

## APPEALS: PRACTICAL TIPS AND PITFALLS

Joe Yeckel  
Law Office of Joseph F. Yeckel, LLC  
116 E. Lockwood Ave.  
St. Louis, MO 63119  
(314) 503-3333  
Joe@Yeckel-Law.com  
www.Yeckel-Law.com

Rick Rollings  
Legal Research & Writing  
379 W. Lake Park  
Camdenton, MO 65020  
(573) 873-6060  
Rick@RRollings.com  
www.RRollings.com

### 1. Creating the trial record and preserving error

Appellate courts generally will only consider issues and objections that have been properly preserved at trial. Making and preserving objections requires more than simply filing motions in limine or motions to suppress. Objections to evidence must be made or renewed when the evidence is actually offered at trial.

Offers of Proof. When evidence is offered and the court sustains an objection to its admission, an offer of proof is required to allow the party to challenge that ruling on appeal. An offer of proof must include all of the facts necessary to establish the admissibility of the evidence sought to be introduced and be “in sufficient detail to demonstrate its relevancy and materiality.” *Kinzel v. West Park Investment Corp.*, 330 S.W.2d 792, 795 (Mo. 1959).

The proper way to make an offer of proof is “to propound questions to a witness who is present and has taken the stand.” *Campbell v. Campbell*, 929 S.W.2d 757, 762 (Mo.App. W.D.1996).

Narrative offers of proof are disfavored. While a narrative offer of proof “may ‘occasionally’ be found to be adequate, . . . it must be given with sufficient certainty and detail so as to demonstrate its quality as relevant, material and probative evidence.” *Campbell*, 929 S.W.2d at 762. “A narrative offer of proof that is merely conclusory is inadequate.” *Id.* See also *Kinzel*, 330 S.W.2d at 795 (stating that an offer of proof should not be “a mere statement of the conclusions of counsel”).

Jury Instructions. Objections to jury instructions are governed by Rules 28.03 and 70.03. *Gill Constr., Inc. v. 18th & Vine Authority*, 157 S.W.3d 699 (Mo.App. W.D.2004). These rules both require specific objections “stating distinctly the matter objected to and the grounds of the objection.” Rule 28.03, 70.03.<sup>1</sup> The objections must also be raised in a motion for new trial. Rule 28.03, 70.03.

After-Trial Motions. A motion for new trial is necessary to preserve certain errors in jury-tried cases. Rule 78.07. All allegations of error must be included in a motion for new trial, except: (a) questions of subject matter jurisdiction; (b) questions as to the sufficiency of the pleadings to state a claim or defense; (c) questions presented in a motion for judgment notwithstanding the

---

<sup>1</sup> All references to Rules are to Missouri Supreme Court Rules or the Special Rules adopted by the Districts of the Missouri Court of Appeals.

verdict; and (d) questions related to motions for directed verdict that are granted at trial. Rule 78.07(a). Rule 29.11(d) is the rule applicable in criminal appeals.

A motion to amend the judgment is required in court-tried cases to preserve error “relating to the form or language of the judgment, including the failure to make statutorily required findings.” Rule 78.07(c).

## **2. Initiating an appeal**

An appeal is initiated by filing a notice of appeal with the clerk of the trial court. Rule 30.01(d); 81.04(a). Each district of the court of appeals requires a supplement be filed with the Notice of Appeal. *See* ED Rule 300, WD Rule XIV, SD Rule 12.

Final judgment is usually required. Generally, to be considered a “judgment,” the ruling must resolve all issues with respect to all parties in the action. A “judgment” must be signed by a judge and denominated “judgment” or “decree.” Rule 74.01(a). A judgment is appealable once it becomes final. “A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed.” Rule 81.05(a)(1). Rule 81.05(a)(2) provides that if an authorized after-trial motion is filed, the judgment becomes final at the earlier of “Ninety days from the date the last timely motion was filed, on which date all motions not ruled shall be deemed overruled; or . . . If all motions have been ruled, then the date of ruling of the last motion to be ruled or thirty days after entry of judgment, whichever is later.” Rule 81.05(a)(2). Note that special rules may apply to certain types of cases, e.g., probate. Mo. Rev. Stat. § 472.160.

