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HANDBOOK

INTRODUCTORY NOTE

The Federal Practice Advisory Committee of the Eighth Circuit is pleased to present the Third Edition of the Practitioner's Handbook for Appeals to the Eighth Circuit. It was conceived as a general guide to practice and procedure before the court and has proved to be a popular reference for the bar and anyone interested in appellate practice. Although the handbook is not an authoritative statement of Eighth Circuit law and should not be cited as authority, every effort has been made to assure that the handbook is accurate (at least as of the date of its publication), and it may serve as a reference and as a starting point for research into questions of appellate procedure in the Eighth Circuit.

This edition of the Handbook has been revised to reflect the 1998 revisions to the Federal Rules of Appellate Procedure and the Eighth Circuit's local rules. The 1998 revisions were sweeping, and included changes in such key areas as the format and length of briefs, motion practice and record preparation. Anyone pursuing an appeal in the Eighth Circuit should thoroughly review the rules, especially Fed. R. App. P. 10, 25-28, and 30-32, as well as 8th Cir. R. 10A, 27A, 28A, and 30A.

Most courts today are besieged by paperwork and growing case loads, and the Eighth Circuit is no exception. The court's active judges and judges in senior service each must read tens of thousands of pages of motions, briefs, transcripts and record materials every year. Many judges feel they have reached the limit of what can be thoughtfully read, thoroughly absorbed and meaningfully analyzed. The Committee makes this point not to lecture counsel, but to help them understand that an attorney's main function in the appeal is to help the court focus on the crucial elements in the case. Short motions which precisely state the relief sought, responses which clearly set out the opposing law, and briefs which raise only the key issues and then discuss them in a concise fashion, with appropriate and

accurate references to the record, do far more to advance a position than law review-type pleadings and briefs.

More so than many clerk's offices, the Eighth Circuit clerk's office encourages questions and is willing to work with counsel to solve problems. While the office cannot give legal advice, the staff can provide valuable insight to the court's preferences and procedures. The clerk and chief deputy both accept many calls from counsel seeking guidance or an explanation of the rules and the court's practices. The office can also provide sample briefs to help your staff with formatting and style questions.

In keeping with its desire to make information accessible, the Eighth Circuit has been among the leaders in the federal courts in developing on-line services and automated systems. Two deserve special note. First, the court maintains its own web site. On the site, counsel can find the full text of all opinions (published and unpublished) since 1995, opinion summaries, docket sheets in all pending cases, the full text of briefs and digital recordings of all oral arguments. Counsel can also download a variety of forms, as well as the federal and local rules. A search engine is also available on the site. Counsel should check the site regularly for updates, announcements and new developments. The site's address is: http://www.ca8.uscourts.gov/.

The second development is the court's *VIA* electronic noticing system. Counsel who agree to participate in the system receive either fax or e-mail notice of all correspondence, orders, briefing schedules, argument calendars and opinions in their cases within minutes after the documents are completed and issued by the clerk's office. The system was implemented in April, 1999, and by the end of the year more than 1300 attorneys had signed up and were receiving all of their documents and correspondence from the court through *VIA*. Anyone interested in participating should contact the clerk's office for more information or download it from the court's web site.

The Committee hopes you find this Handbook useful and welcomes suggestions for improvement. Comments can be directed to any member of the Committee, and you will find their names listed on the pages which follow. Finally, the Committee would like to thank all of the lawyers and court staff who contributed to this work.

NOTE: All references to rules are to the Federal Rules of Appellate Procedure (Fed. R. App. P.) unless otherwise stated. Local rules of the Eighth Circuit will be referred to as Circuit Rules and cited as 8th Cir. R. _____. The Statement of Internal Operating Procedures for the Eighth Circuit will be cited as 8th Cir. IOP § _____; the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964 will be cited as 8th Cir. PICJA §_____; and the Eighth Circuit Plan to Expedite Criminal Appeals will be cited as 8th Cir. Plan §_____. References to such rules are as of December 1998. Later amendments must be checked for revisions. The resources can be found in the Rules volume of 28 U.S.C.

JUDGES AND OFFICERS
UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

CIRCUIT JUSTICE:

Clarence Thomas	Washington, D.C.

CHIEF JUDGE:

Roger L. Wollman	Sioux Falls, South Dakota

CIRCUIT JUDGES IN REGULAR ACTIVE SERVICE:

Theodore McMillian	St. Louis, Missouri
Richard S. Arnold	Little Rock, Arkansas
Pasco M. Bowman, II	Kansas City, Missouri
C. Arlen Beam	Lincoln, Nebraska
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David R. Hansen	Cedar Rapids, Iowa
Morris Sheppard Arnold	Little Rock, Arkansas
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Kermit Bye	Fargo, North Dakota

CIRCUIT JUDGES WHO HAVE TAKEN SENIOR STATUS:

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Myron H. Bright	Fargo, North Dakota
Donald R. Ross	Omaha, Nebraska
John R. Gibson	Kansas City, Missouri
George G. Fagg	Des Moines, Iowa
Frank J. Magill	Fargo, North Dakota

CIRCUIT EXECUTIVE:

Millie B. Adams	St. Louis, Missouri
Telephone: (314) 539-6219	

CLERK:

Michael E. Gans	St. Louis, Missouri

Telephone: (314) 539-3600

CHIEF DEPUTY CLERK:

Robin J. Weinberger — St. Louis, Missouri
Telephone: (314) 539-3600

DEPUTY-IN-CHARGE, ST. PAUL OFFICE:

Maureen Watz Gornik — St. Paul, Minnesota
Telephone: (651) 848-1301

LIBRARIAN:

Ann Fessenden — St. Louis, Missouri
Telephone: (314) 539-2930

Nancee Halling — St. Paul, Minnesota
Telephone: (651) 848-1320

Crata Castleberry — Little Rock, Arkansas
Telephone: (501) 324-5039

Cheryl Gritton — Des Moines, Iowa
Telephone: (515) 284-6228

Tranne Pearce — Kansas City, Missouri
Telephone: (816) 512-5790

Suzanne Morrison — Fargo, North Dakota
Telephone: (701) 297-7280

Angela Lange — Omaha, Nebraska
Telephone: (402) 221-4768

Joyce Larson Schampel — Minneapolis, Minnesota
Telephone: (612) 664-5830

Laura Headrick — Lincoln, Nebraska
Telephone: (402) 437-5684

COURT OF APPEALS INTERNET SITE: <http://www.ca8.uscourts.gov/>

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I. OUTLINE OF PROCEDURAL STEPS AND TIME LIMITS ON APPEALS FROM DISTRICT COURTS AND TAX COURT

After an appealable judgment or order has been entered in the district court, the following steps are necessary to insure that the appeal will be considered on its merits. See pages 17-25 within. For a detailed discussion of the final judgment rule, see 15A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §§ 3905-3919 (2d ed.1992).

A. Timely Perfection Of Appeal.

1. Notice of Appeal for an appeal as of right is filed, along with the $5.00 district court filing fee and the $100.00 appellate docketing fee (collected on behalf of the court of appeals), with the clerk of the district court or tax court. Fed. R. App. P. 3. The fees must be paid upon the filing of the notice of appeal unless the appellant files a motion or is granted leave to proceed in forma pauperis. Fed. R. App. P. 3(e); See Fed. R. App. P. 4(c). A Notice of Appeal is considered filed on the date it is received by the clerk of the district court or tax court, and not when it is mailed, (except in the case of inmates confined in an institution). See Fed. R. App. P. 4(c). Pursuant to Fed. R. App. P. 4(c), the notice of appeal must be filed in the district court within the following time limits:

   Civil Cases:

   a. Fourteen (14) days from the date on which the first notice of appeal was filed in civil cases for any other party desiring to appeal;

   b. Thirty (30) days from the entry of judgment or order in civil cases;

c. Sixty (60) days from the entry of judgment or order in civil cases in which the United States or an officer or agency thereof is a party;

d. An extension of up to thirty (30) days from the prescribed time or ten (10) days after the date of the order, whichever is later, may be granted by the district court upon a showing of excusable neglect or good cause.

Criminal Cases:

a. Ten (10) days from the entry of judgment or final order; additionally if the government files a notice of appeal, a defendant may file a notice of appeal within ten (10) days of the filing of the government's notice of appeal;

b. Thirty (30) days from the entry of judgment or order for appeal by the United States in criminal cases, when authorized by statute;

c. An extension of up to thirty (30) days may be granted by the district court upon a showing of excusable neglect or good cause.

2. Bankruptcy Appellate Panel.

The rules for appeal in civil cases generally apply to appeals from a judgment, order or decree of a bankruptcy appellate panel. See Fed. R. App. P. 6 for additional rules.

3. The petition for permission to appeal from an interlocutory order must be filed within the following time limits. Fed. R. App. P. 5. See also infra section V(B).

a. Ten (10) days after the entry of an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) or of an amended order containing such statement. The petition

is filed with the clerk of court of appeals. Petitions for cross-appeals should be filed within fourteen (14) days.

b. Ten (10) days after the entry of the court appeals's order granting permission to appeal, appellant must pay the clerk of the district court the district court filing fee and appellate docketing fee and file a bond for costs if required under Fed. R. App. P. 7.

B. Other Filings At Time Of Appeal.

1. Appeal Information Form (Settlement Conference Form) 8th Cir. R. 3B.

In all civil cases (except habeas cases), an Appeal Information Form must be filed with the notice of appeal or the petition for leave to appeal and a copy served on the appellee. Forms are available from the court of appeals, the court's Internet site, or district court clerks' offices.

2. Bond for Costs on Appeal.

a. Civil Cases. Fed. R. App. P. 7.

Costs bonds are no longer automatically required; however, the district court may require appellant to file a bond in a form and amount it finds necessary to ensure payment of costs.

b. Interlocutory appeals. Fed. R. App. P. 5(d).

If required by Fed. R. App. P. 7, the bond must be filed within ten (10) days after entry of the order granting permission to appeal by the court of appeals.

C. Supersedeas Bond. Fed. R. App. P. 8(b).

A supersedeas bond may be presented for approval to the district court at or after the time of filing the notice of appeal or of procuring the order allowing appeal. Fed. R. Civ. P. 62(d)

D. Docketing Of Appeal.

1. Civil Cases. Fed. R. App. P. 11(e) and 12(a); 8th Cir. R. 11A.

   The appeal will be docketed as soon as a copy of the notice of appeal and docket entries are received by the clerk of the court of appeals from the district court clerk.

2. Criminal Cases. Fed. R. App. P. 11(e) and 12(a); 8th Cir. R. 11A; 8th Cir. Plan § III(C), IV(A).

   Within two (2) working days after notice of appeal is filed, the district court clerk transmits to the court of appeals clerk the district court docket entries, court order or judgment and notice of appeal. The court of appeals clerk then dockets the appeal and establishes a briefing schedule.

E. Corporate Disclosure Statement. Fed. R. App. P. 26.1; 8th Cir. R. 26.1A.

Non-government corporate parties must file five (5) copies of the Corporate Disclosure Statement within ten (10) days after receipt of notice that the appeal has been docketed. See Fed. R. App. P. 26.1.

F. Entry Of Appearance. 8th Cir. IOP § II(B).

Upon receipt of a notice of appeal, the clerk mails the appearance form to all counsel identified on the district court docket entries. Counsel representing the party on appeal must complete an appearance form and return it immediately.

G. Prehearing Conference. 8th Cir. R. 33A; 8th Cir. IOP § I(C)(2).

Appropriate civil cases are referred by the circuit clerk's office to the prehearing conference director to explore the possibility of settlement.

H. Designation Of Record. The Eighth Circuit has no preference concerning the type of appendix elected.

1. Civil Cases. Fed. R. App. P. 10; 8th Cir. R. 30A; 8th Cir. IOP Appendix A, Chronology.

   a. Within ten (10) days of filing a notice of appeal, the appellant must elect the method of producing the record from three alternatives: (1) joint appendix; (2) separate appendices; or (3) agreed statement. At the same time, the appellant must file with the clerk and serve on the opposing parties: (1) election of method of appendix preparation; (2) designation of record, if required; and (3) statement of issues.

   b. Within ten (10) days after receiving appellant's designation of record, appellee must file a supplemental designation if appellant's designation of record is insufficient.

2. Criminal Cases. 8th Cir. Plan § III(A)(1)(b); 8th Cir. IOP Appendix B, Chronology.

   Because the 8th Cir. Plan sets forth the contents of the record, no designation of the record is required. Appellant, however, may supplement the record by filing a request with the district court clerk within seven (7) days after a notice of appeal is filed. Appellee may file a supplemental designation with the district court clerk within fourteen (14) days after a notice of appeal is filed.

I. Ordering The Transcript.

1. Civil Cases. Fed. R. App. P. 10; 8th Cir. IOP § III(H).

   a. Within ten (10) days of filing a notice of appeal, appellant must order those portions of the transcript necessary for appeal and arrange for payment of costs or file a certificate if no transcript is required.

b. Within ten (10) days after appellant orders a transcript, appellee must order additional portions of the transcript if necessary and arrange for payment of costs or move the district court for an order requiring appellant to do so.

c. The court reporter must file the transcript within thirty (30) days of receiving appellant's order (and appellee's order when applicable).

2. Criminal Cases. 8th Cir. Plan § III(A)(1)(a) and (D).

a. Within two (2) days after a notice of appeal is filed, the district court clerk orders the transcript from the court reporter. Appellant must arrange for payment for the transcript at the time a notice of appeal is filed. If the appellant is proceeding in forma pauperis (IFP), he or she must file a completed CJA Form 24 authorizing government payment for the transcript in the district court with the notice of appeal. If an appellant has exhausted his or her funds at the district court level, the appellant can still apply for IFP status with the district court, and if approved, obtain authorization for government payment of the transcript. The motion for IFP status should be filed before or at the same time as the notice of appeal. Once the motion is ruled on, the appellant can file a completed CJA Form 24. The CJA Form 24 can be obtained from the district court clerk's office.

b. In cases not tried or tried in less than three (3) days, the court reporter must file the transcript within twenty (20) days after the notice of appeal is filed. In all other cases, the court reporter must file the transcript within forty (40) days.

