Let's Try That Again:
The Guidelines for Handling Appeals

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I. SUMMARY

The first step in winning on appeal is ensuring that the appellate court will consider your arguments on the merits. If your appeal is dismissed, for whatever reason, then the appellant has not received consideration of her arguments and we, as appellate attorneys, have failed in our jobs. It does not matter that the trial court erred and your client should be entitled to a new trial. If the appellate court does not reach the merits, then the appellant has lost regardless of the strength of her claims.

The purpose of these materials is to assist you in properly presenting your arguments on appeal so that the appellate court will decide the appeal on the merits. When the issues are properly preserved and briefed, the appellate court is more likely to reach the correct result, the resulting opinion is more likely to provide helpful precedence for future cases, and the end result, win or lose, is better for everyone involved.

If you do not handle appeals frequently, when you are preparing to embark on an appeal, read Rules 81, 83, and 84 in their entirety.

If you handle appeals fairly frequently, at the beginning of each appeal, reread Rules 81, 83 and 84 in their entirety.

If you handle appeals as the majority of your practice and continuously have an appeal pending, reread Rule 81 every time you file a new appeal, reread Rule 84 every time you begin working on a brief, and reread Rule 83 every time you receive an appellate opinion.

In addition, read the Special Rules for the district of the Court of Appeals in which your appeal is pending.

II. PRESERVE THE RECORD AND ARGUMENTS IN THE TRIAL COURT

If evidence was not presented to the trial court, generally it cannot be relied upon on appeal. *See Pattie v. French Quarter Resorts*, 213 S.W.3d 237, 239 (Mo.App.S.D. 2007); Supreme Court Rule 81.12. Normally, arguments may not be raised for the first time on appeal. *Tolbert v. Jackson County*, 2007 Mo.App.LEXIS 427, *5 (Mo.App.W.D. WD66520 3/13/2007).

The first steps in a successful appeal occur in the trial court. Evidence is not offered or admitted solely for the benefit of the trier of fact. Objections are not made simply to allow the

trial court to rule. It is important to remember that everything that happens at trial is the possible subject of review on appeal. Make your objection so that it will be understood by the appellate judges when they read the transcript. Present your evidence in a way that allows comprehension simply by reviewing the transcript and exhibits. Remember to make your offer of proof. While the trial court may know what evidence is being excluded, without a proper offer of proof, the Court of Appeals is unlikely to convict the trial court of error.

A. Motions in Limine

Along these lines, there are certain matters that should be remembered. First, motions in limine and motions to suppress do not preserve anything for appellate review. If such motions are denied, you must object at trial when the evidence is offered. If such motions are granted, you must make an offer of proof at trial. *See Henderson v. Fields*, 68 S.W.3d 455 (Mo.App.W.D. 2001); *Carlund Corp. v. Crown Center Redevelopment Corp.*, 910 S.W.2d 273 (Mo.App.W.D. 1995); *State v. Laws*, 853 S.W.2d 472 (Mo.App.S.D. 1993). There are exceptions to these rules, but it is safer to make the objections or offers of proof to ensure the issues are preserved.

B. Offers of Proof

Offers of proof also cause some difficulty.

> "Normally, an appellate court will not review evidence excluded by the [circuit] court unless a *specific* and *definite* offer of proof was made at trial . . . showing . . .: (1) what the evidence will be; (2) the purpose and object of the evidence; and (3) *each fact essential* to establishing the admissibility of the evidence." *State v. Hirt*, 16 S.W.3d 628, 633 (Mo. App. 2000) (emphasis added).

Terry v. Mossie, 59 S.W.3d 611, 612 (Mo.App.W.D. 2001).

> The preferable way to make an offer of proof is by asking the proposed witness questions outside of the jury's presence, but narrative offers of proof are *occasionally* found to be adequate. *State v. Townsend*, 737 S.W.2d 191, 192 (Mo. [*613] banc 1987) (emphasis added). The offer must be more than a "mere statement of the conclusions of counsel." *Kinzel v. West Park Investment Corporation*, 330 S.W.2d 792, 796 (Mo. 1959). Because making an effective narrative offer of proof is difficult, "counsel . . . runs a greater risk that the court will find the offer insufficient." *Townsend*, 737 S.W.2d at 192.

Terry, 59 S.W.3d at 612-13.

C. Objections

Objections must be made at the time evidence is sought to be introduced and must be specific and must state the grounds for the objection. *Rogers v. B. G. Transit Corp.*, 949 S.W.2d 151, 153 (Mo.App.S.D. 1997). “A party must object at the earliest possible opportunity to

opposed evidence to avoid waiver of the objection." *Shelton v. Williamson (In re Estate of Looney)*, 975 S.W.2d 508, 514 (Mo.App.S.D. 1998).

