

**Distinctions with a Difference:
A Comparison of Federal and
State Court Appeals**

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I. APPELLATE COURT JURISDICTION

A. Federal Appeals

- United States Court of Appeals conducts appellate review of decisions of federal district courts and of many federal administrative agencies.
- Jurisdiction must exist by constitution or statute – it cannot be conferred by agreement of the parties.
 - *See, e.g.,* Herr, D., Magnuson, E., Vasaly, M., and Gans, M., eds., 8TH CIRCUIT APPELLATE PRACTICE MANUAL §3.1 (MSBA CLE 6th ed. 2013).

B. State Appeals

- Minnesota Court of Appeals conducts appellate review of decisions of lower courts and of many state administrative agencies.
 - *See, e.g.,* 3 E. Magnuson, D. Herr, & S. Hanson, MINNESOTA PRACTICE SERIES APPELLATE RULES ANNOTATED Vol. 3, §101.4 (Thomson Reuters Westlaw 2013).
- Supreme Court has limited original jurisdiction. Minn. Const. Art. 6, § 2.
- Supreme Court reviews Court of Appeals' decisions on a discretionary basis. Minn. R. Civ. App. P. 117, subd. 2.
- Appellate review is not a constitutional right in civil cases, but is available in all cases. *See, e.g., O'Rourke v. O'Rourke*, 300 Minn. 158, 164-65, 220 N.W.2d 811, 815 (1974).
- Jurisdiction must exist by constitution or statute – it cannot be conferred by agreement of the parties. *See* APPELLATE RULES ANNOTATED at §§ 101.4-101.5.
- Minnesota Supreme Court also hears questions of state law certified from federal court. Minn. Stat. § 480.065. subd. 3.

II. RULES OF PROCEDURE

A. Federal Appeals

- Federal Rules of Appellate Procedure govern for all criminal, civil, and administrative appeals
 - <http://www.uscourts.gov/uscourts/rules/appellate-procedure.pdf>
- Eighth Circuit Rules and Internal Operating Procedures
 - Court's Website: <http://www.ca8.uscourts.gov/>
 - Local Rules:
<http://media.ca8.uscourts.gov/newrules/coa/localrules.pdf>
 - Internal Operating Procedures
<http://media.ca8.uscourts.gov/newrules/coa/IOP.pdf>

B. State Appeals

- Minnesota Rules of Civil Appellate Procedure govern for all civil and administrative appeals. Appellate Rules have been recently amended, amendments to be effective July 1, 2014 in preparation for e-filing.
 - Supreme Court's February 28, 2014 Order Adopting Amended Rules and black-line of changes:
https://www.courts.state.mn.us/Documents/0/Public/Clerks_Office/Rule%20Amendments/2014-02-28%20Order%20Civ%20App%20Proc%20Amendments.pdf
- Court of Appeals Special Rules of Practice for the Minnesota Court of Appeals
 - https://www.revisor.mn.gov/court_rules/rule.php?name=apspec-toh
- Minnesota Supreme Court Rules of Decorum
 - https://www.revisor.mn.gov/court_rules/rule.php?name=pscrd

III. APPEALABILITY

- Appeals can only be taken from “appealable” judgments and orders. Policy favors a “unitary appeal” at the end of trial court proceedings.
 - *See, e.g.*, APPELLATE RULES ANNOTATED at §101.3.

A. Federal Appeals

- Judgments. Generally the following are reviewable:
 - Final judgments – *See, e.g.*, 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §3.2(B).
 - A judgment is final if it terminates the litigation as to all parties and claims.
 - A judgment is final even though ministerial tasks or collateral matters remain.
 - Unresolved question of attorneys’ fees does not affect finality – *See Ray Haluch Gravel Co. v. Central Pension Fund of the Int’l Union of Operating Eng’rs*, 134 S. Ct. 773 (2014); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).
 - Judgments properly certified as final under Fed. R. Civ. P. 54(b) (no just reason for delay, and the court expressly directs entry of judgment).
 - Amended final judgments are appealable, but issues in earlier unappealed judgment unaffected by the amendment will not be reviewed.
- Orders
 - Certain interlocutory orders may be appealed pursuant to 28 U.S.C. §1292. These include injunctions, certain orders regarding receivers, and certain admiralty matters. *See, e.g.*, 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §3.2(D).

