

Basics of Effective Appellate Practice

E-FILING IS MANDATORY.

- E-filing is required in all appellate case types where all parties are represented by attorneys. Lawyers must register to use the appellate e-filing system (E-MACS). Helpful information and resources are available at: <https://emacs.courts.state.mn.us/help/main.htm>.

APPELLATE COURT JURISDICTION GOVERNED BY MINNESOTA CONSTITUTION AND STATUTE.

- Primary jurisdiction is appellate – review of decisions of lower courts.
- Supreme Court also has limited original jurisdiction “in such remedial cases as are prescribed by law.” Minn. Const. Art. 6, § 2.
- Appellate review is not a constitutional right in civil cases but is available in all cases.
- Jurisdiction must exist by constitution or statute – it cannot be conferred by agreement of the parties.
- Only party “aggrieved” by lower court decision can appeal it.
- Minnesota Supreme Court also hears questions of state law certified from federal court. Minn. Stat. § 480.065.

APPELLATE COURT PROCEDURE GOVERNED BY RULES OF PROCEDURE.

- Minnesota Rules of Civil Appellate Procedure for all civil and administrative appeals.
- Minnesota Rules of Criminal Procedure for criminal matters.
 - ➡Minn. R. Crim. P. 28 applies to appeals to Court of Appeals.
 - ➡Minn. R. Crim. P. 29 applies to appeals to the Supreme Court.
 - ➡Rules 28.01, subd. 2 & 29.01, subd. 2, apply Rules of Civil Appellate Procedure to extent criminal rules to not provide a rule governing a particular subject.
- Court of Appeals also publishes Special Rules of Practice for the Minnesota Court of Appeals.
- Supreme Court Rules on Decorum.

APPELLATE COURT JURISDICTION IS INVOKED BY 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 its judgment (except if stay is obtained pursuant to Minn. R. Civ. App. P. 108.02).
- Therefore, make sure trial court has decided issues to be appealed.

APPEAL CAN ONLY BE TAKEN FROM “APPEALABLE” ORDERS AND JUDGMENTS.

- Policy favors a “unitary appeal” at end of trial court proceedings.
- Review is only available for “reviewable” issues raised within an appealable order or judgment. (See “Preparing for Appeal in the Trial Court” on following page for discussion of how issues may be preserved for review.)
- Judgments:** Generally, the following are appealable:
 - ➡Final judgments
 - A judgment is final if all claims of all parties are disposed of.
 - If attorneys’ fees or sanctions still need to be decided, it is not final. If only costs need to be taxed, it is final.
 - ➡Judgments certified as final under Minn. R. Civ. P. 54.02 (no just reason for delay and court directs immediate entry).
 - ➡Amended final judgments are appealable (but issues in earlier, unappealed judgment unaffected by the amendment will not be reviewed).
- Orders:** Generally, only the following are appealable orders:
 - ➡Any order relating to issuance of (or refusal to issue) an injunction. Minn. R. Civ. App. P. 103.03(b).

- ➡Attachment orders. Minn. R. Civ. App. P. 103.03(c).
- ➡Orders denying motion for new trial (or granting one solely on basis of errors of law). Minn. R. Civ. App. P. 103.03(d).
- ➡Orders determining action and preventing entry of appealable judgment. Minn. R. Civ. App. P. 103.03(e).
- ➡Final orders in supplementary proceedings. Minn. R. Civ. App. P. 103.03(f).
- ➡Final decisions in “special proceedings.” Minn. R. Civ. App. P. 103.03(g).
- ➡Orders granting or denying modification of custody, visitation, maintenance or child support provisions in an existing judgment or decree. Minn. R. Civ. App. P. 103.03(h).
- ➡Certified questions arising from orders denying summary judgment or granting motion to dismiss for failure to state a claim. Minn. R. Civ. App. P. 103.03(i). Question must be both important and doubtful.
- ➡Orders made appealable by statute or common law (Minn. R. Civ. App. P. 103.03(j)). These include orders re: dismissal for lack of jurisdiction, some immunity orders, some orders re: vacating of prior orders.
- Orders for judgment, as opposed to the judgments themselves, are not appealable.

