Notes

Appeals: Practical Tips and Pitfalls

June 10, 2010

Slide 2 - Creating a Trial Record

- Motions in Limine are great trial tools. For purposes of preserving issues for appellate review, motions in limine do nothing.
- If a motion in limine is granted, make an offer of proof during trial. If a motion in limine is denied, object to the evidence when it is offered.

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- An offer of proof is necessary if you wish to challenge the exclusion of evidence on appeal.

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- This is not the recommended method for making an offer of proof. This is the PROPER method for making an offer of proof. Put the witness on the stand and ask the questions you want to ask.
- If a motion in limine has been granted regarding documents or other exhibits, take the same steps. Place the witness you would have used to authenticate the exhibit on the stand and ask the necessary questions. Offer the exhibit so the court makes a final ruling on its admissibility.
- A narrative description of the evidence, in the majority of cases, is not sufficient.
- An offer of proof needs to include everything necessary to show admissibility of the evidence, including relevancy and materiality.

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- There are also rules regarding how to preserve objections to jury instructions.

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- Objections to jury instructions require specific grounds to preserve the issue for appeal.
- If you don't believe the instruction complies with the requirements for a not-in-MAI instruction, explain why. If the evidence does not support one of the submissions of negligence, state which one and why.

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- You made all of you objections and offers of proof at trial, buy you still are not done. After trial motions are also required to preserve many issues.

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- In jury-tried cases, a new trial motion is required to preserve most issues. The exceptions are (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 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.

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- In civil cases tried by the Court, a motion to amend the judgment is required to preserve error "relating to the form or language of the judgment, including the failure to make statutorily required findings." Rule 78.07(c).

- A motion for new trial can be filed in a court-tried case, it is just not required to preserve the issues for an appeal. More importantly, if you forget to include an issue in a motion for new trial, you can still raise it on appeal.

- A motion to reconsider is not an authorized after-trial motion. It will, sometimes, be treated as a motion for new trial, but not always. File a motion for new trial and avoid the issue. This is true even from a ruling granting a motion for summary judgment.

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- You have 30 days to file either a motion for new trial or motion to amend the judgment.

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- You only have 15 days to file a motion for new trial in criminal cases. The Court can grant one extension for up to 10 days, but the application for the extension must be made within the 15 days after the return of the verdict.

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- Generally, to appeal you must have either a final judgment or a judgment certified under Rule 74.01(b).

- A "judgment" requires (a) a writing, (b) signed by the judge, (c) denominated "judgment" or "decree", and either (d) disposes of all claims and parties, or (e) disposes of a judicial unit and is certified "no just reason for delay".

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- A notice of appeal is due 10 days after the judgment becomes final. Rule 81.05 provides the timing for when civil judgments generally become final. Thirty days after entry if no authorized after trial motions. Ninety days after the last authorized after trial motion or when motions ruled upon, whichever is earlier, as long as at least 30 days after entry.

- There are special rules for certain types of cases, such as intermediate judgments in probate matters, which are final when entered. As a result, you only have 10 days after entry to file the notice of appeal. However, those judgments can also be appealed when the entire probate matter is concluded.

- The course materials include a link to the notice of appeal form on the Missouri Courts website.

- Call the circuit clerk's office and confirm the filing fee and number of copies of the notice of appeal that they want. The rules specify that the filing fee is $70, but I have had clerk's want an additional fee to cover their cost for sending certified copies to the respondents.

- Generally, the court needs the original plus a copy for each of the other parties plus a copy for the court of appeals, but again, this can vary.

- Remember that all three districts of the Court of Appeals have supplemental forms that are required to be filed with the Notice of Appeal.

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- You can request permission from the Court of Appeals to file a late notice of appeal. This process is not available in unemployment compensation or workers' compensation cases where the judgment was not entered by a trial court.

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- The rules define the record as the Legal File and the Transcript. The record also includes exhibits, which are filed separately but can be an important part of an appeal.

- If the case was decided prior trial, such as on a motion for summary judgment, there will not be a transcript, only the legal file.

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- If you are the appellant, you are responsible for preparing the record on appeal. This means not only ordering the transcript and the documents for the legal file, but also ensuring that everything necessary for determination of the appeal is included in the record. If something you need to prevail on appeal is not included in the record, you will, in all probability, lose the appeal.

- In appeals, the facts, everything except the law, are found in the record. If it is not in the

record, it does not exist for purposes of the appeal.

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- There are also deadlines for ordering and paying for the transcript, see Rule 81.12(c) and § 512.050. Even if there is a transcript and the record is not due for 90 days, you are required to order the documents for the legal file from the clerk within 30 days.

- Different counties or circuits handle these orders differently. Some counties require that either you go to the clerk's office and mark the documents you want copied *or* order certified copies of the entire file. Other counties are happy to provide certified copies of only the necessary documents if you send a letter or other form listing the documents needed.

- Always remember to get a certified copy of the docket sheet as well.

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- Not "not". Basically, everything except the transcript.

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- I prefer spiral binding on the left, book style. It makes the legal file easy to open and use. The goal is to make everything easy on the Court of Appeals. You do not want the Court thinking about how difficult it is to work with the legal file. You want the judges focused on the issues.

