule 81.12(b)(1)(C). Do not include documents about process, pleadings later amended, abandoned pleadings or record, continuances, motions, affidavits, suggestions, briefs, memoranda, notices of filing, subpoenas, summonses, admissions of service and mailing, notices of setting, depositions and notices, or jury lists, unless they are material to the questions on appeal. *Id.* at (D). Do not repeat materials in the legal file if at all possible. Do not worry about obtaining a docket sheet; the electronic system will create one.

An extension of time to file the Record may be requested. If your reason is that the transcript is not complete, you must attach a court reporter's affidavit. Rule 81.19; Western District Rule 15; Eastern District Rule 340; Southern District Rule 3.

e. Exhibits

If exhibits are not attached to a document in the Legal File, originals or agreed copies must be physically deposited or electronically filed separately with the appellate court if relevant. Rule 81.12(e). Exhibits are due by the time the Reply Brief is filed, *id.*, except in the Western District, where they are due along with the principal brief of the party depositing them. Western District Rule 4. An appellant's failure to deposit relevant exhibits can be fatal to its appeal. *See, e.g., Jenkins v. Jenkins*, 368 S.W.3d 363 (Mo. App. 2012). In the Southern District, there is a special process for requesting exhibits from an opposing party who will not give them up. *See* Southern District Rule 4.

f. Mechanics of briefing

i. Word limits

In the Supreme Court and the Southern District, Rule 84.06(b) governs. The appellant's brief can be a maximum of 31,000 words, the respondent's brief 27,900 words, and the reply brief 7,500 words.

In the Western district, the appellant's brief can be a maximum of 15,500 words, the respondent's brief 13,950 words, and the reply brief 5,115 words. Western District Rule 41. In the Eastern District, the appellant's brief can be a maximum of 15,500 words, the respondent's brief 13,950 words, and the reply brief 3,875 words. Eastern District Rule 360. All principal briefs in cross-appeals are allowed to be 15,500 words. In both courts, no less than 10 days before filing its brief, a party can ask for leave to file a brief in excess of these word limits. Requests to file an overlength brief usually are denied and generally should not be filed.

See Rule 84.05, Western District Rule 26, Eastern District Rule 375, and Southern District Rule 15 for details on *amicus curiae* briefs.

ii. Electronic filing.

The Supreme Court and all districts of the Court of Appeals use electronic filing via the Case.Net e-filing system. You must file your documents as Adobe PDFs. Get a good document scanner (Xerox DocuMate 3220; Fujitsu fi-6770a) and

Adobe Acrobat (full version Professional DC) and learn how to make your scanned files as small as possible. Wherever possible, “print” or “save” “direct to PDF” from your word processor to ensure a small file size, readability, and searchability. Under Rule 81.18, all briefs, applications, and motions must be filed in text-searchable Adobe PDF.

The Supreme Court and Southern District *do not* accept any paper copies except from *pro se* parties. But in the Western District and Eastern District, however, all parties must file four paper copies of any brief (including its appendix) and one paper copy of any transcript. In the Western District, these do not have to be bound, but simply can be stapled or two-hole-prong-fastened. In the Eastern District, they must be comb- or spiral-bound with a white cardstock cover.

iii. References to the record.

In all briefs, all statements of fact and argument must have specific page references to the legal file and transcript throughout. Rule 84.04(i). Rule 84.04(c) and (e) instruct on how to cite the legal file, by document and page number, *e.g.*, (D6 p. 4). Cite the transcript “Tr.”

iv. Appendices

All briefs must contain or be accompanied by an appendix containing the following materials, unless the material has been included in a previously filed brief’s appendix: (1) the judgment, order, or decision in question; (2) the complete text of all statutes, ordinances, rules of court, or agency rules claimed to be controlling as to a point on appeal; and (3) the complete text of any instruction to which a point relied on relates. Rule 84.04(h). It also may include other pertinent matters, such as excerpts from the record or new, controlling cases. *Id.* It is best to include anything in the appendix that you believe it is crucial for the judges to see without recourse to the record on appeal itself.

With the advent of electronic filing, all appendices, no matter how long, must be filed as a separate electronic document. Pages in the appendix must be numbered consecutively beginning with page A1. Rule 84.04 instructs to cite an appendix as “App.” And if a document in the record appears in your appendix, you must cite it both to the record and the appendix. Rule 84.04(c), (e), and (h).

v. Certificates of compliance and service

Every brief must contain a certificate explaining how it complies with (1) the word limitations and (2) the electronic filing requirements. Rule 84.06(c). It also must contain a certificate of service, just as anything else filed in a court. *Id.*

g. Appellant's Brief

An appellant's brief must consist of at least the following:

- (1) a detailed table of contents, with page references;
- (2) a table of cases (alphabetically arranged) and other authorities cited, with page references;
- (3) a statement of how the appellate court has jurisdiction, Rule 84.04(b);
- (4) a statement of facts, which must be fair and concise and not contain argument, Rule 84.04(c);
- (5) the points relied on (discussed below);
- (6) an argument, which must follow the order of the points relied on; and
- (7) a short conclusion stating the precise relief sought.