- Special Proceedings: A statute may make an order appealable in “special proceedings.” As a rule of thumb, if the trial court proceedings were commenced by anything other than a Summons and Complaint, they may be special proceedings.

- For more detailed guidance on appealability, see 3 ERIC J. MAGNUSON, DAVID F. HERR & ERICA A. HOLZER, MINNESOTA PRACTICE: APPELLATE RULES ANNOTATED §§ 103.5–.17 (2020 ed.).

TIME TO APPEAL.

- Time to appeal from judgments is 60 days from entry of judgment. (Date of notice, or even absence of notice, does not affect this period.)
- Time to appeal from “appealable” orders is 60 days from service of written notice of filing served by any party. (Clerk’s notice doesn’t affect this, only party’s notice.)

- In Special Proceedings, controlling statutes may establish a different time limit on appeals, often shorter.

- Missing the time to appeal can be fatal.

EVEN IF APPEAL IS POSSIBLE, IS IT LIKELY TO SUCCEED?

- An appellant has an uphill battle – numerous rules conspire to reduce the likelihood of obtaining a favorable result on appeal.
- Limited reviewability, deference to trial court rulings.
- In many cases, the costs of appeal are not justified by the prospects of success.
- Requirement of ordering (and paying for) transcript [see below] or posting supersedeas bond may effectively preclude appeal.

FAMILIARIZE YOURSELF WITH THE TIMING RULES FOR APPEALS – THEY ARE STRICTLY ENFORCED.

(See inside chart for timing and deadline information.)

- Familiarize yourself with all rules; follow all rules.

ORDER A TRANSCRIPT IF APPEAL IS FROM A TRIAL OR EVIDENTIARY HEARING.

- If no transcript is provided, affirmance will be virtually inevitable as to issues that would be reflected in the transcript.
- Transcript of arguments are not normally necessary or useful.

MOTION PRACTICE.

- Motions can be made at any time, and may address virtually any issue. Minn. R. Civ. App. P. 127.

Basics of Effective Appellate Practice (cont.)

PREPARE AN EFFECTIVE BRIEF.

- Select a few issues to raise on appeal.
- Most appeals involve only a small fraction of the possible issues.
- Keep it short and concise. Most briefs can be done in under 25 pages, many in less than 15 pages.
- Cite meaningful authority – not every conceivable case.
- Be specific about what relief you want – as appellant or respondent – reversal, remand, affirmance, etc.
- Think carefully about what is helpful to the court in the Addendum. If needed for a thorough reading of the brief, include it in the Addendum. Select your pages of non-required documents carefully. Court has access to the entire court file!!!!

ORAL ARGUMENT.

- Be prepared.
 - ➡Be familiar with the important cases.
 - ➡Be familiar with the record – have transcript or appendix cites for facts you intend to mention.
 - ➡Be familiar with the trial court decision.
- Consider utilizing a “moot” argument.
- Introduce yourself to the court. (Your name and who you represent – no matter how well you know judge or judges).
- Introduce the major points you intend to make or areas you intend to cover. (Organization will be helpful to court.)

- Questions are opportunities, not problems.
 - ➡Always answer any question you are asked. Now, not later.
 - ➡Use questions to help focus court on facts supporting your position.
 - ➡Answer “Yes,” “No,” if possible, and only then explain answer if necessary. Don’t make the court struggle to figure out what your answer is.
- Select a few issues to stress at oral argument.
 - ➡These may not be the strongest issues, but should be those that best use the oral forum.
 - ➡Use issues to develop a theme.
- Consider using visual aids – enlargements, lists, outlines. But consider not using them too – better yet, include suitable material in the addendum to your brief where it will be both accessible to the judges and legible to them. (Blow-ups on poster boards usually aren’t.)
- Conclude with a specific request for the relief you want – i.e. reversal, remand, affirmance, etc.
- Make use of the opportunity for rebuttal:
 - ➡To answer questions directed to respondent.
 - ➡To address and respond to any points made by the respondent.
 - ➡To repeat your request for the specific relief needed in the case.

COURT OF APPEALS WILL NOT REHEAR OR RECONSIDER A CASE.