- District courts may also create appealability by certifying that an order involves a controlling question of law as to which there is a substantial difference of opinion and that immediate appeal will material advance the ultimate termination of the litigation. 28 U.S.C. §1292(b); *see also* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §3.2(E).
- Orders may also be appealable under the collateral order doctrine, hardship, or death knell doctrines. *See* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §3.2(B)-(C).

B. State Appeals

- Judgments. Generally the following are reviewable:
 - Final judgments – *See, e.g.,* APPELLATE RULES ANNOTATED at §103.03, §103.1.
 - A judgment is final if it terminates the litigation as to all parties and claims.
 - A judgment is final even though ministerial tasks or collateral matters remain.
 - Potential conflict with federal practice: If attorneys’ fees or sanctions still need to be decided, it is not final. If only costs remain, it is final. *See* Eric Magnuson, *But What About My Fees?*, Minnesota Lawyer, Feb. 17, 2014.
 - Judgments properly certified as final under Minn. R. Civ. P. 54.02 (court may expressly direct entry of final judgment as to one or more of multiple claims upon express determination of no just reason for delay). *See also* APPELLATE RULES ANNOTATED at §103.6.
 - Modified final judgments are appealable, but issues in earlier unappealed judgment unaffected by the amendment will not be reviewed. *See* APPELLATE RULES ANNOTATED at §104.6.

- Orders. Generally, only the following are appealable orders, under Minn. R. Civ. App. P. 103.03:
 - Any order relating to the issuance or refusal to issue an injunction
 - Attachments
 - Orders denying motion for new trial or granting one solely on basis of errors of law
 - Orders determining action and preventing entry of appealable judgment
 - Final orders in supplementary proceedings
 - Final decisions affecting a substantial right made in administrative or other special proceedings
 - Orders granting or denying modification of custody, visitation, maintenance, or child support in an existing judgment
 - Certified questions arising from orders denying summary judgment or granting a motion to dismiss
 - Orders made appealable by statute or common law, such as dismissal for lack of jurisdiction
 - Orders for judgment, as opposed to judgments themselves, are not appealable
 - District court's inclusion of language at the end of orders or decisions in the nature of "Let Judgment Be Entered According" does not mean judgment has been entered. The clerk of court enters judgment and such action should appear on the case's Register of Actions available online at MNCIS.

IV. PREPARING FOR APPEAL IN THE TRIAL COURT

- Raise any potential issue in the trial court to ensure it is within the scope of review on appeal.
 - *See, e.g.,* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §12.1; APPELLATE RULES ANNOTATED at §103.16.
- Raise potential appellate issues on the record before the trial court.