J. Transmission Of Record

1. Civil Cases. Fed. R. App. P. 10(d) and 30(a); 8th Cir. R. 11A and 30A(b)(1).

   The district court clerk transmits the agreed statement when appellant's brief is due. Appellant transmits the joint appendix with its brief. If separate appendices are used, each party submits its separate appendix with its brief.

2. Criminal Cases. 8th Cir. Plan § III(C).

   Within two (2) days after the transcript is filed, the district court clerk will transmit the designated record to the court of appeals clerk.

K. Briefing Schedule.

1. Civil Cases. Fed. R. App. P. 31(a).

   Unless a different schedule is set by order of the court, appellant's brief is due forty (40) days after the record is filed (regardless of completeness of the record); appellee's brief thirty (30) days after appellant's brief is filed; and reply brief fourteen (14) days after appellee's brief. Briefs are considered filed on the date they are mailed. A summary of the brief requirements is contained in Table A.

2. Criminal Cases. 8th Cir. Plan § III(B).

   Appellant's brief is due 14 days after district court clerk transmits the record; appellee's brief 21 days after appellant files its brief; and appellant's reply brief within seven (7) days after appellee's brief.

L. Oral Argument. Fed. R. App. P. 34(a); 8th Cir. R. 34A.

All cases are screened for argument or nonargument submission after receipt of appellee's brief. Counsel may file an objection to a nonargument classification within five (5) days of counsel's receipt of a notification letter that

the case will be submitted without argument. Criminal cases are given priority on argument calendar.

M. Opinion. 8th Cir. IOP § IV(A). The court strives to issue an opinion within ninety (90) days after oral argument or submission to a panel without oral argument.

N. Judgment. 8th Cir. IOP § IV(A). Judgment is entered on the date the dispositive order is entered or the opinion is issued.

O. Petition For Rehearing. Fed. R. App. P. 40.

Petition may be filed within fourteen (14) days after entry of judgment unless the time is shortened or extended by order (45 days if the U.S. is a party). *The petition must be received in the court by the 14th (or 45th) day; there is no three-day mailing grace period.* The grant of a petition for rehearing vacates the panel opinion.

P. Mandate. Fed. R. App. P. 41.

Issued by the clerk seven (7) days after time to file a petition for rehearing expires, or seven (7) days after the denial of a petition for rehearing, rehearing en banc or motion for stay of mandate, whichever is later. Until a mandate is entered, the proper motion is a stay of the mandate; once the mandate is entered, the proper motion is to recall the mandate. See Calderon v. Thompson, 523 U.S. 538 (1998) for a discussion on recalling mandates.

Q. Petitions For Writ Of Certiorari. Sup. Ct. R. 13; 28 U.S.C. § 2101(c).

1. Civil Cases. Ninety (90) days from entry of judgment in civil cases or an order disposing of a timely-filed petition for panel rehearing or

rehearing en banc, unless the Supreme Court allows additional time. See also S. Ct. R. 20 (concerning extraordinary writs).

2. Criminal Cases. Ninety (90) days from entry of judgment in criminal cases, entry of order denying discretionary review, or order disposing of a timely-filed petition for panel rehearing or rehearing en banc, unless the Supreme Court allows additional time not exceeding 60 days.

II. ORGANIZATION OF THE COURT. 8th Cir. IOP § I.

The Eighth Circuit encompasses the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. The court of appeals sits regularly in St. Louis, Missouri and St. Paul, Minnesota, and occasionally in other locations in the circuit, such as Omaha, Nebraska and Kansas City, Missouri. Although all of the judges have offices in St. Louis and St. Paul, each judge's primary chambers is located in the judge's city of residence. The court at present is authorized eleven active judges. 8th Cir. IOP § I(A).

The Eighth Circuit Clerk's central office is located in the United States Court and Custom House, Room 511, 1114 Market Street, St. Louis, Missouri 63101-2043, (314) 539-3600. When the clerk's office moves to the Thomas F. Eagleton Courthouse, the new address will be 111 South 10th Street, Suite 24.329, St. Louis, Missouri, 63102. The clerk's office is open for filing and other services from 8:00 A.M. to 5:00 P.M. every weekday except for federal holidays. Fed. R. App. P. 45; 8th Cir. I0P § I(C)(1). The clerk's divisional office is located in the Warren E. Burger Federal Building, Room 500, 316 North Robert Street, St. Paul, Minnesota 55101-1423, (651) 848-1300. Although filings should be made with the clerk's central office in St. Louis, in emergencies, the divisional office in St. Paul will accept filings requiring immediate attention, including applications for stays or extraordinary writs. 8th Cir. IOP § I(C)(1).

By statute, the administrative head of the court is the chief judge. 28 U.S.C. § 45(a). The chief judge presides over any panel on which the chief judge sits. In addition to a full caseload of hearings and opinion writing, the chief judge is responsible for the administration of the court of appeals, and the district courts and bankruptcy courts in the ten districts of the circuit. The chief judge is a member of the Judicial Conference of the United States, 28 U.S.C. § 331, and is head of the Judicial Council for the circuit. The council consists of seven active circuit judges on the court of appeals and seven active district court judges and is empowered to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. § 332(d)(l); 8th Cir. IOP § I(B)(1). The Judicial Council has overall responsibility for the operation of the courts within the Eighth Circuit. The Circuit Executive works for the council and carries out administrative duties assigned by the chief judge or committees of the Eighth Circuit Judicial Council. 8th Cir. IOP § I(B)(2).

After meeting eligibility requirements, a judge may take senior status. See 28 U.S.C. § 294(b). Senior judges may not vote on whether a petition for hearing or rehearing en banc should be granted, but may sit on an en banc rehearing panel if the senior judge participated in the initial panel decision. See Fed. R. App. P. 35(a). Senior judges who continue to perform substantial duties, as most do, retain chambers and are entitled to the services of a law clerk and a secretary.

To facilitate the disposition of cases, statutory provision is made for the assignment of additional judges. The chief judge may request the Chief Justice of the United States to appoint a "visiting" judge from another circuit. 28 U.S.C. § 291(a), or, more frequently, the chief judge may designate senior judges, 28 U.S.C. § 294(c), or district court judges from the districts within the circuit, 28 U.S.C. § 292(a), to serve on panels of the Eighth Circuit.

III. PANEL COMPOSITION AND CASE ASSIGNMENT

Unless a hearing en banc has been ordered pursuant to Fed. R. App. P. 35, the court sits in panels of three judges. There are three types of panels in the Eighth Circuit: argument (hearing) panels; nonargument (screening) panels, and administrative panels.

A. Argument Panels. 8th Cir. IOP § I(D)(1).

Three-judge panels, or hearing panels, hear argued appeals. The members of the panels are assigned before court sessions. In addition to active circuit judges, senior judges, district judges and visiting judges also serve on the hearing panels. The chief judge presides over the hearing panel when he/she is a member of the panel; otherwise, the active circuit judge from the Eighth Circuit with the most seniority presides over the hearing panel.

An oral argument calendar is prepared and published by the clerk's office approximately one month before the court session. Judges do not participate in the case-assignment process. The hearing panel, by unanimous agreement, may direct after reading the briefs that a case on the argument calendar be submitted on the briefs and the record.

The members on the hearing panels change each month and often during each court session. Consequently, rescheduling of cases within a given court session is extremely difficult. The clerk's office should be notified of any potential conflicts before the briefing cycle is completed. The court normally sits the second full week of each month from September through June.

B. Nonargument (Screening) Panels. 8th Cir. IOP § I(D)(2).

All active judges except the chief judge sit on nonargument or screening panels, consisting of three judges. Senior judges also occasionally serve on screening panels. At least three screening panels are in operation at all times and the composition of the panels changes periodically.

The principal purpose of the screening panels is to decide pro se cases and attorney-handled cases submitted without oral argument. Occasionally a case screened for submission without argument will be placed on the argument calendar if one judge on the

screening panel wants oral argument. The parties will be notified by the clerk's office if a case is reclassified for oral argument.

C. Administrative Panels. 8th Cir. IOP § I(D)(3).

Administrative panels consider and decide the following presubmission motions and other preliminary issues which the clerk is not authorized to handle: (1) motions for leave to appeal under 28 U.S.C. § 1292(b); (2) motions for leave to proceed in forma pauperis; (3) applications for certificates of appealability under 28 U.S.C. § 2253(c)(1) after the district court has denied a certificate; (4) motions to quash certificate of appealability issued by a district court judge; (5) motions for appointment of counsel; (6) motions for production of the transcript at the government's expense; (7) motions for bond pending appeal; (8) applications for stay pending appeal; (9) applications for preemptory writs of mandamus and prohibition; (10) motions to dismiss for lack of jurisdiction, see 8th Cir. R. 47A; (11) procedural issues; and (12) emergency and special matters. Although the administrative panels consist of three judges, certain matters prescribed in 8th Cir. R. 27B(b) and (c) can be decided by one or two judges. For more details regarding motions practice, see Section VII Motions and Docket Control.

Stay and writ applications should be coordinated through the clerk's office in St. Louis. Emergencies should be handled by telephoning the clerk for instructions. Panels may be convened for emergency situations and, at the court's initiative, telephone conference calls are used for the initial presentation of an emergency stay request or writ application. An application for temporary emergency relief may be directed to a single circuit judge, but counsel should consult with the clerk's office whenever possible.

IV. ADMISSION TO PRACTICE BEFORE THE COURT

An attorney who orally argues an appeal before the Eighth Circuit must be a member of the bar of the Eighth Circuit unless appointed to represent a party in forma pauperis. 8th Cir. R. 46A; 8th Cir. IOP § II(A). An attorney who is not yet a member of the

Eighth Circuit bar may, however, file briefs, motions and pleadings. 8th Cir. IOP § II(A). To qualify for admission to practice in the Eighth Circuit, an attorney must be a member of the bar in good standing in the highest court of a state or of any court in the federal system. Fed. R. App. P. 46(a). There is no requirement that an applicant must have been admitted to practice for any specific number of years.

The admission fee for the Eighth Circuit is currently $40.00. Checks should be made payable to the "Attorney Admission Fee Fund." Admissions are processed by mail. 8th Cir. IOP § II(A).

V. APPELLATE JURISDICTION

A. In General.

The jurisdiction of the court of appeals for the Eighth Circuit extends to all criminal appeals and virtually all civil appeals from the ten district courts within the circuit, (the Eastern and Western Districts of Arkansas; the Northern and Southern Districts of Iowa; the Eastern and Western Districts of Missouri; the District of Minnesota; the District of Nebraska; the District of North Dakota; and the District of South Dakota).

The Eighth Circuit's jurisdiction over appeals from district court decisions includes appeals from a magistrate's final decision in a civil case pursuant to 28 U.S.C. § 636(c)(3) (jurisdiction exercised upon the consent of the parties).

In addition, the court of appeals has exclusive jurisdiction to review decisions of the United States Tax Court (see 26 U.S.C. § 7482(a)) and of various federal administrative tribunals. The court's jurisdiction in such cases depends, however, on the provisions of the various statutes relating to judicial review of agency determinations, and the relevant statutory authority should be examined in each instance.

Appeals in Tucker Act cases involving less than $10,000 and appeals in patent cases go to the court of appeals for the Federal Circuit. See 28 U.S.C. §§1295 and 1338. Also, some cases are appealable directly from the district court to the Supreme Court of the United States. See, e.g., 28 U.S.C. §§1253, 2284 (decisions of three-judge panels). The

court does not under any circumstances have jurisdiction to hear appeals from decisions of state courts.

B. Appealability.

1. Criminal Cases.

(a) Final Judgment Rule. Ordinarily, a criminal appeal may not be taken until a judgment of conviction and sentence has been entered. Pollard v. U.S., 352 U.S. 354, 358 (1957); Fed. R. App. P. 4(b); 18 U.S.C. § 3742. A pretrial detention order, however, is appealable, 18 U.S.C. § 3145(c), but usually should be challenged by motion instead of filing briefs on the merits. Fed. R. App. P. 9. The government is authorized by statute to appeal certain interlocutory orders, see 18 U.S.C. § 3731, and to appeal some sentences, see 18 U.S.C. § 3742(b).

(b) Interlocutory Appeals. An exception to the final judgment rule has been recognized in criminal cases for interlocutory orders within the scope of the collateral order doctrine. See Abney v. U.S., 431 U.S. 651 (1977) (pretrial order denying motion to dismiss an indictment on double jeopardy grounds immediately appealable under collateral-order doctrine); c.f. United States v. Ivory, 29 F.3d 1307 (8th Cir. 1994) (without colorable claim under double jeopardy clause appeal from denial of motion to dismiss indictment would be dismissed for lack of jurisdiction); see United States v. A.W.J, 804 F.2d 492 (8th Cir. 1986) (order of district court transferring juvenile defendant for criminal prosecution as an adult appealable under collateral-order doctrine). See generally Michael E. Tigar and Jane B. Tigar, Federal Appeals Jurisdiction and Practice, § 2.05 (3d ed. 1999); David G. Knibb, Federal Court of Appeals Manual, § 15.1(i) (4th ed.2000). Orders denying or granting a motion to disqualify counsel are not within this exception. See Flanagan v. United States, 465 U.S. 259 (1984).

2. Civil Cases.

(a) Final Judgment Rule. Generally an appeal may not be taken in a civil case until a final judgment disposing of all claims against all parties has been entered

on the district court's civil docket pursuant to Fed. R. Civ. P. 58. The parties, however, can waive the separate document requirement of Rule 58 if the only obstacle to appellate review is the district court's failure to enter judgment on a separate document, Bankers Trust Co. v. Mallis, 435 U.S. 381, 386 (1978), and if the district court makes clear that the case is over. Hall, M.D. v. Bowen, 830 F.2d 906, 911, n.7 (8th Cir. 1987). After a final judgment has been entered, a party has a right to appeal any earlier interlocutory order entered during the proceedings in the district court (provided that it has not been mooted by subsequent proceedings) as well as the final decision itself. See Scarrella v. Midwest Fed. Savings & Loan, 536 F.2d 1207, 1209 (8th Cir. 1976).