Preparing for Appeal in the Trial Court

RAISE ANY POTENTIAL ISSUE IN THE TRIAL COURT.

- Failure to raise issue precludes review on appeal. *Minnesota-Iowa Tel. Co. v. Watonwan T.V. Improvement Ass’n*, 294 N.W.2d 297 (Minn. 1980).
- Only matters actually presented to trial court will be reviewed.

RAISE ISSUE ON THE RECORD.

- If not apparent from record, review will be denied. *Thiele v. Stich*, 425 N.W.2d 589 (Minn. 1988).
- Record is limited to matters filed with court or appearing in a transcript.

MAKE CERTAIN DISCOVERY MATERIALS NECESSARY TO MOTIONS ARE FILED.

- Obtain leave to file discovery or attach to a filed affidavit.

REQUEST JURY INSTRUCTIONS.

- Requests must be written – oral requests do not preserve issue.
- Be sure that judge’s disposition of instructions (given, refused, modified) is preserved on filed requests or separately.
- Note: Merely requesting another instruction does not constitute an objection to the instructions used. Ask for what you want and object to what is used.

OBJECT TO ANY INSTRUCTIONS JUDGE GIVES THAT YOU CONTEND ARE NOT JUSTIFIED.

- Note: Merely requesting a particular instruction does not constitute an objection to what is given.

REQUEST AN APPROPRIATE VERDICT FORM.

OBJECT TO SPECIAL VERDICT FORM (OR REFUSAL TO SUBMIT CASE ON SPECIAL VERDICT) IF COURT DOES NOT USE YOUR FORM.

- Note: Merely requesting another verdict form does not constitute an objection to the form used. Ask for what you want and object to what is used.

PRESERVE ALL EVIDENTIARY OBJECTIONS.

- Object before the evidence is received or revealed to jury.
- Be sure to object on the record.
- State specific grounds for objection and state all available objections.
- Insist on a ruling from the judge. (Again, make sure ruling is on the record.)
- If ruling excludes evidence, make an offer of proof.
 - ➡Offer of proof is required by Minn. R. Evid. 103(a)(2).
 - ➡Offer can be made by stating to judge what witness would say or by taking actual evidence on the record but outside the hearing of the jury.
- Include all evidentiary ruling errors in motion for new trial.

BRING A MOTION FOR A NEW TRIAL.

Minn. R. Civ. App. P. 59.01

- If not brought, scope of review is severely limited. *Alpha Real Estate Co. v. Delta Dental Plan*, 664 N.W.2d 303 (Minn. 2003); *Sauter v. Wassermiller*, 389 N.W.2d 200 (Minn. 1986).
- Motion gives trial judge opportunity to correct errors, and is sometimes even granted!
- Include in motion for new trial all trial errors you want to preserve for appeal. (If not included, they are waived.)
- A party need not bring a motion for a new trial to preserve objections to pretrial orders deciding motions in limine, but it is still wise to do so. *County of Hennepin v. Bhakta*, 922 N.W.2d 194 (Minn. 2019).

Summary of Minnesota Appellate Procedure

9th ed.

Applies to rules as amended effective January 1, 2020

Basics of Appellate Practice

Preparing for Appeal in the Trial Court

Timelines and Deadlines

The rules for counting days and several specific deadlines were modified by amendments taking effect on January 1, 2020. Those changes are reflected in the timelines here, which should be consulted.



published by
Minnesota Continuing Legal Education, Inc.

Copyright © 2020 Erica A. Holzer, Eric J. Magnuson, David F. Herr, and
Minnesota Continuing Legal Education. No reproduction without written permission.

80-0901-20-13

Erica A. Holzer
Maslon LLP
Minneapolis, Minnesota

Eric J. Magnuson
Robins Kaplan LLP
Minneapolis, Minnesota

David F. Herr
Maslon LLP
Minneapolis, Minnesota

Timelines and Deadlines

General Principles

Most important timing rule: Time period to perfect appeal is **jurisdictional**. If appeal is not timely served and filed, **it will be dismissed**.

Papers that do not conform to rules will not be accepted for filing, and date of attempted filing generally will **not** be preserved.