- Preserve critical discovery issues by filing motions and oppositions to make them part of the record.
- Request jury instructions and special verdict form in writing, and make any objections on the record before the jury begins its deliberations. Make sure that the judge's disposition is preserved.
- Preserve all evidentiary objections, and if ruling excludes evidence, make an offer of proof.
- Include all evidentiary rulings in a motion for new trial.
 - In order to preserve matters involving trial procedure, evidentiary rulings, objections to instructions, or other similar trial court rulings, when in Minnesota state court, a party must bring a motion for a new trial. *See Alpha Real Estate Co. v. Delta Dental Plan* 664 N.W.2d 203, 205 (Minn. 2003); APPELLATE RULES ANNOTATED at §103.19(b).
 - In contrast, in federal court, a party need not bring a motion for new trial to preserve issues with respect to trial procedure or evidentiary rulings, but must object on the record at trial or make an offer of proof to preserve evidentiary issue for appeal. *See Fed. R. Evid. 103(a)(1); Sanders v. Clemco Indus.*, 862 F.2d 161, 165 n.3 (8th Cir. 1988).
- In Federal Court, follow the two-step procedure under Fed. R. Civ. P. 50(a) and then 50(b) to seek judgment as a matter of law. Failure to do so will preclude appellate review of the sufficiency of the evidence. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006) (reversing the decision of the court of appeals to vacate judgment and order new trial based on insufficiency of the evidence because the defendant had failed to bring a post-trial motion for judgment as a matter of law under Rule 50(b)).
- In State Court, while a failure to file a post-verdict motion for judgment as a matter of law may not preclude appellate review of the sufficiency of the evidence in all circumstances, as a general matter, attorneys should treat a post-verdict motion as mandatory in order to preserve appellate review of the sufficiency of the evidence.

APPELLATE RULES ANNOTATED at §103.19 (“When no motion is made, however, an appeal from the judgment in a jury case results in a review that is limited to whether the evidence sustains the verdict under any applicable rule of law.”).

V. TIME FOR APPEAL

- Some statutes may establish a different time limit on appeals.
 - *See, e.g.*, 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §5.2; APPELLATE RULES ANNOTATED at §104.8.

A. Federal Appeals

- 30 days from the entry of the judgment or order or 60 days when the U.S. or its agency is a party. Date of notice does not affect this period.
- Recent federal decisions have strictly held parties to timely filings where parties claimed to have not read or received notice. *See Yeschick v. Mineta*, 675 F.3d 622, 620 (6th Cir. 2012) (court denied relief where counsel did not receive notice of electronic case filings due to a change of email address); *Two-Way Media, LLC v. AT&T Operations, Inc., et al.*, No. 5:09-cv-00476 (W.D. Tex. Feb. 6, 2014) (court denied motion to extend deadline to appeal from a \$40 million verdict despite counsel’s claims that the e-mail ECF notices did not sufficiently notify them that the post-trial motions had been resolved), *available at* <http://assets.law360news.com/0509000/509440/AT&T%20Order.pdf>.
- If a party timely and properly files in the district court one of the post-trial motions listed in FRAP 4(a)(4), the time to file an appeal is tolled for all parties until the entry of the order disposing of the last such remaining motion.
- Court may extend or reopen the time for appeal under very narrow circumstances. FRAP 4(a)(5) and (6); *see also Pioneer Inv. Servs. Co. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993) (determining four factors to

be considered when a party argues “excusable neglect” to justify missing a judicial deadline).

- An appellee must separately file a notice of appeal within 14 additional days after the appellant’s appeal was filed. FRAP 4(a)(3).
 - An appellee must file a cross-appeal to raise an issue that will alter the judgment in the appellee’s favor. *See, e.g., El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 479 (1999); *see also* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §4.3(A), §6.3; APPELLATE RULES ANNOTATED at §106.2 (discussing comparison between state and federal approach to related appeals).

B. State Appeals

- 60 days from the entry of judgment. Date of notice does not affect this period.
 - The Minnesota Court of Appeals does not have authority to extend this time regardless of reason. *Township of Honner v. Redwood County*, 518 N.W.2d 639 (Minn. Ct. App. 1994). The Supreme Court may, but only in exceptional cases. *See In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3-4 (Minn. 2003).
- Time to appeal from appealable orders is 60 days from service of written notice of filing served by any party.
- When an appealable judgment is rendered non-appealable by a timely and proper post-trial motion under Rule 104, the time to appeal the judgment does not begin to run anew until service of notice of filing the order disposing of the last tolling motion. Minn. R. Civ. App. P. 104.01, subd. 2; APPELLATE RULES ANNOTATED at §104.2 (explaining difference between federal and state rules) and §104.4-9 (explaining judgment and order appeals).
- After one party timely files a notice of appeal, any other party may serve and file a notice of related appeal within 14 days after service of the first notice. Minn. R. Civ. App. P. 104.01, subd. 4.