Interlocutory appeals. Normally, any ruling that does not resolve all of the claims or the rights and liabilities of all the parties is not a judgment and “shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment . . .” Rule 74.01(b). However, “the court may enter a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.” Rule 74.01(b). Designating a judgment as final as to particular claims pursuant to Rule 74.01(b) is “effective only when the order disposes of a distinct ‘judicial unit.’” *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. 1997) (“The required ‘judicial unit for an appeal’ has settled meaning: ‘the final judgment on a claim, not a ruling on some of several issues arising out of the same transaction or occurrence which does not dispose of the claim’”) (quoting *State ex rel. State Highway Comm’n v. Smith*, 303 S.W.3d 120, 123 (Mo. 1957)).

Premature notice of appeal. A notice of appeal filed before a judgment is final “shall be considered as filed immediately after the time the judgment becomes final for the purposes of appeal.” Rule 81.05(b). If the trial court enters an amended judgment after the notice of appeal was filed, the best course is to file a new notice of appeal based on the amended judgment.

Deadline for filing notice of appeal. A notice of appeal is due 10 days after the judgment becomes final. Rule 81.04(a). Cross-appeals are initiated by filing a notice of appeal within ten days of the date of the first notice of appeal, assuming that the first notice of appeal was timely. Rule 81.04(b). If your opponent files a notice of appeal and your client wants to pursue a cross-appeal, verify the timeliness of the original notice of appeal.

Late notice of appeal. In civil and criminal cases, the failure to file a timely notice of appeal does not automatically preclude appellate review. A party who misses the deadline for filing a notice of appeal may file a motion in the court of appeals requesting leave to file a late notice of appeal. In civil cases, the motion must be filed within 6 months after the judgment became final. Rule 81.07. In criminal cases, including post-conviction relief cases, the filing deadline is 12 months. Rule 30.03. Notice of the motion must be given to adverse parties. The movant must make “a showing by affidavit, or otherwise, that the delay was not due to appellant’s culpable negligence.” Rule 81.07. In criminal cases, the movant must demonstrate “good cause.” Rule 30.03. A copy of the judgment appealed from must be attached to the motion. If the court of appeals issues an order allowing the filing of a notice of appeal out of time, the movant may file the notice of appeal with the clerk of the trial court within the time specified in the order.

The late notice of appeal provision only applies to judgments entered by trial courts. Accordingly, Rule 81.07 cannot be used to extend the deadline for filing a notice of appeal in unemployment compensation and workers’ compensation cases. *See Jackson v. Nova Marketing Servs., LLC*, 241 S.W.3d 853, 854 (Mo.App. E.D.2007) (unemployment benefits); *Porter v. Emerson Elec. Co.*, 895 S.W.2d 155, 160 (Mo.App. S.D.1995) (workers’ compensation);

Docket fee. The notice of appeal must be accompanied by a docket fee, which is currently \$70. Rule 81.04. “No trial court clerk shall accept or file a notice of appeal unless . . . [t]he docket fee is deposited therewith.” Rule 81.04(d). The appellate court acquires no jurisdiction over the appeal unless the docket fee is paid within the time for filing the notice of appeal. *Moore ex rel. Moore v. Bi-State Development Agency*, 87 S.W.3d 279, 296 (Mo.App. E.D.2002). No docket fee is required, however, where the appellant is not required by law to pay the fee or the appellant is prosecuting the appeal in forma pauperis. Rule 81.04(d).

Content of notice of appeal. The notice of appeal must “specify the parties taking the appeal, the judgment or order appealed from, the court to which the appeal is taken, and if the appeal is to [the Supreme Court], the ground or grounds on which jurisdiction of [the Supreme Court] is based.” Rule 81.08(a). Form No. 8-A in the Supreme Court Rules should be used in civil appeals. Copies of Form No. 8-A can be found at <http://www.courts.mo.gov/page.jsp?id=525>. Form No. 8-B applies to unemployment compensation appeals and Form No. 8-C applies to worker’s compensation appeals.

### **3. The Record on Appeal**

After filing the notice of appeal, the next step is preparing the record on appeal. The record on appeal consists of the transcript and legal file. Rule 30.04(a) & 81.12(a). The appellant is responsible for ordering the transcript and compiling the legal file. Rule 30.04(c) & 81.12(c). If the respondent believes relevant matters have been omitted, he or she may supplement the record within the time allowed for filing the respondent’s brief. Rule 30.04(c) & 81.12(c).

Transcript. The transcript contains the portions of the proceedings and evidence not previously reduced to written form. Rule 30.04(a) & 81.12(a). The appellant in civil cases is required to order the transcript within ten days after the notice of appeal is filed. Rule 81.12(c). In criminal

cases, the transcript order must be placed within thirty days of the filing of the notice of appeal. Rule 30.04(c).