(b) Attorneys' Fees. Once a district court has entered a final judgment on the merits of a case, the entry of a subsequent order granting or denying an award of attorneys' fees is a separate proceeding having no effect on the finality of the merits judgment and requires a separate notice of appeal. See Obin v. District No. 9 of the Int'l Ass'n of Machinists & Aerospace Workers, 651 F.2d 574, 584 (8th Cir. 1981). An order determining that a party is entitled to fees but leaving the amount of the award undetermined may be appealable if it can be consolidated with an appeal on the merits. Id. See also Maristuen v. National States, Ins. Co., 57 F.3d 673, 677-78 (8th Cir. 1995) (atty fees were an integral part of the judgment). The denial of a prejudgment motion for costs and fees is a nonappealable interlocutory order. See Martenson v. Commissioner, 748 F.2d 489 (8th Cir. 1984). A notice of appeal from an order awarding or denying fees does not bring up the judgment on the merits for appellate review.

(c) Bankruptcy. Bankruptcy cases present unique issues concerning finality. Generally, an order finally resolving a separable controversy (e.g., between a creditor and a debtor) is appealable even though the bankruptcy proceeding is not over. The determination of the finality of a bankruptcy order is based on the extent to which (1) the order leaves the bankruptcy court with nothing left to do but execute the order; (2) delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) a later reversal on that issue would require the recommencement of the entire proceeding. Lewis v. United States, Farmers Home Admin., 992 F2d 767, 772 (8th Cir. 1993). The

caselaw should be carefully reviewed to determine appealability. The court of appeals does not have jurisdiction to consider direct appeals from the bankruptcy court. See 28 U.S.C. § 158.

(d) Administrative Agencies--Remands. An agency order remanding a case within the agency (e.g., to an ALJ) for further consideration, or a district court order remanding a case to an agency, is not appealable unless the task on remand will be ministerial or involve only mechanical computations. If, however, the order will not be effectively reviewable by a petition to review the agency's final decision, it is appealable immediately.

3. Interlocutory Appeals.

If no final judgment has been entered, an appeal may be taken only if the order sought to be appealed falls within one of the statutory or judicial exceptions to the final judgment rule:

(a) Rule 54(b). Fed. R. Civ. P. 54(b) allows (but does not require) a district judge to certify for immediate appeal an order that disposes of one or more but fewer than all of the claims or parties in a multiple claim or multiple party case. Under Rule 54(b), the district judge must expressly direct the entry of judgment and make an express determination that there is no just reason for delay. The express findings required by the rule are indispensable to appealability and should substantially comply with the language stated in the rule. Bullock v. Baptist Mem. Hosp., 817 F.2d 58, 59-60 (8th Cir. 1987). An appeal will be dismissed if the district court fails to indicate that there is no just reason for delay. Id. The findings required by Rule 54(b) must be entered on a separate document to qualify for appealability or, in the absence of objection, are assumed to be waived by appellees. Anoka Orthopaedic Assoc. v. Lechner, 910 F.2d 514, 515, n.2 (8th Cir. 1990).

Even if the district court certifies an order using the language expressly required by Rule 54(b), such certification is not binding on the court of appeals. Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 806-07 (8th Cir. 1993). A district court's certification is reviewable for abuse of discretion and the court of appeals has cautioned district courts that Rule 54(b) certification should not be granted routinely. Id. The court may accept a 28 U.S.C. § 1292(b) certification as Rule 54(b) judgment if the order satisfies the requirements of Rule 54(b). See Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 745 (1976); Lincoln Benefit Life Co. v. Edwards, 160 F.3d 415 (8th Cir. 1998).

If a judgment is properly entered under Rule 54(b), it is a final judgment and the time to appeal begins to run from the date the judgment is entered. See Kocher v. Dow Chemical Co., 132 F.3d 1225 (8th Cir. 1997); Page v. Presseir, 585 F.2d 336, 338 (8th Cir. 1978). A district court's certification of an order under Rule 54(b) after the notice of appeal is filed is sufficient to vest the court of appeals with jurisdiction. Thomas v. Basham, 931 F.2d 521, 523 (8th Cir. 1991).

(b) Section 1292(a)(1). The court of appeals has jurisdiction to review interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1). Under this provision, interlocutory orders granting or denying a request for a preliminary injunction and interlocutory orders granting a permanent injunction are automatically appealable; an interlocutory order denying (or having the effect of denying) a request for permanent injunction may be appealable. See Carson v. American Brands, Inc., 450 U.S. 79, 83-84 (1981); Morgenstern v. Wilson, 29 F.3d 1291 (8th Cir. 1994). In addition, other nonappealable orders may be reviewed along with the injunction order if they are closely related and considering them together is more economical than postponing consideration to a later appeal. An order interpreting or clarifying an injunction is not appealable. Mikel v. Gourley, 951 F.2d 166, 168 (8th Cir. 1991).

Unless the order granting a temporary restraining order (TRO) is not limited in time as Fed. R. Civ. P. 65(b) requires, the grant or denial of a TRO is not appealable. See 16 C. Wright, A. Miller & E. Cooper Federal Practice and Procedure § 3922.1 (2d ed.1996).

(c) Section 1292(b). Under 28 U.S.C. § 1292(b), a district judge has discretion to certify for immediate appeal an interlocutory order not otherwise appealable if the "order involves a controlling question of law as to which there is substantial ground for difference of opinion" and an immediate appeal "may materially advance the ultimate termination of the litigation." The statute applies to all civil cases. Within ten (10) days after the entry of a § 1292(b) certification, the party seeking appeal must petition the court of appeals for permission to bring the appeal. Answers or cross-petitions must be filed within seven (7) days after the petition is served. Fed. R. App. P. 5(a) and (b). The court of appeals may, in its discretion, grant or deny the petition. 28 U.S.C. § 1292(b). The district court cannot limit the issues that the court of appeals may address on appeal inasmuch as the statute refers to certifying orders, not particular questions. Simon v. G. D. Searle & Co., 816 F.2d 397, 400 (8th Cir. 1987). The court may accept a 28 U.S.C. §1292(b) certification as Rule 54(b) judgment if the order satisfies the requirements of Rule 54(b). Lincoln Benefit Life Co. v. Edwards, 160 F.3d 415 (8th Cir. 1998).

(d) Collateral Order Doctrine. The collateral order doctrine is a narrow exception which permits immediate appeal under 28 U.S.C. § 1292 of an interlocutory decision if the decision conclusively determines an important issue, is collateral to the merits of the action, would be effectively unreviewable if immediate appeal were not available, and threatens the appellant with irreparable harm if no appeal is permitted. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); see also David G. Knibb, Federal Court of Appeals Manual § 2.5 (4th ed. 2000). If a party fails to take an immediate interlocutory appeal permitted under the doctrine, it may later seek review by filing an appeal after the final judgment in the case (assuming the issue has not been mooted). Sierra Club v. Robertson, 28 F.3d 753, 756, n.3 (8th Cir. 1994).

(e) Cases Within the "Twilight Zone" of Finality. The doctrine of pragmatic finality is an extremely narrow exception to the final judgment rule. Interlocutory orders involving issues fundamental to the further conduct of the case may be appealable in rare instances, depending on the inconvenience and costs of piecemeal review and the danger of denying justice by delay. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-54 (1964). The use of this doctrine, however, is very limited; in fact, it may be limited to the unique circumstances of the Gillespie case. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 477, n.30 (1978); see also Barnes v. Bosley, 790 F.2d 718, 718-19 (8th Cir. 1986).

4. Effect On District Court's Jurisdiction.

Filing a notice of appeal divests the district court of jurisdiction over those aspects of the case involved in the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); State ex rel. Nixon v. Coeur d'Alene Tribe, 163 F.3d 1102, 1106 (8th Cir. 1999). Upon filing a notice of appeal from a judgment which decides the entire case, the district court cannot take any further action in the case without leave of the court of appeals, except in aid of the appeal, to correct clerical errors under Fed. R. Civ. P. 60(a) or to deny relief under Rule 60(b). But if the appeal is interlocutory, the district court retains the power to proceed with matters not involved in the appeal or to dismiss the case as settled, thereby mooting the appeal. See West Publishing Co. v. Mead Data Cent, Inc., 799

F.2d 1219, 1229 (8th Cir. 1986), (pendency of interlocutory appeal does not wholly divest district court of jurisdiction over entire case). In addition, the district court does not lose jurisdiction when there is a purported appeal from a nonappealable order. United States v. Grabinski, 674 F.2d 677, 679 (8th Cir. 1982).

C. The Time For Filing An Appeal.

The times prescribed by law for filing a notice of appeal or petition for review are mandatory and jurisdictional. Griggs, 459 U.S. at 61; Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978). The court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b). Failure to file within the time prescribed will therefore result in dismissal of the appeal for lack of jurisdiction. The notice of appeal must be actually received, not merely mailed, within the time prescribed. An exception to this requirement is provided for an appeal taken by an inmate confined to an institution; a notice of appeal in such cases is timely when it is deposited in the institution's internal mail system. Fed. R. App. P. 4(c).

1. Criminal Cases.

(a) Time Prescribed. A notice of appeal by a defendant must be filed within ten (10) days of the entry of the judgment or order appealed. An appeal by the government, where appeal is authorized by statute (see 18 U.S.C. §§ 3731 and 3742(b)) must be filed within thirty (30) days of the entry of the judgment or order appealed. See Fed. R. App. P. 4(b). Except as noted below, the time for appeal begins to run when a sentence (which is the judgment of conviction) is entered on the district court's criminal docket.

(b) Effect of Certain Post-Trial Motions. If any of the motions listed below is timely filed, the notice of appeal from a judgment of conviction must be filed within ten (10) days after the entry of the order disposing of the last such remaining motion(s) on the docket, or within ten (10) days after the entry of the judgment of conviction, whichever is later see Fed. R. App. P. 4(b)(3):

(i) for judgment of acquittal provided it is made within seven (7) days after the discharge of the jury or the return of a verdict of guilty as prescribed by Fed. R. Crim. P. 29(c);

(ii) a motion for arrest of judgment, provided it is made within seven (7) days after the verdict or finding of guilty, or after a plea of guilty or *nolo contendere* as prescribed by Fed. R. Crim. P. 34;

(iii) a motion for a new trial on grounds other than newly discovered evidence provided it is made within seven (7) days after the verdict or finding of guilty as prescribed by Fed. R. Crim. P. 33;

(iv) a motion for a new trial on the grounds of newly discovered evidence, provided it is made within three (3) years after the verdict or finding of guilty as prescribed by Fed. R. Crim. P. 33.

(c) Appeals From Interlocutory Orders. Where an appeal may be taken from an interlocutory order under the collateral order doctrine, see supra at 23, the time for appeal begins to run when the order is entered on the docket.

(d) Extensions of Time. The court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b). The district court may, upon a finding of excusable neglect or good cause, extend the time for appeal for up to thirty (30) days. Fed. R. App. P. 4(b)(4). Unlike civil appeals, a motion for extension of time to file a notice of appeal in a criminal case can be filed after the original time has expired, provided that the extended period does not exceed thirty (30) days after the expiration of the time otherwise prescribed by Rule 4(b). Fed. R. App. P. 4(b).

2. Civil Cases--Appeals From The District Court.

(a) Time Prescribed. If the federal government (including officers and agencies of the United States) is not a party to the case in the district court, the notice of appeal must be filed within thirty (30) days of the entry of the judgment or order appealed. If the government is a party to the case, the notice of appeal (of any party) must be filed within sixty (60) days of the entry of judgment. Fed. R. App. P. 4(a)(1). If one party files a timely notice of appeal, any other party may file its notice of cross-appeal if it wishes to

alter the judgment, within fourteen (14) days from the date on which the first notice of appeal was filed even though the usual time for appeal has expired. Fed. R. App. P. 4(a)(3). See Wycoff v. Menke, 773 F.2d 983, 985 (8th Cir. 1985).

If the district court finds that a party entitled to receive notice of the entry of judgment or order did not receive notice from the clerk or any other party within 21 days of its entry and no party would be prejudiced, it may, upon a motion filed within 180 days of the entry of judgment or within seven (7) days of receipt of notice of the judgment, reopen the time for appeal. The time for appeal will then be fourteen (14) days from the date of the order reopening the time for appeal. Fed. R. App. P. 4(a)(6).

(b) When Time Begins to Run. Except as provided below, the time for appeal begins to run the day after a final judgment disposing of the entire case has been entered on the district court's civil docket pursuant to Fed. R. Civ. P. 58; the date the judge signed the order is irrelevant. A trivial or clerical correction to a judgment does not restart the time for appeal. BBCA, Inc. v. United States, 954 F.2d 1429, 1431-32 (8th Cir. 1992); White v. Westrick, 921 F.2d 784 (8th Cir. 1990). Failure to receive notice of the entry of judgment does not excuse untimely filing of an appeal, although relief may be granted. See Fed. R. Civ. P. 77(d); Fed. R. App. P. 4(a)(6).

(c) Effect of Certain Post-Judgment Motions. If one of the motions listed below is timely filed, the effect is twofold. First, a notice of appeal filed after the announcement or entry of judgment but before the disposition of a listed motion is ineffective to appeal from the judgment specified in the notice of appeal until the date of entry of the order disposing of the last such motion. Upon entry of the order, the notice of appeal takes effect. No new notice of appeal is required. If a party seeks review of an amendment to the judgment or wishes to appeal the order ruling on the motion, an amended notice of appeal must be filed. Fed. R. App. P. 4(a)(4). Second, the time for appeal does not begin to run until the order disposing of the motion(s) is entered. Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251, 253-54 (1986) (appeal filed after announcing denial of Rule 59 motion but before entry of order dismissed as premature). A later filed appeal will "bring up" the entire case for review. The motions having these effects are:

(i) a motion under Fed. R. Civ. P. 59(a) and (b) for a new trial (must be served within ten (10) days of the entry of judgment);

(ii) a motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment (must be served within ten (10) days of the entry of judgment);

(iii) a motion under Fed. R. Civ. P. 50(b) for judgment as a matter of law (must be made within ten (10) days of the entry of judgment);

(iv) a motion under Fed. R. Civ. P. 52(b) to amend or make additional findings of fact (must be made within ten (10) days from the entry of judgment);

(v) a motion for attorneys' fees under Fed. R. Civ. P. 54 if the district court under Fed. R. Civ. P. 58 extends the time for appeal;

(vi) a motion for relief under Fed. R. Civ. P. 60 if the motion is served within ten (10) days after entry of judgment.