- A party wishing to change the manner in which the judgment affects their client, either positively or negatively, needs to file a notice of related appeal (cross-appeal). *See* Minn. R. Civ. App. P. 106. It is not generally necessary to file a cross-appeal if a party simply wants to raise an additional argument in support of the existing judgment. *See generally* APPELLATE RULES ANNOTATED at §106.1-6.

VI. PERFECTING APPEAL

- Perfection of appeal is term of art, requiring timely service and filing of certain documents.
- Perfecting the appeal transfers jurisdiction to the appellate courts (only as to matters at issue in appeal).
- Trial court retains jurisdiction to enforce or stay its judgment.

A. Federal Appeals

- Perfection of appeals requires timely filing of certain documents with the district court:
 - E-file notice of appeal with District Court, not Eighth Circuit. The notice must identify the party or parties taking the appeal, designate the judgment or order being appealed and name the court to which the appeal is taken. A notice of appeal is effective on filing.
 - File and Serve Appeal Information Form (Form A), available from Eighth Circuit Website.
 - Pay required filing fee to Clerk of District Court.
 - *See generally* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §5.3 and Checklists 5-1 (Procedural Guide to Appeals as of Right) and 5-2 (Procedural Guide to Appeals by Permission).

B. State Appeals

- Perfection of appeals requires timely filing and service of certain documents with the district court [Rules recently amended, amendments to be effective July 1, 2014]:
 - Serve on the respondent a Notice of Appeal and Statement of Case (including request for oral argument).
 - File with the Clerk of Appellate Court the following:
 - Notice of appeal. Notice of appeal is effective upon mailing
 - Copy of judgment or order (or both);
 - Statement of case (including request for oral argument). Minn. R. Civ. App. P. 133.03;
 - Proof of service
 - Proof of filing with trial court administrator
 - filing fee
 - Rules changed as of July 1, 2014 -See Supreme Court's February 28, 2014 Order Adopting Amended Rules and black-line of changes:
https://www.courts.state.mn.us/Documents/0/Public/Clerks_Office/Rule%20Amendments/2014-02-28%20Order%20Civ%20App%20Proc%20Amendments.pdf
 - File with the trial court administrator:
 - Copy of notice of appeal. Minn. R. Civ. App. P. 103.01.
 - Cost bond (or stipulation waiving bond). Minn. R. Civ. App. P. 107.01, .02, 103.01. Under amended rules no cost

bond required, trial court may upon motion order that a bond be provided in certain cases.

- *See generally* APPELLATE RULES ANNOTATED at §103.1.

VII. STAYS AND BONDS

A. Federal Appeals

- Appellant is not required to file a cost bond unless the district court requires otherwise. FRAP 7.
- Fed. R. Civ. P. 62(a) provides for an automatic 10-day stay of execution on any judgment entered by the district court. A motion under Rule 62 is required for a longer stay.
- If the district court denies the stay, the motion may be renewed in the appellate court under FRAP 8.
- *See generally* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §7.1, §7.3.

B. State Appeals

- Through June 30, 2014, a cost bond is mandatory in a civil appeal except for certain enumerated entities. Minn. R. Civ. App. P. 107, subd. 2. Amended Rules effective July 1, 2014 eliminate this cost bond requirement. Under amended rules no cost bond required, trial court may upon motion order that a bond be provided in certain cases.
- Minn. R. Civ. App. P. 125 of the General Rules of Practice for the District provides that the court administrator shall stay entry of judgment for 30 days unless the court orders otherwise.
- There is no provision for an automatic stay of execution on a judgment. A party may seek relief under Rule 62.