"A party may not advance on appeal an objection to evidence different from the one presented to the trial court. [Citation omitted]. Nor may the party alter or broaden the scope of the objection on appeal." *Rogers*, 949 S.W.2d at 153; *Khan v. Gutsgell*, 55 S.W.3d 440, 442 (Mo.App.E.D. 2001).

> In order to preserve an evidentiary issue for appellate review, a party must offer a specific objection apprising the trial court of which rule of evidence is being invoked and why that rule should exclude a responsive answer. . . . [T]he focus is on whether the stated objection gives opposing counsel and the trial court reasonable grounds upon which to either rephrase the question or correctly rule on the objection.

Khan, 55 S.W.3d at 442. Lastly, ensure that the trial court rules all objections. If the trial court does not rule on your objection, the objection is not preserved for appellate review.

D. Motions for Directed Verdict

Supreme Court Rule 72.01 governs motions for a directed verdict and for judgment notwithstanding the verdict. Such rule requires that a motion for directed verdict state the specific grounds for the motion. An insufficient motion for directed verdict fails to preserve the claim that the plaintiff failed to make a submissible case. *Pope v. Pope*, 179 S.W.3d 442 (Mo.App.W.D. 2005).

E. Objections to Jury Instructions

Rule 70.03 requires specific objections to jury instructions. Supreme Court Rule 70.03.

F. Motions for New Trial

In jury tried cases, most "allegations of error must be included in a motion for new trial in order to be preserved for appellate review." Supreme Court Rule 78.07(a). As a result, when an objection has been made at trial, such objection must also be included in a motion for new trial to preserve the issue on appeal. *Rogers v. B. G. Transit Corp.*, 949 S.W.2d 151, 153 (Mo.App.S.D. 1997); *Khan v. Gutsgell*, 55 S.W.3d 440, 442 (Mo.App.E.D. 2001). Allegations in a motion for new trial need to be sufficiently definite to direct the court to the particular ruling claimed to be erroneous.

III. FINAL JUDGMENT

"Judgment" is defined in Rule 74.01. When multiple parties or claims are involved, a "judgment" must dispose of all claims and parties *unless* (1) it is entered with respect to one or more of the claims or parties, *and* (2) includes "an express determination that there is no just reason for delay." Supreme Court Rule 74.01(b). Such a judgment must dispose of an entire

claim, not just part of a claim. A "judgment" must also be (1) a writing, (2) signed by the judge, and (3) denominated "judgment" or "decree". Supreme Court Rule 74.01(a).

Section 512.020 also specifies certain orders that are appealable. However, for such an order to qualify as a "judgment" so that an appeal will be proper, it must comply with the provisions of Rule 74.01(a) be a writing, signed by the judge, and denominated "judgment" or "decree".

If you file an appeal from an order that does not qualify as a judgment under Rule 74.01, it is very likely that the appellate court will issue a "show cause" order asking you why the appeal should not be dismissed. This does not necessarily mean that your appeal will be dismissed. This can actually be the appellate court giving you a chance to correct the problem. If possible, correct whatever deficiency exists and then request leave to supplement the record or take whatever other actions are necessary to get the corrected "judgment" before the appellate court.

IV. RECORD ON APPEAL

The Record on Appeal consists of two parts, the "legal file" and the "transcript". Supreme Court Rule 81.12(a). Together with the exhibits deposited with the appellate court, the Record on Appeal provides the evidence and procedural history upon which the appeal will be decided. You need to include everything necessary for the court to consider the issues raised on appeal.

The Record on Appeal is due within 30 days from the date the notice of appeal was filed in the trial court if the Record consists of only the legal file. Supreme Court Rule 81.19(a). Otherwise, the Record is due within 90 days from the date the notice of appeal was filed in the trial court. Supreme Court Rule 81.19(b).

A. Legal File

The legal file contains the pleadings and other documents filed with the trial court. Rule 81.12(a) specifies documents that should always be included and Rule 81.12(b) lists matters that should normally be omitted. The legal file is to begin with the docket sheet followed by the other documents arranged in chronological order ending with the notice of appeal. Supreme Court Rule 81.12(a). The pages of the legal file are to be numbered consecutively, with the docket sheet beginning at page 1, and include the index at the beginning. Supreme Court Rules 81.12(a) and 81.14(b).