In most post-trial appeals, appeal should be taken from **both** judgment and order denying motion for new trial.

- Appeal from order denying motion for new trial allows review of matters raised in that motion; appeal from judgment allows review of other matters not relating to trial itself (such as pre-trial orders, discovery matters, etc.).

AND. In addition appellant must take these non-jurisdictional steps:

- Appellant must serve the following on the trial court administrator:
 - Copy of notice of appeal, (Minn. R. Civ. App. P. 103.01 subd. 1(d)), and
 - Cost bond. Only if required by motion in trial (not normally required). Minn. R. Civ. App. P. 107.01, .02; 103.01 subd. 1.

Papers that do not conform to rules will not be accepted for filing, and date of attempted filing generally will **not** be preserved.

If stay of trial court order or judgment is sought, **supersedeas bond** is a likely condition. Must first apply for stay in district court. Minn. R. Civ. App. P. 108.02. In some cases Rule 108 allows a stay without requiring a bond, but for appeals of money judgments no stay will exist unless a required supersedeas bond is obtained.

- Supersedeas bond is **not** required to perfect an appeal, but if stay is not obtained, trial court order or judgment is enforceable during appeal.
- Amount of supersedeas bond (as well as form and surety) is approved by trial court. Can be reviewed by motion to the appellate courts.

Appellate Practice Timing Requirements

Motions for New Trial

Must bring motion for new trial within 30 days (and have heard within 60 days) after service by **any party** of notice of entry of order on special verdict. Minn. R. Civ. P. 59.03.

1. PERFECTING AN APPEAL (FROM A JUDGMENT OR FROM AN ORDER)

Within 60 days of **entry** of judgment, an appeal must be perfected. Minn. R. Civ. App. P. 104.

Within 60 days of **service of notice** of filing of decision or order, an appeal must be perfected. Minn. R. Civ. App. P. 104.

The time to appeal an order or judgment may be tolled if a motion listed in Rule 104.01 is properly served and filed.

To perfect an appeal:

- Appellant must serve the following on respondent:
 - Notice of appeal, and
 - Statement of case (including request for oral argument).

AND

- Appellant must file with the Clerk of Appellate Court:
 - Notice of appeal,
 - Copy of judgment or order (or both) (need not be certified, but must be provided),
 - Statement of case (including request for oral argument), Minn. R. Civ. App. P. 133.03
 - Proof of service on adverse party (of notice of appeal and statement of case) (if not served electronically using appellate court e-file system),
 - Proof of filing with trial court administrator (of notice of appeal); and
 - \$550 filing fee.

2. ORDERING TRANSCRIPT

A. Within 14 days of filing notice of appeal with the Clerk of Appellate Court, appellant must:

- Order transcript (if transcript desired or needed), or
- Order partial transcript or notify of intent to use no transcript (and serve and file notice on adverse party and Clerk of Appellate Court). Minn. R. Civ. App. P. 110.02, or
- File notice of intent to proceed on statement or agreed statement. Minn. R. Civ. App. P. 110.03 and 04.

B. If respondent desires to order partial or complete transcript, it must be ordered within 14 days of the appellant's notification. Minn. R. Civ. App. P. 110.02, subd. 1.

C. **Delivery of Transcript.** Reporter is required to deliver transcript within 60 days after date transcript ordered. The court may allow additional time. Minn. R. Civ. App. P. 110.02, subd. 2.

D. Reporter is required to file transcript—in electronic format only—with the trial court and serve a copy on all to the parties separately represented unless reporter receives notice requesting a paper copy, in which case that party receives only a paper copy, not both.

The reporter must file with the Clerk of the Appellate Courts a certificate evidencing the date and method of delivery. E-service using **the district court's system (MNCIS)** is going to be the means of delivery in most cases.

3. FILING CERTIFICATE OF ORDER OF TRANSCRIPT

Within 14 days after ordering transcript, appellant (and court reporter) must file certificate of order of transcript with Clerk of Appellate Court. Minn. R. Civ. App. P. 110.02, subd. 2. Must be filed electronically by the reporter.

4. RESPONDENT'S STATEMENT OF CASE

Respondent may (but need not) file a statement of case within 14 days after receiving appellant's statement of case. Rule 133.03.