- Stays of execution upon appeal may be obtained by obtaining a supersedeas bond pursuant to Rule 108, or by obtaining an order from the Court of Appeals.
- *See generally* APPELLATE RULES ANNOTATED at §108.1, §108.4-.11; Eric Magnuson, *Staying alive, redux: Judgments*, Minnesota Lawyer, March 17, 2014; Eric Magnuson, *Staying alive: Appeals and stays*, Minnesota Lawyer, May 17, 2013.

VIII. RECORD ON APPEAL

A. Federal Appeals

- The record consists of the papers and exhibits filed in the district court, the transcript, and a certified copy of the docket entries. FRAP 10(a).
- Transcript, if any, must be ordered within 14 days after filing notice of appeal. The reporter must file the transcript within 30 days after the transcript is ordered.
- Appellant must file a certified copy of all docket entries with the proceedings below. FRAP 11(e); 8th Cir. R. 11A.
- In the Eighth Circuit, appellant's counsel is required to confer with opposing counsel regarding method of preparation of appendix. FRAP 30; 8th Cir. R. 30A. Appellant's counsel must then notify the opposing party and the court of the method selected. Methods of preparation include an agreed statement of the record, a joint appendix, or separate appendices. *See* FRAP 30 and 8th Cir. R. 30A for specifications.
- Appellant must include an addendum including a copy of the district court or agency opinion or order, any magistrate report and recommendation preceding the district court opinion or order, and other relevant filings before the district court. 8th Cir. R. 28A(g). Consider adding other key items to the addendum that would help the court decide the appeal, such as the contract in a breach of

contract case or the jury instructions when raising an appellate issue relating to instructions. *See* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at §10.4(M).

- *See generally* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at Chapter 8 (“Record on Appeal”) and Chapter 10 (“Brief Writing and Appendices”).

B. State Appeals

- The record consists of the papers filed in the district court, the exhibits and the transcript.
- Transcript, if any, must be ordered within ten days after filing notice of appeal.
- Under the amended rules, effective July 1, 2014, the parties are no longer allowed to prepare and file an appendix. The entire record is always available to the court for reference or examination. Minn. R. Civ. App. P. 130.01.
- The trial court administrator transmits the record to the clerk of Appellate Court within 10 days after the due date for filing of appellant’s brief. Minn. R. Civ. App. P. 111.01.
- Addendum containing certain specified orders and other material is required. Minn. R. Civ. App. P. 130.02(a). Under the amended rules effective July 1, 2014, the addendum must not exceed 50 pages excluding the orders and judgments or other materials required by Rule 130.02(a).
- *See generally* APPELLATE RULES ANNOTATED at §110.1-17 (“Record on Appeal”); §130.1-4 (“Appendix to Briefs”)(commenting on requirements relating to Appendix pre-2014 amendments).

IX. MOTION PRACTICE

A. Federal Appeals

- A motion may be made at any time, and may address virtually any issue. FRAP 27.
- Motions are filed and served electronically. 8th Cir. R. 25A(b). Motions should be in a separate document, stating the grounds for the motion with particularity. Procedural motions may be granted before a response.
- Motions and responses must conform to the type requirements of FRAP 32.
- *See generally* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at Chapter 9 (“Motion Practice and Summary Disposition of Appeal”).

B. State Appeals

- A motion may be made at any time, and may address virtually any issue. *See* Minn. R. Civ. App. P. 127.
- *See generally* APPELLATE RULES ANNOTATED at §127.1-.6.

X. BRIEFS

A. Federal Appeals

- The Eighth Circuit has its own rules addressing the time requirements for briefing. *See* 8th Cir. R. 28A & 30A. The Clerk’s office will send out an Appeal Briefing Schedule which the parties are then obligated to follow.
- A four brief schedule applies in cross appeals, i.e., when at least one notice of related appeal or other notice of appeal is filed. FRAP 28.1.
- Be sure to know the length limitations, and font limitations. FRAP 32.

- Contents of the brief should comply with FRAP 28.
- *See generally* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at Chapter 10 (“Brief Writing and Appendices”).