The appellant must also prepare an index for the legal file. Supreme Court Rules 81.12(c) and 81.14(b). Certified copies of the documents necessary for the legal file shall be ordered from the clerk of the trial court within 30 days after filing the notice of appeal. Supreme Court Rules 81.12(c) and 81.15(a). Note however, if the Record on Appeal consists solely of the legal file, the Record is due 30 days after the notice of appeal was filed. Supreme Court Rule 81.19(a). As a result, it will be necessary to order the documents for the legal file early enough to allow filing the Record within 30 days.

Only the original legal file must be filed with the appellate court. A copy of the legal file must be served on each respondent if not represented by the same counsel. Supreme Court Rules 81.12(d) and 81.14(d). A copy of the index to the legal file must also be filed with the clerk of the trial court. Supreme Court Rule 81.12(d).

B. Transcript

The transcript must be ordered within 10 days after filing the notice of appeal. Supreme Court Rule 81.12(c). The charges or estimated charges for the transcript must be paid in accordance with § 512.050. The order must designate the portions of the record to be included in the transcript. Supreme Court Rule 81.12(c). A certificate stating the date the transcript was ordered and the date the charges were paid must be filed and served within 10 days after payment. Supreme Court Rule 81.12(c). Rule 81.12(b) again lists matters that generally should not be included in the Record.

Only the original transcript need be filed with the appellate court. A copy of the transcript is to be served on the respondent or respondents, if only one or if all respondents are represented by the same counsel. Supreme Court Rules 81.12(d) and 81.14(d). The appellant may request the appellate court make a just and equitable order regarding delivery of a copy of the transcript if there are multiple respondents not represented by the same counsel. Supreme Court Rule 81.14(d).

A page reduction transcript may be filed, but a floppy disk containing the transcript must then also be filed. Supreme Court Rule 81.18(c). If a floppy disk is available from the court reporter, I would recommend filing it even if a page reduction transcript is not used.

C. Exhibits

"Appellant is responsible for depositing all exhibits that are necessary for the determination of any point relied on." Supreme Court Rule 81.12(e). Rule 81.12(e) has provisions for exhibits that are not in the appellant's custody. Exhibits are normally due on or before the day the reply brief is due. Supreme Court Rules 81.12(e) and 81.16(c). Consult the Special Rules for each district of the Court of Appeals regarding the index and labeling requirements.

If an exhibit is important to your arguments, it is a good idea to include a *copy* in the appendix to your brief. However, the original *must* be deposited according to Rule 81.12(e). The copy in the appendix is simply for convenience and does not allow the exhibit to be considered if the original is not deposited.

V. BRIEFS

While oral argument is important, the time for such argument is very limited. The briefs provide the primary means of informing the appellate court regarding your case and the law. The briefs are the best opportunity to convince the court that your client should prevail. Rule 84.06

provides the details regarding the formatting requirements for both the paper and electronic versions of the briefs. Additionally, the various districts of the Court of Appeals have Special Rules that may vary the specific formatting requirements as well as the number of copies to be filed. Rule 84.05 provides the due dates for the various briefs.

Rule 84.04 governs the contents of appellate briefs in Missouri. Failure to comply with Rule 84.04 can result in points relied on being waived or even appeals being dismissed. That rule requires the appellant's brief to contain: (1) a detailed table of contents, (2) a table of cases and other authorities, (3) a jurisdictional statement, (4) a statement of facts, (5) the points relied on, (6) the argument section, and (7) the conclusion. Supreme Court Rule 84.04(a).

Before starting your brief, it is important to determine the issues you wish to raise and the standard of review to be applied by the appellate court regarding those issues. The standard of review may vary for different points relied on. The standard of review affects the way the statement of facts is to be drafted, the proper formation of the points relied on, and the way arguments will be framed. As a result, it is important to keep the proper standard or standards of review in mind when drafting all portions of the briefs, not just the argument sections.

A. Jurisdictional Statement

The Jurisdictional Statement must include sufficient factual data to show jurisdiction is proper in the appellate court before which the appeal is pending under Article V, section 3, of the Constitution. Supreme Court Rule 84.04(b).

B. Statement of Facts

The statement of facts is to be "a fair and concise statement of the facts relevant to the questions presented for determination without argument." Supreme Court Rule 84.04(c). The statement of facts must include *specific* references to the pages of the transcript or legal file. Supreme Court Rule 84.04(i). I also recommend including line number references when citing the transcript. Your job is to do everything possible to make it easy for the court to find the support for your arguments.

What constitutes "a fair and concise statement of facts" varies depending on the issues involved in your appeal and the standard of review to be applied by the court. An appellate court reviews a judgment granting a motion for summary judgment differently than a judgment based on a jury verdict. As a result, you must address the facts in your brief differently. The facts are also treated differently if you are claiming the judgment is not supported by substantial evidence rather than claiming the trial court misapplied the law. If you raise multiple issues subject to different standards of review, then the statement of facts needs to be "fair and concise" but also address the facts relevant to each issue with consideration of the standards of review that will be applied.