Rule 84.04(a).

But it is not *limited* to these sections. Think about including a one-page preliminary statement or summary as the first section of the brief, as in many federal courts. The judges find it helpful. Also consider a glossary if there are many abbreviations, an index of the record if the legal file and transcript are in many complex volumes, and illustrative diagrams (such as a timeline chart, a family tree, or a map).

i. Points Relied On

The “point relied on” is Missouri’s unique, required method of framing issues on appeal, which *must* be followed. If it is not followed, the brief can be stricken.

Rule 84.04(d) contains formulae for points relied on for review from a trial court, review from an administrative agency, and an original writ proceeding.

For review from a trial court, the point must “(A) identify the trial court ruling or action that the appellant challenges; (B) state concisely the legal reasons for the appellant's claim of reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.” It must “be in substantially the following form:”

“The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*].”

ii. Standards of Review

An appeal, of course, is not a new trial, but rather is a review of what already has happened. Appellate review of any issue is governed by the standard of review. Each issue in an appellant's brief (and the respondent's response) must state the relevant standard of review for that issue. Rule 84.04(e).

A thorough discussion of the minutiae of all standards of review is beyond the scope of this presentation. But they range from *de novo* review of the trial court's action (such as over questions of law) to review of whether the trial court abused its discretion (such as over questions of the admission or exclusion of evidence).

For bench-tried cases, the Supreme Court of Missouri has promulgated an overarching standard of review for all issues, which functionally encompasses all other standards: "the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). *Houston v. Crider*, 317 S.W.3d 178 (Mo. App. 2010), *Ivie v. Smith*, 439 S.W.3d 189 (Mo. banc 2014), and *White v. Dir. of Revenue*, 321 S.W.3d 298 (Mo. banc 2010) explore the contours of "*Murphy v. Carron*" review well.

iii. Other considerations

If an appellant argues error in instructing the jury, it must include a copy of the jury instruction alleged to be erroneous both in the appendix to its brief *and* in the body of its argument. Rule 84.04(h). Failure to do so waives the error.

h. Respondent's Brief

The respondent's brief must provide the same sort of tables of contents, authorities, and argument as the appellant's brief. Rule 84.04(f). It may include its own statement of facts and jurisdictional statement. *Id.* Counter-points relied on are unnecessary (and unhelpful; don't include them).

In the Court of Appeals, a respondent who fails to file a brief loses the right to appear at oral argument, if one is held. Eastern District Rule 395(f); Western District Rule 23; Southern District Rule 1(b).

i. Reply Brief

Technically, a reply brief is optional under the rules. As the appellant having the burden, though, don't lose out on having the last word and miss the opportunity to hammer home the merits of your appeal.

The reply brief is effectively freeform, but "shall not reargue points covered in the appellant's initial brief." Rule 84.04(g). Instead, it should reply to the respondent's arguments without re-argument. Functionally, though, it also should include a table of contents and authorities, as well as a conclusion. Eastern District reply briefs are very short, limited to 3,875 words. Eastern District Rule 360.

VI. Oral Argument

a. Missouri Court of Appeals, Western District

In the Western District, all parties are entitled to oral argument except a respondent who did not file a brief. Western District Rule 1. If the Court sends a letter stating that the case has been placed on the "submitted on briefs docket," within ten days of receiving that letter either party can request oral argument as a matter of right. *Id.*

Oral arguments in the Western District are a maximum of ten minutes for the appellant, ten minutes for the respondent, and three minutes for the appellant's rebuttal, unless the Court has informed the parties otherwise. *Id.*

b. Missouri Court of Appeals, Eastern District

In the Eastern District, parties are *not* necessarily entitled to oral argument. The Court will notify the parties if the case is not on the oral argument calendar. Eastern District Rule 390. If it is not, then any party may request oral argument. *Id.* The Court does not have to grant the request. *Id.*

Oral arguments in the Eastern District are a maximum of 15 minutes for the appellant, 15 minutes for the respondent, and three minutes for the appellant's rebuttal, unless the Court has informed the parties otherwise. Eastern District Rule 395.

c. Missouri Court of Appeals, Southern District

In the Southern District, parties also are not necessarily entitled to oral argument. A party requesting oral argument must serve notice of the request as a separate motion no later than ten days after the respondent's brief is due. Southern

District Rule 1(b). If oral argument is requested, the Court still can deny it. *Id.* If the requested is not filed timely, parties cannot thereafter request oral argument, except for good cause shown. *Id.*

Unless the Court has informed the parties otherwise, oral arguments in the Southern District are a maximum of 20 minutes for the appellant and 15 minutes for the respondent, though the appellant may reserve up to five of his 20 minutes for rebuttal. Southern District Rule 1(c).

