

**Nuts and Bolts Substantive:
Practical Tips, Tricks, and Hints When Handling Appeals**

June 11, 2004

- Two parts: First, how to win appeals. Second, how to handle the actual appellate process.
- How to win an appeal. **BE THE RESPONDENT**. In other words, win in the trial court.
- 10th Circuit statistics: Looking at the statistics for a couple of years, civil appeals resulted in reversal approximately 10 to 15% of the time; criminal was 6 to 10%. Other courts will vary, but invariably less than 25% of cases appealed result in reversal of the trial court's judgment. The odds favor the winner in the trial court.
- Now for the nuts and bolts you have to go through. Feel free to ask questions.
- Consider the possibility of an appeal when first discussing litigation with the client.
 - How does it affect the cost.
 - How does it affect the time for resolution.
 - How will the appeal be handled.
 - Several attorneys throughout the state that practice primarily appellate work as well as several attorneys that do contract legal work, including appellate work. Most will work with you on the appeal.
- During trial: Make a record. Get a ruling from the trial court. Make an offer of proof. Make your objections.
- After trial: Raise issues in motion for new trial if jury case.
- Those are all the preliminaries. Now we get to the actual appellate process, the fun stuff, what I actually do.
- Number 1 rule for proper handling of an appeal: **READ THE RULES**. Both the Supreme Court Rules and the local/special rules for the district in which your appeal is to be heard.
- The Rules change periodically. The rules are complicated and sometimes inconsistent. Read them.
- Number 2 rule for proper handling of an appeal: **IF YOU STILL HAVE QUESTIONS AFTER READING THE RULES, CALL THE CLERK'S OFFICE**. They are very helpful. Start the conversation by saying "I have read the rule, but I still have a question."

- The Rules came from Sandra Skinner, clerk for the Southern District. If you get nothing else from this presentation, remember these two things. Read the rules and if you still have questions, call the clerk's office.
- Must have a judgment in order to appeal (even in criminal cases). Rule 74.01 specifies the requirements of a judgment in civil cases. Must be denominated "judgment" or "decree" and either determine entire case or include express determination that there is no just reason for delay.
- I have it from a very good source that there is often no judgment in misdemeanor cases, the defendant appeals anyway, the appeal is eventually dismissed because there is no judgment.
- Unless timely authorized after-trial motions filed, judgment becomes final 30 days after entry. If a timely authorized after-trial motion, judgment becomes final 90 days after filing of such motion if the motion is not ruled upon. If the motion is ruled upon, the judgment becomes final at the later of 30 days after entered or the date the motion is ruled upon.
- Notice of appeal due 10 days after judgment final. Filed with trial court clerk. Other parties can file notice of appeal within 10 days after initial notice. Docket fee is \$70.
- Each district of the court of appeals has a required supplemental form to be attached to the notice of appeal. See their special rules. All are similar, but not identical.
- **May be necessary to cross-appeal even if prevailed in trial court. Raise errors in case the initial appellant is successful. Classic case is the granting of a motion for new trial but denial of a motion for JNOV. Discuss *Norman v. Wright*, 2004 Mo.App.LEXIS 775 (Mo.App.S.D. May 26, 2004).**
- Next step is ordering the transcript. Must be done within 10 days after notice of appeal filed. Include written request for an estimate of the charges. Court reporter has 10 days to provide estimate. You then have 10 days to pay the estimated charges after which you have 10 days to file a certificate with the appellate court. Rule 81.12(c) and § 512.050.
- I always request a floppy disk with the transcript. If the transcript is filed in page reduction format, rule 81.18(c) requires a floppy disk to also be filed.
- The electronic version of the transcript is also handy for doing word searches. I convert the transcripts to PDF format and review them on the computer.
- Must order documents for legal file within 30 days after the notice of appeal filed.

- Appellant's duty to prepare the legal file, including the index and cover. Rule 81.12 governs the record. Specifies items to be included in the Legal File.
- If the record includes a transcript, it is due 90 days after the notice of appeal filed. If the record consists only of the legal file, it is due 30 days after the notice was filed.
- If the transcript is not going to be ready in time to file the record by the due date, it is your duty to obtain an extension. Call the reporter or the office of state courts administrator a week or two before the record is due to check the status. If they will not have it done, they will get you an affidavit which you attach to your motion and you will get your extension almost assuredly. Of course, be sure you ordered the transcript on time.
- Appellant's brief is due 60 days after the record is filed. Respondent's brief due 30 days after Appellant's brief filed (not served). Reply brief can be filed within 15 days after Respondent's brief filed.
- The rules have gotten more particular about formatting of briefs. Everything needs to be a 13 point or larger font. Everything between the cover page and the signature block is to be double spaced. EVERYTHING.
- Use word limits, not page limits, for briefs. 31,000 words for appellant's brief, then 90% and 25% for respondent's brief and the reply brief.
- Rule 84.06 has the formatting requirements for briefs and the requirement for filing a floppy disk.
- I always covert the opponent's brief to PDF format for review. Again, allows searching for words and highlighted portions.
- Rule 84.04 is a blue-print for drafting a brief. Lists and discusses all the required sections.
- If the brief is not formatted correctly, the Southern District will still file it, but it is stamped "AS IS" on the front cover so the Judges know it is not formatted correctly.
- Briefs must include an Appendix with the judgment and various other matters included. Good place to include COPIES of important exhibits. Exhibits must still be separately filed.
- Points Relied On - read Rule 84.04(d) and *Thummel v. King*, 570 S.W.2d 679 (Mo. 1978).

- Judge Parrish has a quote he includes in a footnote when the number of points starts getting large:
- (FN1.) . . . Briefs of such magnitude bring to mind the suggestion of Chief Justice Burger in *Jones v. Barnes*, 463 U.S. 745, 752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), quoting from Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951), that "[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." Chief Justice Burger further 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, 103 S.Ct. 3308. . . .

14 S.W.3d 188, *Sanders v. Hartville Mill. Co.*, (Mo.App. S.D. 2000)

----- Excerpt from page 14 S.W.3d 217.

- Judge Parrish suggests that you identify the issues that are strong and focus on those and that weaker issues not be included.
- Oral argument. Eastern and Western Districts you automatically get oral argument unless the court sends you a notice that they do not think it is necessary. You then have a chance to request it and I believe they generally grant those requests. I generally include a request for oral argument in the cover letter filing the appellant's brief in the hope of avoiding the notice.
- The Southern District requires you to request oral argument and the preferred method is by placing "Oral Argument Requested" on the cover of the appellant's brief.
- My understanding from various judges is that oral argument changes a judge's opinion in very few cases. However, it is still important because it is the one opportunity to answer questions the judges may have.
- Be responsive and answer the judges' questions. DON'T TRY TO EVADE THE QUESTIONS.
- Be candid.