See Fed. R. App. P. 4(a)(4)(A)(vi).

The district court cannot extend the time for making or serving any of the above motions. Fed. R. Civ. P. 6(b). If such a motion is untimely filed, it will not toll the time for appealing the original judgment and will not affect a notice of appeal that has been already filed. See Sanders v. Clemco Indus., 862 F.2d 161, 170-71 (8th Cir. 1988). But if a party relies on the district court's assurances that an untimely Rule 59 motion is timely (or that the party still has time to appeal) and forgoes a timely appeal, the appeal may be deemed timely. See 4A. C. Wright & A. Miller, Federal Practice and Procedure § 1168 (2d ed.1987). Subsequent post-judgment motions not made or served within ten (10) days of the entry of the judgment are of no effect. Sanders, F.2d at 171.

A "motion for reconsideration" must be described by a particular rule of federal procedure, such as Rule 59(e) (motion to alter or amend the judgment) or Rule 60(b) (relief from judgment for mistake or other reason). Sanders, 862 F.2d at 168. If the moving party fails to specify the rule under which it makes a post-judgment motion, the characterization

of the motion will be left to the court, subject to the hazards of the unsuccessful moving party losing the opportunity to appeal the underlying merits because of delay. Id.

The district court has jurisdiction to deny a Rule 60(b) motion filed more than ten (10) days after entry of judgment even though a notice of appeal has been filed; if the district court is inclined to grant Rule 60(b) relief, however, the case must be remanded from the court of appeals. Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069, 1073 (8th Cir. 1991). An appeal from the denial of a Rule 60(b) motion does not bring up for review the underlying judgment. Brooks v. Ferguson-Florissant School Dist., 113 F.3d 903, 904 (8th Cir. 1997).

(d) Interlocutory Appeals.

(i) Appeals under 28 U.S.C. § 1292(a)(1). The time for appeal runs from the date on which the district court enters the order "granting, continuing, refusing or dissolving injunctions or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). Where a motion to dismiss is granted dismissing fewer than all plaintiffs or defendants, the test to determine whether the order is one granting or denying injunctive relief is essentially whether the order contracts the scope of injunctive relief originally sought. See Scarrella v. Midwest Fed. Savings & Loan, 536 F.2d 1207, 1209-10 (8th Cir. 1987).

(ii) Permissive Appeals Under 28 U.S.C. § 1292(b). The petition for permission to appeal must be filed (in the court of appeals) within ten (10) days from the date on which the district court enters the order containing a proper § 1292(b) certification, see supra, Section V(B)(3)(e). See Fed. R. App. P. 5(a).

(iii) Appeals Under Collateral Order Doctrine. The time for an immediate appeal of an interlocutory order appealable under the collateral order doctrine, see supra, Section V(B)(3)(e), begins to run when the order is entered in the civil docket. There is, however, no obligation to take an

immediate appeal; a party may wait until final judgment is entered. Sierra Club v. Robertson, 28 F.3d 753, 756, n.3 (8th Cir. 1994).

(e) Extensions of Time. The court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b). In civil cases where the United States is not a party, a notice of appeal must be filed within thirty (30) days of the entry of judgment. Fed. R. App. P. 4(a)(1). However, upon a showing of good cause or excusable neglect, the district court may extend the time for appeal upon a motion filed not later than thirty (30) days after the entry of judgment or ten (10) days after the date the order granting the motion is entered. Fed. R. App. P. 4(a)(5). See Lowry v. McDonnell Douglas Corp., 211 F. 3d 457 (8th Cir. 2000). Rule 4(a)(5) allows the district court to grant an extension of no more than thirty (30) days past the normal appeal period; however, if a party relies on a longer extension erroneously granted by the district court and files within the extension granted, the appeal will be considered timely. See Estle v. Country Mutual Ins. Co., 970 F.2d 476, 478 (8th Cir. 1992).

D. Appeals From Tax Court Decisions.

1. Time Prescribed. A notice of appeal must be filed in the tax court in Washington, D.C. within 90 days from the date on which the tax court's decision is entered on its docket. If, however, one party files a timely notice of appeal, any other party may file its notice of appeal within 120 days from the date on which the decision was entered. Fed. R. App. P. 13(a). If the notice of appeal is filed by mail, the appeal will be timely if it is postmarked within the time prescribed. Fed. R. App. P. 13(b).

2. Effect of Certain Post-Decision Motions. If a motion to vacate a decision or a motion to revise a decision is made within the time prescribed by the Rules of Practice of the tax court, the full time for appeal (90 or 120 days) runs from the date on which the order disposing of the motion(s) is entered or the date on which the final decision is entered, whichever is later. Fed. R. App. P. 13(a).

3. Interlocutory Appeals. Interlocutory appeals of certain tax court orders may be taken to the court of appeals if application is made within ten (10) days after entry of such order. 26 U.S.C. § 7482(a)(2)(A).

E. Appeals From Administrative Agencies.

Like a notice of appeal, the timely filing of a petition for review is jurisdictional and cannot be waived by the court. Goos v. ICC, 911 F.2d 1283, 1288 (8th Cir. 1990); Fed. R. App. P. 26(b). Parties should consult the applicable statutes for filing deadlines and tolling provisions.

F. Appeals From Bankruptcy Appellate Panel.

Bankruptcy court decisions are not appealed directly to the court of appeals. Prior to the passage of the Bankruptcy Reform Act of 1994, bankruptcy appeals went to the United States District Court for the bankruptcy court's home district. Only when the district court had issued its decision in the matter could the case be appealed to the court of appeals. The Bankruptcy Reform Act of 1994 provided for the creation of a Bankruptcy Appellate Panel, composed of sitting bankruptcy judges, as an alternative to district court review. See 28 U.S.C.§ 158. By the provisions of the statute, appeals from bankruptcy court decisions go to the Bankruptcy Appellate Panel unless one of the parties makes a timely election to have the case sent to the district court. See 28 U.S.C. § 158(c)(1).

In 1996 the Eighth Circuit Judicial Council voted to establish a six-judge Bankruptcy Appellate Panel for the Eighth Circuit. The administrative and case processing duties of the Panel were assigned to the Eighth Circuit's clerk's office. The Panel began operation on January 1, 1997, and hears approximately 110 appeals each year. About two-thirds of all bankruptcy appeals go to the Panel, while the remaining third elect to proceed in the district court.

Practice before the Panel is governed by its rules and Internal Operating Procedures Manual, and counsel should carefully review them before an appeal is taken, as they differ in many ways from Eighth Circuit practice. The Panel clerk's office is a separate operation within the Circuit clerk's office and questions about procedures before the panel may be addressed to the Panel Coordinator or the Eighth Circuit Clerk. Either may be reached at 314-539-3600. The Panel's rules and Internal Operating Procedures are available on the Eighth Circuit's web site at http://www.ca8.uscourts.gov/.

A party wishing to appeal a Panel decision to the United States Court of Appeals for the Eighth Circuit does so by filing a notice of appeal with the Panel clerk's office, together with the $105.00 appellate docketing and filing fees. The Panel Coordinator will process the notice of appeal and transmit it to the court of appeals clerk's office. The appeal will then be treated as a regular civil appeal, and a briefing schedule will be established by the court of appeals clerk's office.

VI. SCOPE OF REVIEW

The court of appeals considers questions of fact as well as questions of law. It does not, however, substitute its judgment for the verdict of a jury, or for the findings of a trial judge or an administrative agency; the scope of its factual review is limited to determining whether or not there is sufficient evidence to support the verdict or finding.

When the court reviews cases tried by a judge without a jury, it accords respect to the judge's superior opportunity to evaluate the credibility of witnesses, and ordinarily limits itself to reviewing the inferences and legal decisions made by the judge. It will not reverse on the facts unless it concludes that the findings of the district judge are "clearly erroneous." Fed. R. Civ. P. 52(a).

Both appellants and appellees are required to include a statement of the standard of review in the argument section of their briefs. The following resources may provide a good starting point for determining the applicable standard of review: S. Childress and M. Davis, Federal Standards of Review (3d ed. 1999); 19 Moore's Federal Practice, Chap. 206. Standards of Review (Matthew Bender 3d ed.).

VII. MOTIONS AND DOCKET CONTROL

All motions should be filed in accordance with Fed. R. App. P. 27 and 32(c), 8th Cir. R. 27B(a), and other applicable rules with copies served on "all other parties." The moving party must file the original and one copy of any motion that may be granted by the

clerk under 8th Cir. R. 27B(a). In all other cases, the original and three copies of the motion must be filed. 8th Cir. R. 27A. Motions should be typewritten on 8½" x 11" paper, and copies should be reproduced by photocopy. Each motion should include a caption, the title of the appeal, its docket number, and a brief heading descriptive of the relief sought therein (e.g., "Motion for Extension of Time to File Appellant's Brief and Appendix"). Fed. R. App. P. 27(d). If a motion is accompanied by affidavits, or exhibits, these attachments must also be served and filed. Fed. R. App. P. 27(a)(2)(B). A separate brief supporting or responding to a motion must not be filed. Fed. R. App. P. 27(a)(2)(c). Motions are always to be submitted to the court by filing with the clerk's office.

All motions are decided upon the papers filed, without oral hearing, unless otherwise ordered by the court. Fed. R. App. P. 27(e). Oral hearing is rarely granted. Since the judges rule on numerous motions each week, brevity in motion procedure is important. A terse and lucid statement of the facts and the relief sought is always preferable to a lengthy presentation in both the motion and any accompanying documents.

The court receives a large number of motions every year. To minimize the judges' involvement in routine matters and to prevent any delay in case processing, the clerk is authorized under 8th Cir. R. 27A(a) to rule on many types of procedural motions. In general, the clerk may rule on motions regarding extensions of time, overlength documents, supplementation of the record on appeal, substitution of parties, amicus filings, advancements or continuance of cases, appointment of counsel in Criminal Justice Act cases, withdrawal of counsel in civil cases and fee-paid criminal cases, entry of consent decrees in certain types of agency cases, voluntary dismissal of an appeal and taxation of costs. The rule is not meant to be an exhaustive list of every motion the clerk may grant, and, in practice, the clerk has a certain amount of discretion in determining what is referred to the court, either for an immediate ruling or for a later ruling in connection with the court's decision on the merits of the case.

Pursuant to 8th Cir. R. 27A(b), certain motions may be granted by one judge, for example, a single judge may grant a certificate of appealability or appoint counsel in a civil rights case. The local rule also provides that two judges may, among other things, deny

leave to proceed in forma pauperis or deny a certificate of appealability. See 8th Cir. R. 27A(c). While motions are occasionally referred to a single judge or to two judges, in nearly every instance, the clerk's office refers motions to three-judge panels.

In the event a party is dissatisfied with the clerk's ruling under 8th Cir. R. 27A(a), a motion for reconsideration should be filed within ten (10) days of the order. The motion will be referred to a three-judge panel for review. See 8th Cir. R. 27A(e). Similarly, a party dissatisfied with a judge or panel ruling may file a motion for reconsideration under 8th Cir. R. 27A(e). Suggestions in opposition filed after a ruling are not considered to be a request for reconsideration; a separate request for reconsideration must be filed. See Fed. R. App. P. 27(b).

Procedural motions, such as those for extensions of time, demand no responses; the court will act on them immediately unless it desires a response. Fed. R. App. P. 27(b). Any other party who wishes to take a position may notify the clerk immediately by telephone that a response will be filed. Motions in which time is of the essence, such as those for stay, injunction or bail, will go to the administrative panel immediately. The panel may grant or deny the motion outright or enter an order requesting an answer within a certain period of time. Unless otherwise ordered, an adversary may have ten (10) days to respond to any other type of motion. Fed. R. App. P. 27(a). Responses filed after a ruling will not be considered a motion to reconsider. Fed. R. App. P. 27(b).

Format/Length: Motions and responses to motions should not exceed 20 pages. Fed. R. App. P. 27(d)(2). A reply to a response may not exceed 10 pages. Id. The form of motions is governed by Rule 27(d). See Fed. R. App. P. 32(c)(1).

Emergency Motions: In the event of an emergency, counsel should consult with the clerk's office before filing any motion. The clerk will authorize fax filing for emergency motions or responses and will coordinate filing procedures with the three-judge panel assigned to the case. Counsel should contact the clerk's office at the earliest possible time, so that the clerk can make the appropriate arrangements with the panel. Every judge has fax machines in chambers and at home, so the clerk can get documents to a panel within

minutes after they are filed. The need for after-hours or week-end filing should be discussed with the clerk in advance so that documents receive prompt attention.

VIII. TEMPORARY RELIEF PENDING APPEAL

Normally, the court takes no action in cases until the record is transmitted, briefs are filed and the case has been argued. If a party desires to request any relief in the court of appeals before the record can be transmitted, the party may request the clerk of the district court, pursuant to Fed. R. App. P. 11(g), to send up any relevant portions of the record. The minimal "short record" usually consists of certified copies of: (1) docket entries; (2) the order sought to be reviewed; (3) the notice of appeal; and (4) the Eighth Circuit Appeal Information Form. Often counsel will designate some other documents, such as findings of fact and conclusions of law, transcripts, affidavits, and exhibits, to be included in the "short record." This type of record is ordinarily used in conjunction with motions made in the court of appeals for injunctions or stays pending appeal, or for bail or for reduction of bond pending appeal.