*i. Ordering the transcript.* The request must be in writing and designate the portions of the proceedings that are to be included in the transcript. Rule 30.04(c) & 81.12(c). It is best to be comprehensive. Unless absolutely certain that specific portions of the proceedings are not pertinent to the appeal, ordering a transcript of all proceedings conducted on the record is the best course.

*ii. Payment.* Within 10 days of receiving a request for a transcript, the court reporter shall provide a written estimate and request for deposit. Payment of the deposit requested by the court reporter must be made within ten days of the written notification. Mo. Rev. Stat. § 512.050. “Appellant’s certificate stating the date on which the transcript was ordered and the date on which the transcript charges were paid shall be filed in the appellate court within ten days after the payment of the charges. A copy of appellant’s certificate shall be served on all other parties.” Rule 84.12(c). *Cf.* Rule 30.04(c) (stating that a copy of the appellant’s written transcript order “shall be filed with the appellate court and served on the respondent”).

Legal File. The legal file contains “clearly reproduced exact copies of the pleadings and other portions of the trial record previously reduced to written form.” Rule 81.12(a). *Cf.* Rule 30.04(a).

*i. Ordering the legal file.* The legal file can be ordered by sending a letter to the clerk of the trial court requesting certified copies of the necessary documents. A form for ordering the documents can be found at <http://www.courts.mo.gov/file.jsp?id=653>. You can also send a letter requesting certified copies and specifying the documents by filing date and title or description. There is normally a charge for preparation of the certified copies.

*ii. Contents.* Include only documents pertinent to the appeal in the legal file. “The legal file shall always include: the docket sheet or case record, which contains a complete summary of all events in the case; 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, together with their respective dates of filing or entry of record.” Rule 81.12(a). For criminal appeals, consult Rule 30.04(a).

The legal file “shall be securely bound on the top or left side” and have a cover page labeled “Legal File.” Rule 81.12(a), 81.18 (a), (d). A volume of the legal file shall not exceed 200 pages. Rule 81.18(d). The legal file should begin with an index followed by the documents in chronological order, starting with the docket sheet and ending with the notice of appeal. Rule 81.12(a), (c). Unless the parties file a written stipulation that the documents in the legal file are true and accurate copies, the documents must be certified copies from the court file. Rule 81.12(c) & 81.15(a), (c). Consult Rule 30.04 for criminal appeals.

Matters omitted from the record on appeal. Unless “necessary to determination of issues on appeal,” the following documents should be omitted from the record on appeal: “voir dire, opening statements, closing arguments, MAI 2.01, evidence regarding damages, briefs and memoranda, notices of filing, subpoenas, summonses, motions to extend time, affidavits and

admissions of service and mailing, notices of settings, depositions and notices, and jury lists.” Rule 81.12(b). Rule 30.04(b) is the equivalent rule applicable in criminal appeals. Include any of these items if they may be relevant to an issue that will be raised in the appeal.

Filing deadline. The record on appeal is due 30 days from the date the notice of appeal is filed in the trial court if it consists of only a legal file. Rule 81.19. Where the record on appeal includes a transcript, it is due 90 days from the date of the notice of appeal is filed. Rule 81.19. In cross-appeals, the due date is calculated from the date of the last notice of appeal. Rule 81.19.

Filing & Service. File one copy of the record on appeal and proof of service with the clerk of the appellate court. Rule 30.04(f) & 81.12(d). A copy of the index of the transcript and index of the legal file shall be filed with the clerk of the trial court. Rule 30.04(f) & 81.12(d). Each district of the Court of Appeals requires that the transcript be accompanied by an electronic copy on floppy disk, or, in the Eastern District, CD-ROM. WD Rule XXVIII, ED Rule 337, SD Rule 2(b). A copy of the floppy disk or CD-ROM containing the transcript shall also be served. Rule 81.12(d).

Working With the Record. The floppy disk or CD-ROM containing the transcript makes it easy to create a searchable copy of the transcript in PDF for use in Adobe Acrobat. A searchable PDF version of the transcript allows you to conduct word searches and to copy and paste portions of the transcript into your brief. The legal file can be scanned and then OCR'd to create a hybrid PDF that contains an exact image of the legal file, but with the text available for searching and copying.

#### **4. Briefs**

The requirements of Rule 84.04 governing the contents of appellate briefs are mandatory and must be strictly applied. *Brown v. Ameristar Casino Kansas City, Inc.*, 211 S.W.3d 145 (Mo.App. W.D.2007). A brief which substantially fails to comply with the briefing requirements of Rule 84.04 is inadequate to invoke appellate jurisdiction and preserves nothing for review. *Livingston v. Schnuck Markets, Inc.*, 184 S.W.3d 617, 619 (Mo.App. E.D.2006).