5. FILING NOTICE OF RELATED APPEAL

Minn. R. Civ. App. P. 106,103.02 subd. 2 & 104.01, subd. 4.

Within 14 days of service of notice of appeal on respondent, respondent (in order to preserve the right to review) must:

- Serve notice of related appeal on appellant, and
- File notice of related appeal with Clerk of Appellate Court, plus \$100 filing fee. (Note: Notice must specify judgment or order to be reviewed. Minn. R. Civ. App. P. 103.02, subd. 2.)

6. FILING BRIEFS

Minn. R. Civ. App. P. 128.02 & .03 and 131.01 & .02.

A. Within 30 days of delivery of transcript, appellant must:

- Serve brief and addendum on respondent, and
- File brief and addendum with the Clerk of Appellate Court. **OR**
 - If no transcript or partial transcript is ordered, then: Within 30 days of filing of notice of appeal,
 - Serve brief and addendum on respondent, and
 - File brief and addendum with Clerk of Appellate Court.

B. Within 30 days after service of the last appellants' brief, or within 30 days after delivery of transcript ordered by respondent, respondent must:

- Serve respondent's brief on appellant, and
- File respondent's brief with Clerk of Appellate Court.

C. Within 14 days of service of the last respondents' brief, appellant must:

- Serve reply brief on respondent, and
- File reply brief with the Clerk of Appellate Court.

D. If multiple appellants or respondents, time to serve responsive brief runs from date of last party's brief.

E. 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. *See* Minn. R. Civ. App. P. 131.02, subd. 5.

F. In appeals where an *amicus curiae* is allowed to participate, amicus brief shall be served on all parties and filed with the clerk with proof of service within 7 days after the time allowed for filing the brief of the party supported, or if in support of neither party, no later than the time allowed for filing appellant's brief. Minn. R. Civ. App. P. 129.02.

7. NOTIFYING COURT OF SCHEDULE CONFLICTS FOR ORAL ARGUMENT

Minn. R. Civ. App. P. 134.02

Counsel must provide written notice of any conflicts which limit counsel's availability for argument when filing the party's initial brief. Notice should initially cover a period of 2 to 5 months out, and should be updated as appropriate.

Notice of Argument

Minn. R. Civ. App. P. 134

Clerk of Appellate Court notifies parties of the date and place of argument. Minn. R. Civ. App. P. 134.02.

Notice also includes designation of judges assigned to case.

7A. [OPTIONAL] RECUSAL MUST BE SOUGHT BY MOTION

- Rule 141 governs, but should rarely be needed. (Deadlines therefore not depicted in chart below.)
- In supreme court, motion due no later than 14 days after commencement of appeal of right or order granting review. Rule 141.01(b)
- In court of appeals, motion due 7 days after notice of assignment of judges in notice of oral argument. Rule 141.02(b)

8. MOTION TO CHANGE DATE OR TIME OF ARGUMENT

Immediately upon notification of date and time of argument, parties must file notice for change of date or time (cases reset only once and only if showing of extreme emergency).

9. TRANSMITTAL OF EXHIBITS AND RECORD

Within 14 days after due date for respondent's brief, parties in possession of exhibits must transmit exhibits with itemized list to Clerk of Appellate Court. Minn. R. Civ. App. P. 111.01.

Transmittal of Trial Court File

The trial court administrator transmits the record or provides notice it is available to the Clerk of Appellate Court within 7 days after the due date for filing of appellant's brief. Minn. R. Civ. App. P. 111.01.

10. TIME FOR ORAL ARGUMENT

Time: In the Court of Appeals, appellant is allowed 15 minutes for oral argument, respondent is allowed 15 minutes, and appellant 5 minutes for rebuttal. Minn. R. Civ. App. P. 143.03, subd. 1.

In the Supreme Court, appellant is allowed 35 minutes for oral argument, and respondent is allowed 25 minutes. Minn. R. Civ. App. P. 134.03, subd. 1.

Multiple appellants or respondents must divide the allotted time. Additional time is granted only upon motion filed before date of argument. Minn. R. Civ. App. P. 134.03, subd. 2.