If any party deems other parts of the record essential to a fair presentation of the issues, the party may request the clerk of the district court to certify and transmit those other parts of the record to the court of appeals. Fed. R. App. P. 11(g). The parties may, alternatively, simply prepare appendices to be filed with their motion or response; these materials will be circulated to the judges in lieu of the record prepared by the district court clerk's office. The motion for temporary relief will usually be considered by a panel of judges; however, if time is of the essence, a single judge may determine the motion. Fed. R. App. P. 8(a) and 18; 8th Cir. IOP § I(D)(3).

If time is of the essence, counsel may wish to advise the clerk's office of an intention to file an emergency motion. The motion should explain the necessity for having a quick response and should, if possible, be personally served on, or faxed to, the other parties. Counsel should also include copies of all relevant district court orders and documents which the court may need to make a ruling.

A. Stays Or Injunctions In Civil Cases.

Filing a notice of appeal does not automatically stay the operation of the judgment or order of which review is sought. Application for a stay should be made first to the district court. Fed. R. App. P. 8(a). The application for a stay should be accompanied by a copy of the judgment, order, decree or decision in question and any accompanying opinion. A stay pending appeal may be conditioned upon the filing of a supersedeas bond in the district court. Fed. R. App. P. 8(b).

The court will consider the following factors in determining the request for stay or injunction: (1) the showing of likelihood of success on the merits; (2) the likelihood of irreparable harm absent the stay order; (3) harm to other parties if the stay is granted; and (4) the public interest. James River Flood Control Ass'n v. Watt, 680 F.2d 543, 544 (8th Cir. 1982).

B. Motions Concerning Custody Pending Trial Or Appeal.

1. Before Sentencing.

Fed. R. Crim. P. 46 and 18 U.S.C. §§ 3141, 3142, and 3143 set forth the criteria governing the release of a defendant before trial, during trial, and after conviction but before sentencing. The order refusing or imposing conditions of release may then be appealed to the court of appeals which may order the release of the defendant pending the appeal. Fed. R. App. P. 9; 18 U.S.C. § 3145. Unlike the normal appeal, the defendant, after filing a notice of appeal, files a motion and the case is decided upon the motion and papers, affidavits and parts of the record that the parties present . Fed. R. App. P. 9(b).

2. After Sentencing.

Fed. R. Crim. P. 38 allows the district court to stay the execution of a judgment of conviction upon such terms as the court sets. The defendant should initially request release pending appeal or modification of conditions of release in the district court. That court's order may then be reviewed on motion in the pending appeal of the conviction to the court of appeals, pursuant to Fed. R. App. P. 9(b) and 18 U.S.C. § 3145.

C. Administrative Agency Cases.

Application should be made first to the agency. If the agency denies relief or does not afford the relief requested, application may then be made to the court of appeals by motion, which should comply with the usual requirements for motions. The motion may be made, on whatever notice is feasible, as soon as the order is entered. The motion should state what previous application for relief was made and the result of the previous application. Grounds for the relief sought should be stated, and the supporting material should be furnished. See Fed. R. App. P. 18.

IX. EXPEDITED APPEALS

A. Civil Cases.

Requests for expedited appeals should be made by motion.

B. Criminal Cases.

The Eighth Circuit has adopted the Eighth Circuit Plan to Expedite Criminal Appeals. The plan's objective is to ensure that criminal appeals are decided within five (5) months after the notice of appeal is filed.

Under the plan, defendant's trial counsel, whether appointed or retained, is required to represent the defendant on appeal. Absent unusual circumstances, a motion to withdraw will not be granted. Section XIV of this handbook discusses duties of counsel when seeking withdrawal in a criminal case. Within two (2) working days after the notice of appeal is filed, the district court clerk transmits the docket entries, court order or judgment, and notice of appeal to the court of appeals. The court of appeals clerk then dockets the appeal and establishes a briefing schedule. No designation of the record is necessary because 8th Cir. Plan § III(A)(1)(b) sets forth the contents of the record. The parties, however, may request that the record be supplemented.

A transcript of the district court proceeding must be ordered from the court reporter by the district court clerk within two (2) working days after the notice of appeal is

filed. 8th Cir. Plan § III(A)(1)(a). In cases not tried or tried in less than three (3) days, the court reporter must file the transcript within 20 days after the notice of appeal is filed. In all other cases, the court reporter must file the transcript within 40 days after the notice of appeal is filed. 8th Cir. Plan § III(D).

Within two (2) days after the transcript is filed, the district court clerk transmits the designated record to the court of appeals. 8th Cir. Plan § III(C). The appellant's brief is due 14 days after the district court transmits the record; the appellee's brief is due 21 days after appellant files its brief; and the reply brief is due within seven (7) days of the filing of appellee's brief. 8th Cir. Plan § III(B). Criminal cases are given priority on the argument calendar. 8th Cir. Plan § I.

X. CROSS-APPEALS AND JOINT APPEALS

A. Cross-Appeals.

The appellee may, without having to file a cross- appeal, defend a judgment on any grounds consistent with the record (even if rejected in the lower court) and should not file a cross-appeal in this instance. A party, however, cannot attack the judgment, either to enlarge his own rights thereunder or to lessen the rights of his adversary, unless the party files a cross-appeal. 8th Cir. IOP § III(F)(1). A cross-appeal is always necessary when an appellee or a respondent seek to modify or alter the lower court's decision. Wycoff v. Menke, 773 F.2d 983, 985 (8th Cir. 1985). Thus, the court of appeals is often called upon to decide more than one appeal from a single district court judgment.

Where there are cross-appeals, the party who first files the notice of appeal, or in the event the notices are filed on the same day, the plaintiff in the proceeding below, is deemed the appellant for purposes of Fed. R. App. P. 28 and 30, unless the parties agree, or the court of appeals orders, otherwise. Fed. R. App. P. 28(h). The court sets a briefing schedule in all cases involving cross-appeals. There will be four briefs filed by the two parties in the cross-appeal situation. The parties will not be allowed to file separate briefs in each appeal. The appellee/cross-appellant's brief must be filed as one brief within

thirty (30) days after service of the appellant's brief. Appellant's reply/cross-appellee's brief must be filed within thirty (30) days after service of cross-appellant's brief. Appellee/cross-appellant's reply brief must be filed within fourteen (14) days after service of appellant/cross-appellee's brief.

The length of appellant's opening brief and the appellee/cross-appellant's brief is governed by Fed. R. App. P. 32(a)(7)(A) and (B). The length of appellant's reply/cross-appellee brief is governed by 8th Cir. R. 28A(e)(2). The length of the cross-appellant's reply is governed by Fed. R. App. R. 32(a)(7)(A) and (B). If briefs are prepared on a computer, parties must provide a 3.5" diskette containing the full text to the clerk. 8th Cir. R. 28A(d). All docket numbers should be on all briefs. Further briefing requires permission of the court. Fed. R. App. P. 28(c). A party may move that the court approve a different schedule. For a summarization of the technical brief requirements and time limits, see Table A of this handbook.

B. Joint Appeals.

Persons entitled to appeal whose interests are such as to make joinder practicable may file a joint notice of appeal or petition for review, or may join in appeal after filing separate timely notices or petitions. The court may consolidate appeals or the parties may stipulate to do so. Fed. R. App. P. 3(b) and 15(a) (agency order). Regardless of the substance of the matter, a separate appeal must be docketed and separate filing and docketing fees paid to the district court clerk for each notice of appeal filed. 8th Cir. IOP § III(F)(2).

Cooperation among counsel on the same side is essential in arranging for preparation and transmittal of the record. 8th Cir. IOP § III (F)(2). The parties on the same side, or any number of them, may join in a single brief and are encouraged to do so. One party may adopt by reference any part of the brief of another. Fed. R. App. P. 28(i). Parties adopting, in total, the brief of another party should do so by motion. Repetitious statements and arguments are to be avoided and can result in sanctions. If more than one

case involves the same question on appeal, they may be ordered by the court to be heard together as one appeal. Fed. R. App. P. 34(d).

XI. APPEALS IN FORMA PAUPERIS

The district court and the court of appeals are authorized by 28 U.S.C. § 1915(a) and Fed. R. App. P. 24 to allow an appeal to be taken without prepayment of fees and costs or security for costs by a party who makes an affidavit that he or she cannot pay them. The affidavit must also state the nature of the appeal and the affiant's belief that he or she is entitled to redress. See Fed. R. App. P. Form 4. Once the district court allows a party to proceed in forma pauperis, the party may continue on appeal in forma pauperis without further authorization unless that court states that the appeal is not taken in good faith or the party's financial status has changed. Application may be made to the court of appeals after the district court denies leave to proceed on appeal in forma pauperis. Application must be made in the district court first.

If the appeal is under the Criminal Justice Act, the appellant need only determine that the parts of the transcript requested are necessary to the issues to be raised on appeal, subject to local rule. See 18 U.S.C. § 3006A(d); Fed. R. App. P. 10(b)(1). In every other in forma pauperis case, the appeal and transcript preparation are conditioned on a determination by the district court or the court of appeals that the appeal is not frivolous and that the transcript sections are necessary to the appeal; request must first be made to the district court. 28 U.S.C. § 753(f) Absent such a determination, the Administrative Office of the United States Courts will not pay for the transcript.

Briefs by unrepresented parties proceeding in forma pauperis may be typewritten and carbon copies of the briefs may be filed and served in lieu of photocopies. Fed. R. App. P. 31(b); 8th Cir. R. 28A(a). A party proceeding in forma pauperis who chooses to file and serve typewritten and carbon copies of a brief must file the original and three (3) carbon copies with the clerk and serve one (1) legible copy on counsel for each party. 8th Cir. R. 28A(a).

Until the passage of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, lawyers representing indigents were rewarded for their services only by the professional satisfaction of upholding an honorable tradition of the bar. That Act authorized the payment of some

compensation to lawyers who represent indigents in criminal cases, habeas corpus cases, and other designated proceedings. The amount of compensation authorized for representation is set out in 18 U.S.C. § 3006A(d). The statute also allows compensation for discretionary appointment of counsel in habeas corpus cases, infractions for which a sentence to confinement is authorized, or when the interests of justice require representation. 18 U.S.C. § 3006A(a).

The Eighth Circuit Plan to Implement the Criminal Justice Act of 1964 regulates appointment and compensation of attorneys. In direct criminal appeals and state habeas corpus cases in which the district court has granted a certificate of appealability, trial counsel is reappointed automatically on appeal. 8th Cir. PICJA § II(1). In all other cases, counsel is appointed only by order of the court, and a party or a party's counsel must file a formal motion with the clerk seeking appointment on appeal. The clerk forwards motions for appointment of counsel to an administrative panel. If the motion is granted, the clerk enters the order of appointment and sends the necessary appearance and voucher forms to appointed counsel with appropriate instructions. See 8th Cir. IOP § II(C)(1).

To be relieved of an appointment, an attorney must file a motion with the clerk specifying the reason for the request. Motions for leave to withdraw must be served on the client. The court discourages these requests and will authorize withdrawal only for good cause. Trial counsel requesting permission to withdraw must preserve the client's right to appeal. Unless the prospective appellant in a criminal case expresses a desire not to appeal in a written notice to the district court, trial counsel must file a timely notice of appeal and prosecute the appeal with diligence until the court grants leave to withdraw. Appointed counsel who believes an appeal is without merit must nonetheless file a brief in conformity with Anders v. California, 386 U.S. 738 (1967), and Penson v. Ohio, 488 U.S. 75 (1988). But see Smith v. Robbins, 120 S.Ct. 746, 759 (2000). ("Anders procedure is merely one method of satisfying the requirements of the constitution for indigent criminal appeals.")

In addition, the court has inherent power to appoint counsel in certain civil cases. The court exercises its inherent power of appointment sparingly and primarily in civil rights

actions. Proof of indigency is required, and the party seeking appointment of counsel must satisfy the court that the action is not frivolous. 8th Cir. IOP § II(C)(2).

No fee is authorized for legal services of counsel appointed under the court's inherent power. 8th Cir. IOP § II(C)(2). The court does, however, authorize reimbursement from the Attorney Admission Fee Fund for reasonable out-of-pocket expenses incurred in connection with the appointment. 8th Cir. § IOP II(C)(2); 8th Cir. R. 47H. Appointed counsel must keep an accurate record of all out-of-pocket expenses incurred and submit an itemized statement to the clerk after issuance of the mandate. 8th Cir. IOP § II(C)(2).

Court authorization is needed to obtain the necessary transcript for an indigent appellant. In direct criminal appeals and state or federal habeas corpus cases in which a certificate appealability has been granted, the district court or the court of appeals will authorize only the requested parts of the transcript that are necessary to the issues raised on appeal. A request for a transcript in a case governed by the Criminal Justice Act is made by filing a CJA Form 24 with the district court at the time the notice of appeal is filed. Authorization for a transcript in federal habeas corpus and other postconviction appeals is not automatic. A motion for a transcript at government expense must be presented to and granted by the court of appeals. The court of appeals has the power to order a transcript prepared at public expense in any civil case if the proper findings are made. See 28 U.S.C. § 753(f).

XII. ATTORNEY COMPENSATION UNDER THE CRIMINAL JUSTICE ACT OF 1964

After an attorney is appointed to represent a criminal defendant or habeas petitioner under the Criminal Justice Act, the clerk's office will issue the attorney a CJA Form 20 or Form 30 (death penalty cases). In 1999, the Administrative Office of the U.S. Courts replaced the CJA payment system with a new computerized tracking and payment system. In an effort to protect the attorney's privacy, the new CJA Form 20/30 will not contain the attorney's Social Security number or Tax Identification number. The social security number, however, is required at the time of the appointment in order to generate the CJA Form

20/30. Thus, attorneys who have not previously represented a defendant under the CJA system must provide their social security number at the request of the clerk's office, either by telephone or by completing and submitting a Panel Attorney Data form. If the attorney has a pre-existing agreement with his or her law firm or professional corporation indicating that the CJA earnings belong to the law firm or corporation, the attorney may elect to have the Internal Revenue Service issue a 1099 Statement reflecting the CJA payments to the firm. In this instance, the attorney must provide the clerk's office with the firm's Tax Identification number and the law firm's mailing address. The attorney may indicate this election on the Panel Attorney Data form, which is provided to the attorney with the CJA Form 20/30, and may complete and return the form to the clerk's office after the appointment.