##### Appellant's Brief

- i. Cover.*
- ii. Table of Contents.* “A detailed table of contents, with page references.” Rule 84.04(a).
- iii. Table of Authorities.* List cases, statutes, and other authorities cited in the brief. Provide page references of where each authority is cited in the brief. Order cases alphabetically.
- iv. Jurisdictional Statement.* The jurisdictional statement must “set forth sufficient factual data to demonstrate the applicability of the particular provision or provisions of Article V, section 3 of the Constitution whereon jurisdiction is sought to be predicated.” Rule 84.04(b). “It is the appellant’s responsibility to invoke the court’s jurisdiction and to support that proposition by an affirmative statement to that effect in the brief. Where such is not done, the

appeal is subject to dismissal.” *Joy v. New Plaza BMW & Pontiac*, 771 S.W.2d 906, 907 (Mo.App. W.D.1989).

v. *Statement of Facts*. “The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument.” Rule 84.04(c). Page references to the legal file or transcript must be included. Rule 84.04(i). “The primary purpose of the statement of facts is to afford an immediate, accurate, complete and unbiased understanding of the facts of the case.” *Kent v. Charlie Chicken, II, Inc.*, 972 S.W.2d 513, 515 (Mo.App. E.D.1998). “Failure to include, in the statement of facts, the facts upon which an appellant’s claim of error is based fails to preserve the contention for appellate review.” *Snyder v. Snyder*, 142 S.W.3d 780, 782 (Mo.App. E.D.2004). The failure to include specific page references to the legal file or transcript preserves nothing for appellate review. *Osgood v. Worm World, Inc.*, 959 S.W.2d 139, 140 (Mo.App. S.D.1998). Whether the statement of facts is “fair” is determined based on the applicable standard of review.

vi. *Points Relied On*. The purpose of this rule “is to give notice to the opposing party as to the precise matters that must be contended with and to inform the court of the issues presented for review.” *Eddington v. Cova*, 118 S.W.3d 678, 681 (Mo.App. S.D.2003). Rule 84.04(d) provides the format for points relied on. Issues not included in a point relied on are deemed abandoned and may not be raised in the argument. *Klinkerfuss v. Cronin*, 199 S.W.3d 831, 840 n.2 (Mo.App. E.D. 2006) (holding that errors asserted in the argument portion of a brief but not included in the point relied on “are not reviewable”). An insufficient or defective point relied on preserves nothing for review.

The requirement that each point relied on in an appellant’s brief be followed by a list of cases and other authority is “mandatory and must be strictly applied.” *Salmons v. Rich*, 206 S.W.3d 353, 355 (Mo.App. W.D.2006). The only exception is when no authority exists. In such cases, the appellant should assert this as the reason for the lack of citation of authority. *Thummel v. King*, 570 S.W.2d 679, 687 (Mo. 1978). An example of a point relied on is:

The trial court erred in denying Ms. Smith’s motion to suppress evidence and overruling her objection to the admission of the evidence because the State obtained the evidence through an unlawful search and seizure in that (1) Officer Jones unlawfully detained Ms. Smith longer than necessary to complete the traffic stop by questioning her regarding matters unrelated to the traffic violation without having any reasonable, articulable grounds for suspicion of criminal activity; (2) Officer Jones unlawfully detained Ms. Smith after the completion of the traffic stop without having created a consensual encounter; and (3) any consent to search the vehicle was tainted by the unlawful detention and was not freely and voluntarily given.

Strive to limit the number of points relied on. Focus on the strongest issues. Keep in mind the applicable standard of review. Resist the urge to assert a point relied on for every possible error. Various appellate judges have explained:

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), “[t]he 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, “[e]xperienced 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).

vii. *Argument.* The point relied on must be restated at the beginning of the section of the argument discussing that point. Rule 84.04(e). The argument must also “include a concise statement of the applicable standard of review for each claim of error.” *Id.*

The standard of review introduces and frames the argument. “The standard of review is an essential portion of all appellate arguments; it outlines this court’s role in disposing of the matter before us.” *Waller v. Shippey*, 251 S.W.3d 403, 406 (Mo.App. W.D.2008). It is not the duty of the appellate court to supplement a deficient brief with its own research. *Id.* An appellant’s brief that fails to contain the applicable standard of review in its argument section is deficient. *Id.*

The argument should discuss the applicable law and then apply that law to the facts of your case. This should be done in the context of the standard of review to show why the judgment should be affirmed or reversed. If you represent the appellant, it is critical to show how your client was prejudiced by the trial court’s ruling or why prejudice is presumed. Rule 84.13(b) (“No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action.”); *Romeo v. Jones*, 144 S.W.3d 324, 332 (Mo.App. E.D.2004) (noting that even if the trial court erroneously excluded evidence, the court of appeals will not reverse the judgment unless it concludes the error “was prejudicial and not harmless and that the error materially affected the merits of the action”).