C. Points Relied On

Despite decades of cases explaining the proper method for drafting a point relied on, it is not always a simple matter to properly craft a point relied on. Rule 84.04(d) provides templates for points relied on depending on the type of appeal or proceeding involved. Follow the format in Rule 84.04(d). If you have doubts or questions, it can be helpful to have someone else review your point. The Small Firm Internet Group, SFIG, is a good source for finding someone willing to review your point. Examples of both good and bad points are available in cases and through other sources, such as the MoBar CLE, Appellate Court Practice, § 6.8 Points Relied On (2007).

While a program dedicated solely to points relied on could easily involve twice the time and materials available for this program, some guidelines are available. "Detailed evidentiary facts shall not be included" in a point. Supreme Court Rule 84.04(d)(4). "Abstract statements of law" are not proper points. Supreme Court Rule 84.04(d)(4). Points should be limited to a single issue. Generally, a point relied on should not exceed a half page of text. If it is longer, it probably either includes detailed evidentiary facts or multiple issues. Avoid sub-parts if possible. If used, sub-parts must relate to a single issue.

The purpose of the points relied on is to specify the issues for both the appellate court and the respondent. It is advisable to limit the number of points relied on so that you can focus on the more important issues and avoid wasting time on issues with less merit.

> As stated in *Jones v. Barnes*, 463 U.S. 745, 752, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983), quoting from Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951), "'The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases.'" *Jones* suggests, "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id*. at 751-52.

Baker v. Empire District Electric Co., 24 S.W.3d 255, 257 n.1 (Mo.App.S.D. 2000); *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188, 192 n.1 (Mo.App.S.D. 2000).

A list of up to four cases together with the constitutional, statutory, and regulatory provisions or other authorities upon which the argument principally relies must immediately follow each point relied on.

If an issue is not mentioned in a point relied on, it is considered abandoned. A defective point relied on preserves nothing for appellate review. Failing to cite authority when available waives a point relied on. A court may review such issues for plain error but it is very difficult to obtain relief based on plain error. It is also possible that a court will consider such a point waived or even dismiss the appeal.

D. Argument

> The argument shall substantially follow the order of "Points Relied On." The point relied on shall be restated at the beginning of the section of the argument discussing that point. The argument shall be limited to those errors included in the "Points Relied On." The argument shall also include a concise statement of the applicable standard of review for each claim of error.

Supreme Court Rule 84.04(e). As a result, the argument should be divided into sections for each point relied on. Each of those sections must begin with a copy of the point followed by the standard of review. For ease of reference, the argument may be further divided into additional sub-sections.

All facts stated in the argument section "shall have specific page references to the legal file or the transcript." Supreme Court Rule 84.04(i). As with the statement of facts, I recommend including references to the specific line numbers for the transcript. Again, make it as easy for the Court of Appeals to find the support for your argument as possible.

Any error claimed in the point relied on must be addressed in the argument section of the brief or it is deemed abandoned. Conversely, any claimed errors addressed in the argument section but not raised in the point relied on are not preserved for appellate review. Any argument not supported by citations to authority, unless the lack of authority is adequately explained, is deemed abandoned.

E. Conclusion

Rule 84.04 requires the appellate's brief to include "A short conclusion stating the precise relief sought." Supreme Court Rule 84.04(a)(6). If you want the judgment reversed and remanded for a new trial, say so. If you are seeking other relief, tell the court precisely what you want it to do.

F. Appendix

Rule 84.04(h) governs the appendix to the various briefs. Unless the material is included in an earlier appendix, it must include: (1) "the judgment, order, or decision . . . including the relevant findings of fact and conclusions of law", (2) the complete text of statutes, ordinances, court rules, or agency rules claimed to be controlling, and (3) the complete text of any instruction addressed in a point relied on. Supreme Court Rule 84.04(h). The appendix may include additional relevant materials, including *copies* of exhibits, excerpts from the Record on Appeal, and copies of new cases or other authorities. Supreme Court Rule 84.04(h). While it is a good idea to include copies of important exhibits in the appendix, the *original* exhibits must still be deposited according to Rule 81.12(e) to be considered by the appellate court.

The appendix shall be page numbered consecutively starting with page A1 and shall have a separate table of contents. Supreme Court Rule 84.04(h). If less than 30 pages, the appendix

shall be bound into the back of the brief. If 30 pages or more, the appendix is to be separately bound. Supreme Court Rule 84.04(h).