Complete instructions for preparing and submitting the voucher may be mailed to counsel with the CJA Form 20/30. These instructions are available on the court's web site.

The appointment date is indicated on the CJA Form 20/30. Services provided outside of the appointment period are not reimbursable. A separate appointment is required for each appeal, including any cross-appeal. The appointment is personal. An appointed counsel may claim compensation for services furnished by a partner or an associate within the maximum compensation allowed, but claims for travel expenses and in-court services are limited to those attorneys actually appointed under the Act.

A. Travel: CJA-appointed attorneys are authorized to obtain government rates for hotels and airlines for travel in connection with their representation under the Act. The clerk's office will provide attorneys requiring air transportation to attend oral argument with a travel authorization allowing them to use the services of National Travel Service to book the reservation and issue the airline ticket. The cost of the ticket will then be paid directly through the CJA payment system. Attorneys are advised to carry the travel authorization with them when they travel and they should submit both the authorization and a copy of

the airline ticket or travel itinerary provided by National Travel Service with their completed CJA voucher at the completion of the appointment.

B. Hotels**:** Many hotels will offer CJA-appointed attorneys government rates for their travel in connection with their representation under the Act. The clerk's office will supply a list of hotels offering government rates to CJA-appointed attorneys. Attorneys are encouraged to avail themselves of reduced-government rates whenever possible.

C. Submission of Vouchers - CJA Form 20: Vouchers must be submitted to the clerk's office within 45 days after the mandate has been issued at the close of the case. Interim vouchers are rarely allowed. Vouchers submitted after the 45 days should be accompanied with a letter explaining the delay. Time should be reported only in tenths of an hour. Receipts are required for reimbursable expenses and all services provided out of the attorney's office. For example, a receipt is required for copies made at a commercial vendor, whereas a receipt is not required for copies made in-house. See the CJA Form 20 instructions for details. The hourly compensation rate for in-court services is $70 per hour and for out-of-court services is $50 per hour. The statutory maximum compensation for appeals of criminal convictions is $2,500 per representation. The statutory maximum for other criminal matters, including appeals of denials of habeas petitions, and federal motions to vacate (28 U.S.C. § 2255) is $750. These amounts do not include reimbursable expenses and travel expenses. Claims for compensation in excess of the statutory maximum must be accompanied by a statement why the case involved extended or complex representation. The court will use the following criteria for determining whether a case is extended or complex: the responsibilities involved as measured by the magnitude and importance of the case; the manner in which the duties were performed; the knowledge, skill, efficiency, professionalism and judgment used by counsel; the nature of

counsel's practice and injury thereto; any extraordinary pressure of time; and other circumstances relevant and material to a determination of a fair and reasonable fee. In cases where the court allows compensation in excess of the statutory maximum, approval by the chief judge or chief judge's designee is required.

D. Submission of Vouchers - CJA Form 30: Vouchers in capital cases should be submitted at the close of each stage of proceedings. There is no statutory maximum associated with capital cases and the court has discretion to allow an hourly rate not to exceed $125 per hour for in-court and out-of-court time. Following completion of each stage of the proceeding and submission of the interim voucher, a supplemental CJA Form 30 will be mailed to counsel.

E. Process for Voucher Approval: After final disposition of the appeal and issuance of the mandate, the CJA appointed attorney must submit the completed and signed voucher. The voucher is reviewed for mathematical accuracy and for completeness. A deputy clerk may contact the attorney to obtain missing information. After initial review, the voucher and attachments are sent to the court for initial approval. If the court approves a request for compensation which exceeds the statutory maximum, the voucher and attachments are forwarded to the chief judge or chief judge's designee for additional approval. The voucher is then returned to the clerk's office and the data is entered into the national CJA database. After two levels of approval and processing by clerk's office personnel, payment is authorized and the check is mailed to counsel from Washington, D.C. within two (2) business days. The clerk's office will notify the attorney when the process for authorizing payment has been completed. There are no formal procedures for seeking reconsideration of the authorized amount of compensation, but counsel may submit a letter to the clerk of court asking that the award be reconsidered.

XIII. GENERAL DUTIES OF COUNSEL IN THE COURT OF APPEALS

An attorney's handling of a case in the court of appeals is governed by the Eight Circuit Rules of Appellate Procedure, the Federal Rules of Appellate Procedure and procedural orders of the court issued in most appeals. Compliance with these rules, particularly on matters involving the timeliness and content of briefs, enables the court to handle its cases effectively and efficiently. Attorneys may contact the clerk's office for guidance on these rules and procedures.

When an appeal is docketed by the court of appeals, an appearance form is sent to all counsel of record below. Attorneys must complete the appearance form and return it immediately to the clerk's office for filing. 8th Cir. IOP § II(B). In criminal cases, defendant's trial counsel, whether retained or appointed, must represent the defendant on appeal. A motion to withdraw will not be granted absent unusual circumstances. See infra Section XIII and supra Section XI (in forma pauperis appeals).

Briefing schedules in the court of appeals are established in most cases automatically by operation of 8th Cir. Plan § III(B) (criminal appeals) and Fed. R. App. P. 31(a) (civil appeals) or by order of the court. After the case is docketed, the clerk's office will send a letter to counsel establishing the briefing schedule and deadlines. Requests for extensions of time to file briefs are disfavored and will not be granted routinely even if all parties have agreed to the extension. Equally important are the form and content requirements for briefs filed in the court of appeals. See Fed. R. App. P. 28, 30, 31, 32; 8th Cir. R. 28A, 8th Cir. IOP § III(I); and supra Section XX. Lack of compliance with these rules, or attempts to circumvent them can result in rejection of the brief by the clerk's office or sanctions.

Counsel should bear in mind that the court may sanction attorneys (or litigants proceeding pro se) for making frivolous arguments on appeal. See, e.g., Fed. R. App. P. 38. Lincoln Ben. Life Co. v. Edwards, 160 F.3d 415, 416 (8th Cir. 1998); First Commercial Trust Co., N.A. v. Colt's Mfg. Co., Inc., 77 F.3d 1081, 1083-84 (8th Cir. 1996).

XIV. DUTIES OF TRIAL COUNSEL IN CRIMINAL CASES WITH REGARD TO APPEALS

A. Counsel Who Does Not Wish To Proceed On Appeal.

Trial counsel, whether appointed or retained, shall continue to represent a client on appeal unless relieved of this responsibility by the court of appeals. 8th Cir. Plan § II. The court discourages requests of withdrawal and such motions will not be granted absent unusual circumstances. Additionally, the court will only grant a retained counsel's motion to withdraw if another attorney has entered an appearance for the defendant, or if the motion states another attorney has agreed to represent the defendant with the defendant's consent. 8th Cir. Plan § II. Motions to withdraw must be served on the client and with the clerk. 8th Cir. IOP § II(C)(1) and 8th Cir. Plan § II. Without a written notice to the district court that a prospective appellant in a criminal case does not wish to appeal, trial counsel must enter an appearance, file a timely notice of appeal, and ensure indigent criminal defendants are provided the minimum safeguards necessary to make their appeal adequate and effective. See Smith v. Robbins, S.Ct. 746, 759 (2000).

B. Withdrawal Of Court-Appointed Counsel.

When a convicted defendant wants to appeal and an appointed trial counsel wishes to withdraw, counsel is still responsible for representing the defendant until relieved by the court of appeals. Appointed counsel who wishes to withdraw because he or she believes that the appeal is frivolous must nonetheless file a brief in accordance with Anders v. California, 386 U.S. 738 (1967), along with his or her motion to withdraw. The brief should refer to "anything in the record that might arguably support the appeal." 386 U.S. at 744. See also Evans v. Clarke, 868 F.2d 267 (8th Cir. 1989); Robinson v. Black, 812 F.2d 1084 (8th Cir.). The motion to withdraw must also be served on the client. Trial counsel must enter an appearance, file a timely notice of appeal and prosecute the appeal with diligence until the court grants the motion to withdraw. 8th Cir. IOP § II(C)(1).

The court will only authorize withdrawal for good cause. If counsel was appointed by the district court, counsel must show good reasons for seeking to be relieved. Generally, the court does not look with favor on the substitution of new counsel, unfamiliar with the record and the issues on appeal, because it is likely to result in appellate delay. Moreover, mere distance from the court of appeals is not generally sufficient reason to relieve counsel. Counsel, however, may move to withdraw because of inability to agree with the defendant as to the issues to be argued on appeal or because, after study, counsel finds the appeal is without merit.

If such a motion is granted in the case of an indigent defendant, the court may order the appointment of new counsel from the panel of attorneys maintained by the clerk for that purpose. Compensation will be made under the Criminal Justice Act, 18 U.S.C § 3006A.

No defendant, indigent or otherwise, will be allowed to proceed pro se on a criminal appeal except where there is a clear showing that the defendant insists upon doing so after having been advised of his or her constitutional right to counsel. If a defendant does so insist, trial counsel must advise the defendant of the requirements concerning the filing of his or her own brief.

C. Proceeding In Forma Pauperis.

If the defendant lacks funds to pay his previously retained attorney for the appeal, the attorney should file a motion with the district court requesting leave to appeal in forma pauperis. If denied, the motion may be renewed in the court of appeals. If the motion is granted, counsel may proceed without further application to the court of appeals. Fed. R. App. P. 24. The court of appeals may then appoint counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

D. Perfecting The Appeal.

1. Defendant's trial counsel, either appointed or retained, shall represent the defendant on appeal unless relieved by the court of appeals. Only

in unusual circumstances will a motion to withdraw be granted. 8th Cir. Plan § II. To prepare the record, the district court clerk shall order the transcript from a court reporter within two (2) working days after the notice of appeal is filed, unless the transcript was ordered earlier, or appellant's counsel informs the clerk that the transcript or sections of it are not needed for the appeal. 8th Cir. Plan § III(A)(1)(a). If transcripts from any other proceedings are necessary for the appeal, counsel must notify the clerk and the clerk will order the transcripts from the court reporter. Counsel shall arrange for the costs of the transcript with the court reporter unless the appeal is in forma pauperis. See Fed. R. App. P. 10(b). If the appeal is in forma pauperis, appellant's counsel shall file CJA Form 24 for government payment of transcript costs when notice of appeal is filed with the district court clerk.

2. Counsel must file a timely notice of appeal and pay the $105.00 filing and docketing fee to the district court clerk unless defendant has been granted leave to proceed in forma pauperis. Fed. R. App. P. 3(e).

3. The record shall be prepared and indexed by the district court clerk. This record shall include: (1) the transcript; (2) the notice of appeal; (3) the docket entries; (4) the indictment or information; (5) any district court memorandum opinions; (6) the judgment and sentence; and (7) the presentence investigative report and sentencing transcript (if the appeal is from the sentence of the district court). 8th Cir. Plan § III(A)(1)(b). Counsel is not required to prepare and file a designation of the record. Within seven (7) days after notice of the appeal is filed, appellant's counsel may request supplementation of the record on appeal from the district court clerk. Appellee's counsel may make a similar request to supplement the record within 14 days after the notice of appeal is filed. 8th Cir. Plan § III(A)(1)(b).

4. Counsel must insure the timely transmission of the record to the court of appeals. Fed. R. App. P. 11(a).

5. Counsel must file an appearance as soon as possible, 8th Cir. IOP § II(B), and must file five (5) copies of a Corporate Disclosure Statement within ten (10) days after receipt of notice that the appeal has been docketed. 8th Cir. R. 26.1A.

E. Counsel's Obligation To File A Writ Of Certiorari To United States Supreme Court.

Under amendments to the Plan to Implement the Criminal Justice Act, representation by counsel on appeal extends to advising the defendant of the right to file a petition for writ of certiorari in the United States Supreme Court, and informing the defendant of counsel's opinion as to the merits and the likelihood of success. If the defendant requests a petition be filed and counsel determines there is a reasonable likelihood that a writ of certiorari will be granted, counsel must prepare and file such a petition. If counsel determines that there is no reasonable likelihood of success and the defendant insists that a petition be filed, counsel should inform the court and file a written notice to withdraw, accompanied by a certification that a copy of the motion to withdraw was furnished to the defendant. If the motion to withdraw is granted, counsel shall inform the defendant of the process for filing a pro se petition for a writ of certiorari; after which counsel's representation may be terminated.

XV. DISMISSAL OF ANY TYPE OF APPEAL

A. Voluntary Dismissal.

If an appeal has not been docketed, it may be dismissed by the district court on stipulation or upon motion and notice by the appellant. Fed. R. App. P. 42(a). Once

docketed in the court of appeals, the district court loses jurisdiction to dismiss the appeal. After the appeal is docketed, the court of appeals may dismiss the appeal on the stipulation of all parties or on motion of appellant, in accordance with Fed. R. App. P. 42(b). The stipulation or motion should state who is to bear the costs on appeal. Fed. R. App. P. 42(b). If the appeal is from a criminal conviction, the defendant must personally sign a written consent to the dismissal. 8th Cir. IOP § III(C).

B. Dismissal For Failure To Perfect Appeal.

The clerk is authorized to dismiss the appeal if the appellant fails to comply with the Federal Rules of Appellate Procedure or the Eighth Circuit Rules. If the appellant is not in compliance, the clerk shall notify the appellant that the appeal will be dismissed for want of prosecution unless the default is remedied within 15 days. 8th Cir. R. 3C. The only remedy for a default after an appeal is dismissed under this rule is an order of the court. The court also has authority to take disciplinary action against defaulting counsel in addition to dismissal of the appeal. 8th Cir. R. 3C; Fed. R. App. P. 46(c).

XVI. HOW AN APPEAL IS TAKEN

The Federal Rules of Appellate Procedure regulate the means of access to a United States Court of Appeals, whether by appeal from a district court as a matter of right or with permission or allowance; by appeal from the United States Tax Court; by petition to review or enforce an administrative determination; or by an original proceeding. Fed. R. App. P. 1. The parties on appeal are designated as they appeared in the district court. Depending upon the type of appellate proceeding, the party commencing the appeal is the "appellant" or "petitioner" and the adversary is the "appellee" or "respondent." In an application for review or enforcement of an agency order, the agency must be named as a respondent. Fed R. App. 15(a). A petition for a writ of mandamus or writ of prohibition against any federal judge, bankruptcy judge or federal magistrate under Fed. R. App. P. 21

shall be entitled: In re *(name)*, Petitioner. The caption shall not contain the name of the judge.