Facts recited in the argument section must include page references to the legal file or transcript. Rule 84.04(i).

The appellant is obligated to “cite all precedent whether favorable or unfavorable to the claim of error.” *Botanicals on the Park, Inc. v. Microcode Corp.*, 7 S.W.3d 465, 467 n.1 (Mo.App. E.D.1999). You must support your argument with authority. Otherwise, the appellate court may find nothing has been preserved for review. The appellant “is required to develop the issue raised in the point relied on in the argument portion of the brief.” *Kuenz v. Walker*, 244 S.W.3d 191, 194 (Mo.App. E.D.2007). “If a party does not support contentions with relevant authority or argument beyond conclusory statements, the point is deemed abandoned.” *Id.*

viii. *Conclusion.* The conclusion should be concise and state “the precise relief sought” from the appellate court. Rule 84.04(a)(6).

ix. *Certifications.* Include a certificate of service and the certificate of compliance required by Rule 84.06 and the applicable local rule.

Respondent's Brief. The respondent's brief must contain a table of contents and table of authorities and an argument section. Rule 84.04(f). The respondent's brief may include a separate jurisdictional statement and statement of facts. *Id.* An attorney representing a respondent in an appeal should always take advantage of the opportunity to prepare a separate statement of facts. This is your chance to tell the court the other side of the case, emphasizing the facts favorable to the respondent. It also gives you a chance to point out any factual misstatements in the appellant's brief. Another reason to prepare a separate statement of facts is the court may assume that the failure to do so manifests the respondent's adoption of the appellant's statement of facts. *Kantel Communications, Inc. v. Casey*, 865 S.W.2d 685, 692 n.2 (Mo.App. W.D.1993).

If the respondent does not agree with the standard of review provided by appellant, the respondent should state the proper standard of review. Even if the appellant has properly stated the standard of review, consider restating the standard of review in terms favorable to your client. This is especially true in cases where appellate review is limited, as in court-tried cases. Here's an example of a restated standard of review tailored to the statute of limitations issue raised on appeal:

***Standard of Review:*** In a court-tried case, the court of appeals will affirm the judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). "Where the running of the statute of limitations depends upon when the plaintiff discovered or by reasonable diligence could have discovered the fraud, a question of fact is presented." *Schwartz v. Lawson*, 797 S.W.2d 828, 836 (Mo.App. W.D.1990). When reviewing questions of fact, the court of appeals views "the evidence and all reasonable inferences in the light most favorable to the judgment and disregard[s] all contrary evidence and inferences." *Christian Health Care of Springfield West Park, Inc. v. Little*, 145 S.W.3d 44, 48 (Mo.App. S.D.2004). Appellate courts "defer to the trial court's determination of witness credibility and recognize that the court is free to accept or reject all, part, or none of the testimony presented." *Id.*

Reply Brief. A reply brief is optional but strongly recommended. The purpose of the reply brief is to address factual or legal issues raised in the respondent's brief. Strive for brevity and precision. Do not "reargue points covered in the appellant's initial brief." Rule 84.04(g).

Appendix to Brief. Rule 84.04(h) includes items that are required to be included in an appendix. The appellant's brief must include the judgment, order, or decisions appealed from, the complete text of any statutes, ordinances, court rules, or agency rules claimed to be controlling, and the complete text of any instruction to which a point relied on relates. *Original* exhibits should *NOT* be included in an appendix. *Copies* of exhibits are appropriate for inclusion in an appendix but remember to deposit the original exhibits with the court. An effective appendix will provide judges with quick and easy access to critical evidence. Consider including exhibits, contract provisions, transcript pages, or cases that support your argument.

Filing Deadlines. The appellant's initial brief is due 60 days after the record on appeal is filed with the respondent's brief due 30 days after the filing of the appellant's brief. The appellant's reply brief is due 15 days after the respondent's brief is filed. Appellate courts routinely grant motions seeking to extend these deadlines.