11. DECISION

The Court of Appeals issues decisions within 90 days after oral argument or final submission of briefs by parties, whichever is later. The Appellate Court may waive 90-day requirement for good cause. Minn. R. Civ. App. P. 136.01 and Minn. Stat. § 480A.08 subd. 3.

12. TAXATION OF COSTS AND DISBURSEMENTS

Within 14 days after filing of decision by appellate court, prevailing party must file bill of costs or will be deemed to have waived costs. Written objections to bill of costs must be served and filed within 7 days after service of taxation notice. Minn. R. Civ. App. P. 139.03. Requests for attorney fees must be made by motion. Minn. R. Civ. App. P. 139.05.

Costs and disbursements are taxed by the Clerk of Appellate Court.

13. PETITION FOR REHEARING

Not allowed in Court of Appeals. Minn. R. Civ. App. P. 140.01.

14. PETITION TO PARTICIPATE AS AMICUS CURIAE

A party may participate as *amicus curiae* by filing a petition for leave to do so. In either the Court of Appeals or Supreme Court, a petition is due not later than 14 days after the filing of the notice of appeal, the petition for review, or the order granting further review. Minn. R. Civ. App. P. 129.01.

An applicant who requests leave to participate as amicus if review is granted, and wants to include an argument on the question of granting review, must file its request to participate as amicus not later than 14 days after the petition is filed. Minn. R. Civ. App. P. 129, 117.

15. PETITION FOR FURTHER REVIEW

Minn. R. Civ. App. P. 117

Within 30 days of filing of Court of Appeals decision, must file petition for further review by the Minnesota Supreme Court with the clerk of appellate courts (plus \$550 filing fee). Petition is limited to 2,000 words. Addendum is not required but recommended. Grounds are limited by rules; relatively few petitions are granted.

Response due 21 days after petition is served. May include a conditional Request for Cross-Review, but no additional pages are allowed. No reply to Request for Cross-Review is permitted unless ordered by court. Minn. R. Civ. App. P. 117, subd. 4.

16. FILING PETITION FOR REHEARING BY THE MINNESOTA SUPREME COURT

Minn. R. Civ. App. P. 140.01.

Within 14 days of filing of a decision by Minnesota Supreme Court, must serve and file petition for rehearing, plus \$100 filing fee. (Opposing party may respond **within** 7 days of petition).

17. TAXATION OF COSTS AND DISBURSEMENTS IN THE SUPREME COURT

After reversal, a prevailing party in the Supreme Court who did not prevail in the Court of Appeals, may serve and file a notice of costs and disbursements incurred in each court. Minn. R. Civ. App. P. 139.03. A prevailing party who also prevailed in the Court of Appeals need only seek the Supreme Court costs, as it may rely on its previously filed Court of Appeals bill of costs.

NUMBER OF PAPER COPIES TO BE FILED AND SERVED

Appellate briefs and addenda must be filed and served electronically and in paper form. For all other documents, do not submit paper copies of documents that have been e-filed, unless otherwise ordered by the court.

- Filed with the Court**
 - Court of Appeals: 4 bound copies, 1 unbound copy
 - Supreme Court : 1 unbound copy only
- Served on Each Party**
 - Two paper copies of each brief and addendum. Minn. R. Civ. App. P. 131.03. Proof of service must be filed with Appellate Court.
 - Service of paper copies of briefs after electronic filing and service of the original brief does not extend the time to respond. Minn. R. Civ. App. P. 131.01.

In the Court of Appeals, paper copies of e-filed briefs must include a signed certification including the following language:

I hereby certify that the content of the accompanying paper brief and addendum or addenda, if applicable, is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alterations to a brief filed electronically must be separately served and filed in the form of an errata sheet.

RESOURCES

For more detailed guidance on the operation of the rules, see:

3 ERIC J. MAGNUSON, DAVID F. HERR & ERICA A. HOLZER, MINNESOTA PRACTICE: APPELLATE RULES ANNOTATED (2020 ed.).

DIANE B. BRATVOLD & PAULA DUGGAN VRAA, *The Appellate Process*, in 5A MINNESOTA PRACTICE (4th ed. 2007).