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- Also include any other motions, pleadings, jury instructions, or documents that are necessary based on the issues you expect to raise.

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- The one except to the exclusion of "briefs and memoranda" relates to summary judgment motions. If you are appealing a judgment granting a motion for summary judgment, I believe you need to include the suggestions in support and opposition to the motion.

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- Good example. Different clerks do the certification differently. Some stamp the certification on every document, so there will not be a separate certification.

- If a motion is included in the legal file and it has a lot of exhibits, include each of the exhibits in the index to the legal file. It makes them easy to find.

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- Most of this also applies to the opposing party's brief as well. Use the floppy disk or CD

you get with the transcript or brief to create a PDF version of the document. It will look identical to the paper version but also be word searchable. I use Adobe Acrobat, but there are other programs that will let you work with PDF files.

- Once you have the PDF file, you can review, highlight, make notes, and copy and paste from the document all on your computer. You also can search for words or phrases to quickly find a discussion of a topic or exhibit.

- The legal file can be scanned and OCRed to create a picture of the documents with the text available for searching and copying. You can then do the same review, highlighting, and note taking as with the transcript.

- I also add bookmarks for the direct and cross-examination for each witness and each of the documents in the legal file. This allows me to jump to specific items in the record with just a few clicks.

- The rules generally require the filing of an electronic copy of the briefs together with the paper copies. I like to include the PDF versions of the transcript and legal file so that the Court has those, if any of the judges want to use them.

- The same thing is done automatically for my briefs by WordPerfect. I use the reference tool to create both the table of contents and the table of authorities. Then when I have WordPerfect export the brief to PDF, I can have it include hyperlinks in both tables and it also creates bookmarks for each section of the brief.

- The goal is to allow the judges, if they want to use the electronic versions, to easily find both your arguments and the support for your arguments. It also makes it much easier for me when I am drafting my brief to find the support in the record for my statement of facts and arguments.

- If you cite to something in the legal file, cite to the particular page of the legal file where it can be found, not just the first page of the document. If the document has paragraph numbers, such as a petition or motion, cite to the particular paragraph number.

- If you cite to the transcript, cite both page and line numbers. Make it easy for the Court to find the portion of the record that supports your arguments.

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- Most respondent's briefs have most of the sections that are required of an appellant's brief with the exception of the jurisdictional statement and the points relied on.

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- The Supreme Court of Missouri seems to be more particular about this than the districts of the Court of Appeals.

- If you convert your brief to PDF before printing it, be aware that it can reduce the size of the print slightly. For this reason, I use 14-point Times New Roman.

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- There are a lot of very particular formatting requirements for briefs. Pay attention and comply. They may not seem important and the court may not reject your brief if you do not. However, the clerk's office may stamp the front of your brief "Filed As Is" to indicate that the brief does not comply with all of rules. I do not want the first thing a judge sees when he looks at my brief to be a stamp indicating that I did not comply with the rules.

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- Some of the districts of the Court of Appeals have, by local rule, reduced the allowed length. Always review the rules for the district in which your appeal is pending.

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- Review the Rule 84.06 for specifics.

- Each district of the Court of Appeals has a special rule regarding the electronic copy. You need to review those as well as Rule 84.06(g).

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- Remember that most, if not all, of the time periods involved in appeals are based on when documents are filed, not served. This means that service by mail *does not* add three days to the amount of time available for the next filing.

- Cross Appeals add an additional brief, with 30 days between all briefs except the last, which remains 15 days. Rule 84.05(b).

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- If possible, I prefer to represent the respondent. The odds are always in the respondent's favor.

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- As I indicated, WordPerfect creates the table of authorities for me. I have to mark all of the citations, but it creates the table, which is formatted differently. Same information. Notice that everything is double spaced and the page references are to each time the case is cited.

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- This statement shows why jurisdiction is in the Court of Appeals and not the Supreme

Court as well as the timeliness of the Notice of Appeal.

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- What is fair depends on the standard of review. If you have multiple points relied on that involve different standards of review, what is fair can become tricky.

- You can not simply recite your evidence and ignore the evidence presented by the respondent.

- Focus on the facts that are relevant to the issues being raised on appeal.

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- Every statement of fact needs support in the record.

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- In my opinion, points relied on are unnecessary. The federal courts do not use them and the appeals process seems to still work. However, I do not make the rules and points relied on are a fact of life for appeals in Missouri.

- The purpose is to inform the court and opposing party of the issue to be reviewed and the precise matter involved in the appeal.

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- Rule 84.04 provides a format for the points relied on. Use it. It not only makes it easier to draft your point, it may save your appeal.

- I am involved in an appeal right now where I represent the respondent/cross-appellant. The appellant filed its initial brief late last month. I was trying to decide whether to file a motion to dismiss due to problems with the brief, especially defective points relied on. Two of the three points did not even come close to following the format for a point relied on found in Rule 84.04. Monday of this week, the Western District, on its own motion, struck the brief "for the reason that the Points Relied On are not in compliance with the specific requirements of Rule 84.04(d)."

- It can not be very fun explaining to a client that an appellate brief was struck for failing to comply with the rules.