A. Appellate Jurisdiction.

Counsel should check to make sure that the court of appeals has jurisdiction to handle the appeal. Common errors include appealing a conviction before sentencing, appealing an order which is not final as to all parties and all claims, and appealing a decision in which no judgment has been entered. See supra, Section V.

B. Civil And Criminal Appeals From The District Court As A Matter Of Right.

The appellate process commences with the timely filing of a notice of appeal with the clerk of the district court. Fed. R. App. P. 3(a). The notice of appeal, in either the caption or body, must state the court to which the appeal is taken, designate the judgment or order appealed from and name each party taking the appeal. Fed. R. App. P. 3(c). See Form 1, Appendix of Forms to Fed. R. App. P. However, an attorney representing more than one party may fulfill the rule's requirements by describing those parties with such terms as "all plaintiffs," "defendants," or the "plaintiffs A, B, et al." Fed. R. App. P. 3(c). For appeal of a class action, it is sufficient for the notice of appeal to name one person qualified to bring the appeal as a representative of the class whether or not the class has been certified. Id. In all civil cases except cases brought under 28 U.S.C. §§ 2241, 2254, or 2255, the appellant shall complete an Appeal Information Form (Form A). The appellant shall submit the Appeal Information Form with the notice of appeal to the clerk of the district court and serve a copy on the appellee. 8th Cir. R. 3B. Within three (3) days of receiving service of Form A, the appellee may file and serve a supplemental statement (Form B). 8th Cir. R. 3B. Forms A and B may be obtained from any clerk of the district courts, the clerk of the court of appeals or downloaded from the court of appeals's web site.

The clerk of the district court will notify the other parties by mail that a notice of appeal has been filed and will forward the notice of appeal (together with a certified copy

of the district court docket sheet) to the clerk of the court of appeals. Fed. R. App. P. 3(d). The better practice, however, is to serve the notice of appeal on opposing counsel.

C. Bond For Costs On Appeal In Civil Cases.

The district court may require an appellant to file a bond or provide other security to ensure payment of costs on appeal. Fed. R. App. P. 7. A supersedeas bond may include payment for these costs.

D. Appeals By Permission From Interlocutory Orders Of The District Court Under 28 U.S.C. § 1292(b).

The petition for permission to appeal must state the controlling question of law which is being appealed, the facts necessary to understand the question, the reasons why there is substantial ground for difference of opinion, the relief sought, and the reasons why an immediate appeal may materially advance the ultimate disposition of the case. The order appealed from must be included with the petition, as well as any findings, conclusions, or opinion related to it, and order stating the district court's permission to appeal or finding that the necessary conditions are met. Fed. R. App. P. 5(b). Petitioner has ten (10) days in which to file an appeal from any order containing the statement prescribed by 28 U.S.C. § 1292(b). Fed. R. App. P. 5(a), 28 U.S.C. § 1292(b). No docketing fee is required at that time. The adverse party may answer the petition within seven (7) days. Unless otherwise ordered by the court, the petition and answer are submitted without oral argument. Fed. R. App. P. 5(b).

Neither the petition nor the answer may exceed 25 pages and both must comply by Fed. R. App. P. 32(a)(4),(5), and (6). 8th Cir. R. 5A. If permission to appeal is granted, a notice of appeal need not be filed. Fed. R. App. P. 5(d). However, the docketing fee must then be paid to the district court clerk and the bond for costs on appeal, if required, must be filed. Both must be done within ten (10) days after entry of the order granting permission to appeal. Transmitting the record and docketing the appeal then proceed as in other civil appeals. Fed. R. App. P. 5(d). The time for docketing the record runs from the date of the order of the court of appeals granting permission to appeal. That order is, for procedural purposes, analogous to a notice of appeal.

E. Bankruptcy Appeals.

Pursuant to 28 U.S.C. § 158(a), final judgments and orders of bankruptcy judges are appealable to the bankruptcy appellate panel or federal district court "for the judicial district in which the bankruptcy judge is serving." The district court's or bankruptcy appellate panel's decision on the appeal may be further appealed to the Eighth Circuit. See 28 U.S.C. § 158(d); Fed. R. App. P. 6.

F. Review Of Decisions Of The United States Tax Court.

A notice of appeal and a $100.00 appellate docketing fee are filed in person or by mail, with the clerk of the tax court in Washington, D.C., within the 90 or 120 days prescribed by Fed. R. App. P. 13(a) and (b). The clerk mails the other parties a copy of the notice of appeal. Fed. R. App. P. 13(c). The content of the notice of appeal is the same as in appeals from district courts. See Form 2, Appendix of Forms to Fed. R. App. P. The tax court clerk sends a copy of the notice of appeal and docket entries to the clerk of the court of appeals who dockets the appeal. Fed. R. App. P. 13(d).

G. Review Of Orders Of Certain Administrative Agencies, Boards, Commissions, Or Officers.

Review of administrative decisions is taken by filing a petition for review, as prescribed by the applicable statute, with the clerk of the court of appeals. Fed. R. App. P. 15(a). The petition shall name each party seeking review in the caption or body of the petition. Use of "et al.", "petitioners" or "respondents" is not sufficient. Id. The form of petition for review is similar to that of a notice of appeal. See Form 3, Appendix of Forms to Fed. R. App. P. The respondent is the appropriate agency, board, or officer, as well as the United States, if so required by statute.

1. Number of copies and Service of Petition: The original petition for review and a copy for each respondent is filed with the clerk of the court of appeals. Payment of any fees established by statute and the $100.00 docketing fee to the clerk of the court of appeals, as

prescribed by 28 U.S.C. § 1913, is required at the time of the filing of the petition for review. Fed R. App. P. 15(e). The clerk serves each respondent with a copy of the petition, but the petitioner must serve a copy on all other parties to the administrative proceeding and file with the clerk a list of those so served. Fed. R. App. P. 15(c).

H. Enforcement Of Orders Of Certain Administrative Agencies.

When a statute provides for enforcement of administrative orders by a court of appeals, an application for enforcement may be filed with the clerk of the court of appeals. Fed. R. App. P. 15(b). The clerk serves the respondent with a copy of the application, but the petitioner must serve a copy on all the other parties to the administrative proceeding and file a list of those so served with the clerk. Fed. R. App. P. 15(c). No docketing fee is paid by a governmental agency. A cross-application for enforcement may be filed by the respondent to a petition for review if the court has jurisdiction to enforce the order. Fed. R. App. P. 15(b). The cross-application is filed and docketed as a separate action and payment of a separate docketing fee is required. If feasible, the matters will be consolidated and heard as one appeal.

1. Contents and number of copies of application for enforcement; answer required: An application for enforcement must contain a concise statement describing the proceeding in which the order sought to be enforced was entered, the facts upon which venue is based, and the relief requested. Fed. R. App. P. 15(b). The original and a copy for each respondent are filed with the clerk of the court of appeals. Fed. R. App. P. 15(c). At least an original and three (3) copies should be filed. The respondent must serve and file his answer with the clerk within 20 days; otherwise, judgment will be awarded for the relief requested. Fed. R. App. P. 15(b).

I. Original Proceedings.

An application for writ of mandamus or writ of prohibition directed to a judge, or a petition for other extraordinary writ, is commenced by filing an original and three copies of a petition with the clerk of the court of appeals. The petition for the writ shall not bear the name of the judge. It shall be entitled In re *(name)*, Petitioner. Fed. R. App. P. 21. Proof of service is required on the trial-court judge or judges and all parties to the action in the trial court. Fed. R. App. P. 21(a). The papers may be typewritten. Fed. R. App. P. 21(d). The clerk will not docket the proceeding and submit the petition to the court until the prescribed docket fee has been paid. Fed. R. App. P. 21(a). Applications for extraordinary writs shall comply as much as is practicable to the procedure for writs of mandamus and prohibition. Fed. R. App. P. 21(c).

1. Contents of the petition; no record required: The petition must contain a statement of the issues and a statement of the facts necessary to understand the issues, the relief sought, and the reasons why the writ should issue. Copies of any opinion or order or other necessary parts of the record essential to understanding the issues must also be included. Fed. R. App. P. 21(a).

2. Further proceedings: Within 15 days of filing or as the court directs, the court shall either dismiss the petition or direct an answer be filed. 8th Cir. R. 21A. The clerk serves the order calling for an answer on the judge or judges named as respondents and on all parties to the action in the trial court. Fed. R. App. P. 21(b). All parties other than petitioners are deemed respondents for all purposes. Ordinarily, the party which stands to benefit by the challenged order of the respondent judge will assume the burden of proceeding on behalf of the respondent. Answers filed by respondents must also, of course, be served on petitioners. The court generally will then decide the petition on its merits. Occasionally, however, briefs may subsequently be requested and oral argument even may be scheduled.

XVII. Habeas Corpus Appeals.

The law of habeas corpus is complex and constantly changing, and even the briefest survey of the area is beyond the scope of this handbook. There are a number of multi-volume treatises covering the area, and any attorney appointed to handle a habeas case should begin by consulting one of them, such as James S. Liebman, et al. Federal Habeas Corpus Practice and Procedure (3rd ed. 1998). Counsel should also review the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d) (Supp. 1999) and Fed. R. App. P. 22.

A. Appeals From Orders In A Prisoner's First Habeas Corpus Or Section 2255 Proceedings.

1. Initiating an Appeal. With one key exception, described below in Section 2, both section 2254 habeas corpus appeals by state prisoners and section 2255 motions by federal prisoners are treated as standard civil appeals. The appeal is initiated by filing a notice of appeal with the district court clerk within 30 days of entry of the final judgment or order in the matter. The Prison Litigation Reform Act of 1996, 28 U.S.C. § 1915, does not apply to habeas appeals, and a prisoner who had proceeded in forma pauperis in the district court proceedings may take an appeal without complying with the procedures imposed by that Act. If the prisoner did not have in forma pauperis status, counsel should file a motion for permission to proceed in forma pauperis at the time the notice of appeal is filed; the motion is filed with the district court clerk. See Fed. R. App. P. 24(a). If leave to proceed in forma paupers is denied or revoked by the district court, an application for in forma pauperis status may be filed with the Court of Appeals clerk's office after the appeal is docketed.

2. Certificate of Appealability. The key difference between a habeas appeal and other civil appeals is that before a habeas appeal can proceed, the prisoner must obtain a certificate of appealability by making a "substantial showing of the denial of a constitutional

right." See 28 U.S.C. § 2253(c)(2). The requirement of obtaining a certificate of appealability applies to appeals by state prisoners under 28 U.S.C. § 2254 and federal prisoners under 28 U.S.C. § 2255. Unless the district court or the court of appeals grants a certificate of appealability, the appeal will be dismissed for lack of jurisdiction.

While there was some doubt after AEDPA was first passed as to whether the application for a certificate of appealability should be filed with the district court or the court of appeals, that issue is now settled in the Eighth Circuit, and the application should be first addressed to the district court. See Tiedeman v. Benson, 122 F.3d 518 (8th Cir. 1997). Neither the statute nor the Federal Rules indicate when the application should be filed, but the best practice is to file the application either with the Notice of Appeal or very shortly after it is filed. In the event no application is filed, the appeal will be processed and transmitted to the court of appeals, and the court of appeals will treat the notice of appeal as an application for a certificate of appealability. See Fed. R. App. P. 22(b)(2).

Under AEDPA, the court of appeals can only consider issues for which a certificate of appealability has been granted, so counsel's application should be detailed and specific as to the issues sought to be raised; a memorandum in support of the application is also recommended. In the event the district court denies the application or limits it to certain issues, the appellant may ask the court of appeals to either grant or expand the certificate. Fed. R. App. P. 22(b)(1). If the district court denies the certificate or limits the issues, the court must state the reasons for its action in writing. See Fed. R. App. P. 22(b)(1).

No certificate of appealability is required for an appeal by the government. See Fed R. App. P. 22(b)(3). However, a cross-appeal by the prisoner is subject to the requirement of the certificate of appealability.

3. Appointment of Counsel. Whenever a certificate of appealability is issued, the court of appeals will appoint counsel under the Criminal Justice Act, 18 U.S.C. § 3006A (1994), to represent the prisoner. No motion is required in order for counsel to be appointed, unless the prisoner was previously represented by retained counsel and now has

no funds to pursue the appeal. In such a case, an application for leave to proceed in forma pauperis should be filed with the district court; upon the district court's finding of indigence, the court of appeals will appoint counsel.

Generally, district court counsel will be appointed to the case unless there is some satisfactory reason why that should not occur. The court will also appoint counsel to represent the prisoner when the government appeals.

4. The Appeal. As stated above, habeas appeals are treated as regular civil appeals after the certificate of appealability is granted. A regular civil briefing schedule will be established, calling for the filing of appellant's brief in forty (40) days; appellee's brief will be due thirty (30) days thereafter and appellant's reply brief fourteen (14) days after the service of appellee's brief. An appendix is required as the record on appeal; counsel may proceed by joint appendix or separate appendices. See 8th Cir. R. 30A(b). If evidence was taken by the district court, a transcript should be ordered promptly. See Fed. R. App. P. 10.

Fed. R. App. P. 23 governs transfer of a prisoner and motions for release pending appeal. Any such motions will be referred to a three-judge panel for review. See 8th Cir. R. 27B(d).

B. Second Or Successive Habeas Corpus Proceedings, Including Death Penalty Cases.

The procedures governing second and successive habeas corpus petitions were dramatically altered by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. Before a prisoner can file a second or successive habeas petition, he must file with the court of appeals an application for permission to do so. Unless the application is granted, a second or successive habeas petition cannot be filed with the district court. Any second or successive habeas petition filed in the district court without permission will be dismissed. The court of appeals' function in this process is often referred to as a "gatekeeper role."