G. Respondent's Brief

The respondent's brief is required to contain: (1) a detailed table of contents, (2) a table of authorities like the table required in the appellant's brief, and (3) an argument section. Supreme Court Rule 84.04(f). The respondent's brief may also contain a jurisdictional statement or statement of facts if the respondent is dissatisfied with the accuracy or completeness of such portions of the appellant's brief.

The argument section "shall contain headings identifying the points relied on contained in the appellant's brief to which each such argument responds." Supreme Court Rule 84.04(f). The respondent may also include additional arguments supporting the judgment which are not raised by the appellant's points relied on. There is no requirement that the respondent's brief contain any "point relied on".

While a respondent is not required to file a brief, it is recommended.

> Defendant has declined to file a brief on appeal. Although there is no requirement that a respondent file an appellate brief, we encourage attorneys practicing before this court to do so. Filing an appellate brief provides counsel, and most importantly the client, a vitally important opportunity to apprise the court of their position and relevant authority. This Court is an impartial arbiter, not an advocate for those who decline to argue their position on appeal.

Khan v. Gutsgell, 55 S.W.3d 440, 441 n.2 (Mo.App.E.D. 2001). Failure to file a brief may also waive the right to present oral argument on behalf of the respondent. Southern District Special Rule 1(b); Eastern District Special Rule 395(f); Western District Special Rule XXIII.

VI. ORAL ARGUMENT

The requirements for obtaining oral argument vary between the three districts of the Court of Appeals. Read the Special Rules for the particular district to ensure you have taken the steps necessary to obtain oral argument. Oral argument is your one chance to answer any questions the judges may have after reading the briefs. It also provides you with an opportunity to focus and clarify your arguments. Take advantage of the opportunity.

The various districts of the Court of Appeals hear oral arguments at more than one location. Appeals involving cases from certain counties are automatically heard by the Southern District in Poplar Bluff rather than Springfield. R.S.Mo. § 477.020. Additionally, the various courts hear oral argument on college campuses and other locations at times to allow students and other members of the public to observe the appellate process. Ensure you know where oral argument will be heard for your case because you risk losing your chance to argue if you fail to appear at the proper location at the proper time.

During oral argument, answer the court's questions as fully and accurately as possible. Questions from the court are a good thing. Such questions tell you what facts or legal issues are of concern to the court. This gives you a chance to explain why those facts or legal issues support your position or why you should prevail despite those facts or legal issues.

As with the conclusion in the appellant's brief, tell the court the relief you want.

VII. POST-DISPOSITION MOTIONS

After the appellate court issues an opinion, any of the parties has the option of filing a motion for rehearing, a motion to modify, or a motion to publish an opinion. Supreme Court Rule 84.17(a). Such motions are due 15 days after the court files its opinion or other ruling. Supreme Court Rule 84.17(b). No response to such motions is to be filed unless requested by the court. Supreme Court Rule 84.17(c). "The purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court." Supreme Court Rule 84.17(a)(1). Such motions are seldom granted. A motion for rehearing is not required to be filed in the Court of Appeals in order to obtain transfer to the Supreme Court.

Applications for transfer are governed by Supreme Court Rule 83. The Supreme Court, on application of a party or on its own motion, may order transfer prior to opinion by the Court of Appeals. Supreme Court Rule 83.01. A case may also be transferred on the dissent of a participating judge in the Court of Appeals. Supreme Court Rule 83.03. Neither of these rules results in many transfers.

Rule 83.02 governs applications for transfer filed in the Court of Appeals after the court issues an opinion or other ruling. Such application must be filed within 15 days of the date the ruling is filed. Supreme Court Rule 83.02. No response is to be filed unless requested by the Court of Appeals. Supreme Court Rule 83.02. Because the Supreme Court has the ability to order transfer, the various districts of the Court of Appeals very seldom grant these applications. However, an application for transfer pursuant to Rule 83.02 is required before the Supreme Court may grant an application pursuant to Rule 83.04. Supreme Court Rule 83.04. An application for transfer pursuant to Rule 83.04 must be filed with the Supreme Court within fifteen days of the date the application was denied by the Court of Appeals. Supreme Court Rule 83.04. Again, no response is to be filed unless requested by the court. Supreme Court Rule 83.04.

The form for an application for transfer is governed by Rule 83.05.

VIII. CONCLUSION

When handling appeals, it is important to read and follow the Rules 81, 83, and 84 and the Special Rules closely. Be accurate and careful when drafting briefs and presenting oral argument. If possible, have your brief reviewed by a colleague prior to filing. Handling appeals involves a lot of details, but the results can be very rewarding.