B. State Appeals

- Within 30 days after delivery of the transcript or, if no transcript, within 30 days after the filing of the Notice of Appeal or order granting review, appellant must serve and file brief. The respondent’s brief is due 30 days after service of the appellant’s brief (or 30 days after delivery of transcript ordered by the respondent). The appellant may serve and file a reply brief within 10 days after service of respondent’s brief. Minn. R. Civ. App. P. 131.01.
- If multiple appellants or respondents, time to serve and file responsive brief runs from the date of last party’s brief.
- A four brief schedule applies in cross appeals, i.e., when at least one notice of related appeal or other notice of appeal is filed. Minn. R. Civ. App. P. 131.01.
- Be sure to know the length limitations, and font limitations. The length allowed depends on the number of pages, typestyle, or number of words, and font. Minn. R. Civ. App. P. 132.01.
- Contents of the brief should comply with Minn. R. Civ. App. P. 128.02.
- *See generally* APPELLATE RULES ANNOTATED at §128.1-14; §132.1-8.

XI. ORAL ARGUMENT

A. Federal Appeals

- The clerk notifies parties of the date and place of argument. Arguments can be between 10-30 minutes in length. Cases screened for full oral argument will usually be assigned 15 or 20 minutes per side. Only in extraordinary cases would oral argument time exceed 30 minutes.
- An advocate must obtain permission to practice in the Eighth Circuit. One must be admitted to practice in the Eighth Circuit to argue a case.
- *See generally* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at Chapter 11 (“Hearing and Argument”).

B. State Appeals

- Before the case is scheduled for oral argument, the parties must advise the Clerk in writing of scheduling conflicts. Spec. R. Prac. Minn. Ct. App. 1.
- In the Court of Appeals, appellant is allowed 15 minutes, respondent 15 minutes, and appellant 5 minutes for rebuttal. Spec. R. Prac. Minn. Ct. App. 2.
- Multiple appellants or respondents must divide the allocated time. Additional time granted only upon motion filed prior to argument. Minn. R. Civ. App. 134.03.
- *See generally* APPELLATE RULES ANNOTATED at §134.1-12.

XII. DECISION, REHEARING, AND FURTHER REVIEW

A. Federal Appeals

- The decision is not final until the mandate issues. It will issue seven days after the time to file a petition for rehiring expires or seven days after an entry of an order denying a panel rehearing, rehearing en banc, or motion for stay of the mandate.
- On motion, the court may stay a mandate for 90 days to permit filing of a petition to the Supreme Court. Mandate automatically stayed upon filing a petition for rehearing or rehearing en banc.
- Petition for panel rehearing (FRAP 40) or rehearing en banc (FRAP 35) must be filed within 14 days after entry of judgment unless the U.S. or agency is a party. No answer is permitted.
- Petition for certiorari must generally be filed within 90 days of entry of judgment or order (not mandate) or from denial of timely filed petition for rehearing. S. Ct. R. 13.
- The prevailing party must file a verified and itemized bill of costs within 14 days after entry of judgment or will be deemed to have waived costs. 8th Cir. R. 39A. Some appellate court costs must be taxed in the district court.
- *See generally* 8TH CIRCUIT APPELLATE PRACTICE MANUAL at Chapter 14 (“Post-Judgment Proceedings”), Chapter 21 (“Costs on Appeal”).

B. State Appeals

- Petitions for rehearing are not allowed in the Court of Appeals. Minn. R. Civ. App. P. 140.01.
- Within 30 days of filing of Court of Appeals decision, must file petition for further review with the Minnesota Supreme Court. Minn. R. Civ. App. P. 117.

- Within 15 days after filing of decision by appellate court, prevailing party must file bill of costs. Minn. R. Civ. App. P. 139.03.
- *See generally* APPELLATE RULES ANNOTATED at §139.1-.8; §140.1-.5.

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