Unlike the Western and Eastern Districts, the Southern District maintains a second courtroom outside its headquarters in Springfield. By statute, it is in the Butler County Courthouse in Poplar Bluff. Per § 477.220, R.S.Mo., if your appeal is from Butler, Carter, Ripley, Reynolds, Iron, Wayne, Bollinger, Scott, Stoddard, Dunklin, Pemiscot, New Madrid, Crawford, Dent, Shannon, Oregon, or Mississippi County, oral argument “shall be heard at Poplar Bluff” “except by different stipulation of the parties.” If you don’t want to have your argument heard in Poplar Bluff (which only occurs a few times each year), you and opposing counsel need to stipulate that it should be held in Springfield.

d. Supreme Court of Missouri

Generally, the Supreme Court of Missouri holds oral argument in *all* cases. The Court will inform the parties by letter of the amount of time granted, but most cases are 12 minutes for the appellant, 15 minutes for the respondent, and three minutes for the appellant’s rebuttal.

VII. Post-opinion filings

a. After opinion by the Court of Appeals

A party aggrieved by a decision of the Court of Appeals can seek review by the Supreme Court. This process is called “transfer.” If transfer is granted, the Supreme Court does not review the decision of the Court of Appeals; instead, it vacates the Court of Appeals’ decision and reviews the trial court, as on original appeal. *State v. Freeman*, 269 S.W.3d 422 (Mo. banc 2008).

Transfer also can be requested directly from the Supreme Court *before* opinion of the Court of Appeals, within 10 days of filing the Record on Appeal. Rule 83.01. Granting such a request is extremely rare.

i. Process in the Missouri Court of Appeals

Rule 84.17 explains three possible motions that can be filed in the Court of Appeals within 15 days of the opinion being handed down: (1) a motion for rehearing; (2) a motion to amend the opinion; and (3) a motion to publish an opinion (if the case was decided in an unpublished, memorandum decision). No extensions of time are permitted.

A motion for rehearing cannot reargue the appellant's points, but only point the Court to material matters of fact or law that the Court overlooked or misinterpreted. Rehearing is rarely ever granted. Occasionally, all three Court of Appeals districts will grant motions to publish unpublished decisions.

Additionally, within that 15-day period, a party may file an application to the Court of Appeals to transfer the case to the Supreme Court. *See* Rule 83.02. This is rarely granted, but its denial is necessary to invoke the Supreme Court's jurisdiction to hear a transfer application before it. If you desire to "take your case to the Supreme Court", you *must* first ask the Court of Appeals to transfer it there.

ii. Process in the Supreme Court of Missouri

When the post-opinion motions filed in the Court of Appeals are denied, within 15 days of the order of denial a party may file an application for transfer in the Supreme Court itself. Rule 83.04. The guidelines for its form and content described in Rule 83.05 are highly particularized and strictly enforced.

Transfer may be sought because: (1) the case poses a general question of statewide interest or importance; (2) the opinion of the Court of Appeals warrants reexamination of existing law; or (3) the opinion of the Court of Appeals conflicts with prior Missouri appellate decisions. Rule 83.04.

On average, the Supreme Court grants about 10% of transfer applications each year.

If the case is transferred to the Supreme Court, the parties may file substitute briefs, though on an expedited schedule. The appellant's brief is due 20 days after the order of transfer, the respondent's brief is due 40 days after the order of transfer, and the reply brief is due 50 days after the order of transfer. Rule 83.08. Motions for extension of time are disfavored.

b. After opinion by the Supreme Court

There's a reason it's called the "Supreme Court." After opinion by the Supreme Court, there are only two possible further recourses.

First, under Rule 84.17, a party may file a motion for rehearing within 15 days of the opinion. The same standards detailed above in § VII(a)(i) for rehearing in the Court of Appeals governs rehearing in the Supreme Court.

Second, if your case involves a federal question, within 90 days of the opinion (or denial of a motion for rehearing), you can seek a writ of certiorari in the Supreme Court of the United States. The substance of a "cert petition" and its related proceedings is beyond the scope of this presentation.

c. Mandate

After (1) transfer to the Supreme Court is not sought from a decision of the Court of Appeals, (2) the Supreme Court denies transfer from the Court of Appeals, or (3) the Supreme Court issues an opinion or denies rehearing after opinion, the appellate court hearing the case will issue a short document called a "mandate." Together with the opinion, the mandate constitutes the actual final judgment in the appeal.