## **5. Exhibits**

"Appellant is responsible for depositing all exhibits that are necessary for the determination of any point relied on." Rule 81.12(e). If the exhibits are in another party's custody, "the appellant may request that party to either deposit the exhibits with the appellate court or deliver them to appellant for deposit with the court." Rule 81.12(e).

In civil cases, "[o]riginal exhibits shall be deposited with the appellate court on or before the day the reply brief is due or when the court so directs, whichever is earlier." Rule 81.16(c). In criminal cases, exhibits are to be deposited on or before date of oral argument, or, if submitted on briefs, within 5 days of submission. Rule 30.05. The failure to deposit exhibits in a timely fashion may compromise an appeal. Rule 30.05 (stating that any exhibits not timely deposited "may be considered by the court as immaterial to the issues on appeal"); Rule 81.16(c) (same). The respondent may deposit any additional exhibits deemed necessary to determine the issues raised in the appeal. Rule 81.12(e). The party depositing exhibits "shall serve on all other parties on the day of deposit a listing and description of the exhibits deposited." Rule 81.12(e).

If exhibits have not been filed within the time allotted, file a motion seeking leave to file the exhibits out of time. Otherwise, the court may dismiss one or more points relied on or the entire appeal if it deems the exhibits necessary to the resolution of the appeal. *See, e.g., State ex rel. Missouri Highway & Transp. Comm'n v. Gannon*, 898 S.W.2d 141, 144 (Mo.App. E.D.1995) (stating that where appellant fails to make exhibits that appellant claims were improperly admitted or excluded part of record, trial court's ruling cannot be reviewed).

## **6. Understanding the standard of review**

Understanding the applicable standard of review is crucial in selecting the issues an appellant should raise and in writing the argument of those issues.

Court-tried cases. In a court-tried case, the court of appeals will affirm the judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976).

De novo. Appellate courts review the grant of summary judgment, dismissal of a petition, as well as questions of law and contract interpretation de novo. This standard is quite favorable as the appellate court does not defer to the trial court's determination of questions of law.

Abuse of discretion. Other issues, such as the exclusion of evidence, are reviewed for an abuse of discretion. A trial court abuses its discretion "when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Hoodco of Poplar Bluff, Inc. v. Bosoluke*, 9

S.W.3d 701, 704 (Mo.App. S.D.1999). “[I]f reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” *Id.*

Plain error. Issues which have not been properly preserved for review on appeal are reviewed, if at all, for plain error. Plain errors affecting substantive rights may be considered on appeal when the court finds the error has resulted in manifest injustice or a miscarriage of justice. Rule 30.20; Rule 84.13(c). “Errors are plain if they are evident, obvious, and clear.” *State v. Flemons*, 144 S.W.3d 877, 881 (Mo.App. W.D.2004). Very seldom is plain error a basis for reversal of judgments rendered in civil cases.

## **7. Oral argument**

Oral argument must be specifically requested in the Eastern and Southern Districts. The Southern District requires a Request for Oral Argument be filed by the appellant if he or she wishes to present oral argument. SD Rule 1(b). The request can either be endorsed on the front cover of the appellant’s brief or filed as a separate document within 10 days after the respondent’s brief is due. *Id.*

In preparing for oral argument, educate yourself about the judges who will hear the case. Request the full time for argument. Don’t devote too much time reciting the facts. Start with your best point so that you are sure to discuss it before your time expires. Don’t evade questions but don’t commit to a position if uncertain of the consequences.

## **8. Post-disposition motions**

Post-disposition motions are due within 15 days after the court files its decision. Rule 84.17(b).

Motion for rehearing. “The purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court.” Rule 84.17(a)(1). Reargument of issues is not permitted.

Application for transfer. Applications filed in the court of appeal may seek transfer due to the general interest or importance of a question involved in the case or for the purpose of reexamining existing law. Rule 83.02. Filing an application for transfer in the court of appeals is a prerequisite to seeking transfer from the Supreme Court of Missouri. An additional basis for transfer may be asserted in the application filed in the Supreme Court. The applicant may argue that the opinion is contrary to a previous decision of an appellate court of this state. Rule 83.04.

Motion to publish. The motion must demonstrate why the disposition of the appeal has precedential value, in whole or in part. Rule 84.17(a)(3).

## **9. Attorney fees on appeal**

If party intends to assert a statutory or contractual entitlement to attorney fees incurred in prosecuting or defending an appeal, the party must file a motion requesting attorney fees before the case is submitted. ED Rule 400; WD Rule XXIX.