While the law governing the issuance of permission to file successive habeas petitions is still evolving, it is clear from the language of the statute that "[a] claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed." See 28 U.S.C. § 2244(b)(1). With respect to new claims not previously litigated, AEDPA adopted narrow standards for the courts of appeals' review of the application and for district courts' review of petitions allowed by the court of appeals. See 28 U.S.C. § 2244(b)(2). A discussion of these standards is beyond the scope of this handbook, and counsel should review the applicable statutory sections and the developing case law. This section will concentrate on the procedures followed in presenting and deciding applications for permission to file successive habeas petitions.

1. The Application for Permission to File a Second or Successive Habeas Petition. In an attempt to assure that the applications it receives are complete and that the process it follows is efficient, the Eighth Circuit has adopted 8th Cir. R. 22B setting out the contents of the application. The rule applies to both state prisoner habeas petitions under section 2254 and federal prisoner motions under section 2255. Under the provisions of 8th Cir. R. 22B, the application must provide:

(1) the grounds for relief;

(2) if available, the filing dates, captions, case numbers and courts where all prior habeas corpus or section 2255 motions and appeals were filed;

(3) the outcome of all former proceedings.

The rule requires the clerk to serve a copy of the application on the appropriate state attorney general or U.S. Attorney. The attorney general or U.S. Attorney must file a response within 15 days of receipt of the application from the clerk. The response must include:

(1) a brief response to the grounds for relief;

(2) any information about prior cases which the prisoner may have omitted; and

(3) copies of final orders and memorandum opinions in any prior habeas proceedings or section 2255 motions filed by the prisoner.

Upon receipt of the government's response, the application and the response are referred to a three-judge panel for a decision as to whether "the application makes a prima facie showing that the application" satisfies AEDPA's standards for the filing of a successive habeas petition. See 28 U.S.C. § 2244(b)(3)(B) and (C). The court has thirty (30) days to review the application and issue its ruling. See 28 U.S.C. § 2244(b)(3)(D).

2. Further Proceedings.

In the event the court grants the application, the movant files the petition as approved with the district court. The district court will then review each claim to see if it satisfies AEDPA's substantive standards. See 28 U.S.C. § 2244(b)(2). In the event that the court of appeals denies the application, the movant cannot file a petition for rehearing. See 28 U.S.C. § 2244(b)(3)(E). While some commentators suggest that the language barring petitions for rehearing does not bar petitions for rehearing en banc, the Eighth Circuit does not accept either petitions for rehearing or rehearing en banc. The movant's sole remedy is to seek an original writ from the Supreme Court of the United States. See Felker v. Turpin, 518 U.S. 651 (1998).

C. Death Penalty Matters.

1. Generally. The states in the Eighth Circuit, as a general rule, do not set execution dates before the completion of federal court proceedings (including certiorari proceedings in the Supreme Court of the United States) in a state prisoner's first habeas. This means there is usually no need for emergency stay motions or unusual briefing schedules in first habeas proceedings in capital cases. Once an execution date has been set following the completion of the first habeas, the attorney general is required to notify the clerk of the impending execution. See 8th Cir. R. 22A(a). This notification usually takes place approximately thirty (30) days in advance of the execution date and triggers the provisions of the Eighth Circuit's local rule.

Death penalty proceedings are closely monitored by the clerk of the court, who has personal responsibility for tracking the cases and coordinating counsel's and the court's activity. See 8th Cir. R. 22A(a). When contacted by the clerk, counsel should be prepared to discuss litigation plans in a full and frank fashion so that the court can be prepared to handle any emergency. Information received from counsel is treated as confidential. Counsel are also urged to make their filings as early as possible. The court will not tolerate delay for the sake of tactical advantage, and the court has worked around the clock to issue its rulings on a timely basis. The clerk requires facsimile transmission of documents in death penalty matters, and counsel should obtain fax numbers from the clerk; counsel should also provide the clerk with their fax numbers, office and home numbers, pager numbers, etc. See 8th Cir. R. 22A(b). Counsel should note that the rule requires them to serve opposing counsel by fax (or overnight or hand-delivery when the size or nature of the pleading makes fax impractical). See 8th Cir. R. 22A(b).

2. Second or Successive Habeas in Capital Cases. Once an execution date has been set, counsel should determine whether there are grounds for filing an application for permission to file a successive habeas. In connection with such an application, counsel should review the section above dealing with successive habeas applications. In addition to the information required by 8th Cir. R. 22B(a), the court also requires counsel to provide the clerk with a list of all pending litigation in state or federal court; this information permits the court to monitor parallel last-minute litigation.

A motion for stay of execution should be prepared and filed as a separate document. See. 8th Cir. R. 22A(d).

The Attorney General should be prepared to respond promptly to all filings. The court will not automatically wait for replies to responses to be filed before taking action on last-minute pleadings; if counsel intend to file a reply, they should contact the clerk so that the information can be passed along to the panel considering the matter. The clerk will fax all rulings and opinions to counsel and the United States Supreme Court clerk's office.

Other challenges, such as 28 U.S.C. Section 1983 actions, are common in death penalty litigation and may proceed in parallel with successive habeas applications. The

court's local rule requires prompt notice of the filing of such other challenges. See 8th Cir. R. 22A(f). Counsel should fax informational copies of the documents to the clerk's office at the time they are filed with the district court clerk. The clerk will maintain contact with the district court to monitor the progress of the case and to obtain any rulings.

XVIII. DOCKETING, APPEARANCE, CERTIFICATE OF INTEREST AND DOCKETING CONFERENCE.

A. Docketing: Fees And Filing.

Unless granted leave to appeal in forma pauperis, an appellant must pay a $105.00 filing and docketing fee to the district court clerk when filing the notice of appeal. Fed. R. App. P. 12(a) requires that the appeal be immediately docketed upon receipt from the district court of copies of the notice of appeal and the district court docket entries. At that time, the matter is assigned a general docket number, in numerical sequence and with no relation to the district court number that had been assigned to the case. All subsequent filings in the court of appeals must bear that new docket number.

B. Appearance.

The clerk's office must be informed of the names, addresses and phone numbers of the attorneys participating in an appeal. 8th Cir. IOP § II(B). Counsel representing a party on appeal may either enter an appearance with a form supplied by the clerk's office or by a letter. The clerk will send forms to all counsel identified from the district court in the notice of appeal; the appearance form is also available on the court's web site. The appeal form should be returned immediately to the clerk and should contain individual names rather than firm names. An entry of appearance assures that counsel will receive notification of court actions. 8th Cir. IOP § II(B).

C. Corporate Disclosure Statement.

Within ten (10) days after receipt of notice that the appeal has been docketed, each nongovernmental corporate party must furnish five (5) copies of a Corporate Disclosure Statement to the Clerk. 8th Cir. R. 26.1A. Statements shall identify all parent corporations and list any publicly held company that owns 10% or more of the party's stock.

The corporate disclosure statement is also required in the party's brief before the table of contents. Fed. R. App. P. 26.1(b).

D. Prehearing Conference Program.

The Eighth Circuit Prehearing Conference Program is a voluntary program which provides parties an opportunity to explore settlement and to clarify particular issues. 8th Cir. IOP § I(C)(2). (The following cases are not eligible for the Preconference Hearing Program: petitions for postconviction relief; social security cases; cases dismissed below for lack of jurisdiction; interlocutory appeals certified under 28 U.S.C. § 1292(b); cases appealed under 28 U.S.C. § 1292(a)(1); and federal income tax cases. 8th Cir. R. 33A.) In any civil appeal included in the program, a conference to review, limit or clarify the issues on appeal or to discuss settlement will be promptly conducted by the director of the program, a lawyer with extensive background in mediation and negotiation, or by a senior judge on special assignment by the chief judge. 8th Cir. R. 33A. The conferences are held in Little Rock, St. Louis, and St. Paul. In other areas of the circuit, the conferences are conducted primarily by telephone. 8th Cir. IOP § I(C)(2).

Counsel participating in the program must specify the nature of the case and the issue raised on appeal. The director or senior judge who conducts the conference may request additional materials, including citations, district court briefs and memoranda of law. The director or senior judge do not have appellate briefs available to them and do not have immediate access to the trial court's files. 8th Cir. IOP § I(C)(2).

If settlement appears possible after the initial conference, the director or senior judge who conducts the conference may continue settlement efforts. Although a short extension of the briefing schedule may be arranged with the clerk, participation in the program normally does not delay the briefing schedule. 8th Cir. IOP § I(C)(2).

All settlement materials and settlement-related negotiations are maintained in confidence by the director or the senior judge who conducts the conference. 8th Cir. R. 33A(c). A judge who considers the appeal on its merits does not have access to settlement materials except as agreed by the parties. 8th Cir. R. 33(A)(c); 8th Cir. IOP § I(C)(2).

XIX. RECORD ON APPEAL

A. Introduction. The record on appeal consists of the transcript of the proceedings (if there were recorded proceedings), any exhibits which were introduced into evidence and the pleadings and orders filed in the district court (often called the original file of the district court). Each of these is treated in the following sections.

B. Ordering And Filing The Transcript.

Within ten (10) days after filing the notice of appeal, appellant must order from the court reporter the parts of the transcript not already on file that appellant deems will be needed on appeal. Fed. R. App. P. 10(b); If electronic recording was used in the district court, the transcript should be ordered from the district court clerk. 8th Cir. § IOP III(H)(1). Failure to comply with these responsibilities can result in dismissal of the case. See Fed. R. App. P. 3(a)(2); 8th Cir. R. 3C. The appellee must file and serve a designation of additional parts to be transcribed within ten (10) days after appellant serves the transcript order. 8th Cir. IOP § III(H)(1).

If the transcript cannot be completed by the court reporter within thirty (30) days from the receipt of the appellant's order, the reporter must request an extension of time from the court of appeals. 8th Cir. IOP § III(H)(2); Fed. R. App. P. 11(b).

Generally, failure to provide a transcript of trial proceedings waives claims concerning trial error, findings of fact or sufficiency of the evidence. See Fed. R. App. P. 10(b)(2); Van Treese v. Blome, 7 F.3d 729 (8th Cir. 1993).

C. Transcription Fees.

Before ordering the necessary parts of the transcript, a party proceeding in forma pauperis must obtain authorization from the court. If a certificate of appealability has been granted in a direct criminal appeal or a state or federal habeas corpus case, the district court or the court of appeals will authorize only the requested parts of the transcript that are necessary to the case on appeal. 8th Cir. IOP § III H(3). A request for transcript in a case covered by the Criminal Justice Act is made by filing CJA Form 24. Id.

The court of appeals can order a transcript in a civil case prepared at public expense under 28 U.S.C. § 753(f).

D. Exhibits.

Each district court determines by local rule or practice whether trial exhibits are retained by the district court clerk's office or returned to counsel at the close of the proceedings. For purposes of the record on appeal, 8th Cir. R. 10A requires appellant to ensure that *all* trial exhibits, or copies, are submitted to the clerk no later than the filing of appellant's opening brief. If the exhibits were retained by the district court clerk, appellant's counsel must contact the district court clerk and request that the exhibits be transmitted to the court of appeals clerk. If the exhibits were released, then appellant's counsel must prepare and file one copy of a separate appendix of the exhibits at the time counsel files the opening brief. In appeals where one of the parties is pro se, the clerk of the district court must transmit the exhibits, and no separate appendix is required from the pro se party or counsel. The local rule makes an exception for physical exhibits, unless they are referred to in the brief and their examination would aid the court in understanding the issues. See 8th Cir. R. 10A(b).

E. The Appendix.

In cases in which there were no trial proceedings, the documents in the original file of the district court are the key components of the record on appeal. In pro se cases, the clerk of the court of appeals receives the entire file of the district court, and the panel assigned to decide the case will review this original file in their deliberations. In criminal cases, the court has directed that the clerk of the district court should prepare three (3) copies of a clerk's record of specified items, together with any additional items counsel wish to have included. See Section III(A)(1)(b) of the Eighth Circuit Plan to Expedite Criminal Appeals (1991). The three (3) copies are then transmitted to the clerk of the court of appeals for the court's use as the record on appeal.

In attorney-handled civil cases, however, the court proceeds by the appendix method of preparing the record on appeal. This has several advantages for counsel and the courts, including: (1) it relieves the district court clerk of the responsibility of copying the district court file, (2) it is cheaper for counsel and the parties because counsel may make the copies (either in their offices or through a copy service) from their own file copies, (3) it prevents delays caused by the inability of the district court clerk's offices to make the necessary copies on a timely basis, and (4) it tends to result in a smaller record on appeal. The court gives counsel two primary alternatives for designating and preparing the appendix - the joint appendix and separate appendices.

1. Joint Appendix. When the clerk establishes a briefing schedule at the time a civil case is docketed, the schedule will include dates for designating the record and filing a joint appendix. If appellant's counsel chooses to proceed by joint appendix, within ten (10) days after receiving the briefing schedule, counsel should prepare a designation of record, listing in chronological order all of the district court pleadings and orders counsel believes are relevant to the issues to be raised in the appeal. See Fed. R. App. P. 30(b)(1). Generally, counsel should consult a copy of the district court docket sheets to assure that no important documents are overlooked. Counsel should name the document, at a minimum, by the title of the pleading; it is a good practice to also provide the district court docket number for the pleading, as well as its filing date. The court discourages counsel from designating trial briefs and other memoranda of law (unless the issue on appeal is whether a certain issue or argument was raised in the district court). See Fed. R. App. P. 30(a)(2).

Appellant's counsel serves this designation of the relevant pleadings on the clerk of the court of appeals and all other counsel in the case. Upon receipt of appellant's designation of record, appellee's counsel has ten (10) days to prepare a counter-designation of any additional items appellee's counsel feels need to be included to provide a complete picture of the district court proceedings. See Fed. R. App. P. 30(b)(1). If appellee feels the designation prepared by appellant is adequate, appellee may send appellant's counsel and the clerk of the court of appeal a letter accepting the designation. If appellee's counsel

counter-designates additional record materials, this supplemental list should be served on all counsel and the clerk of the court of appeals.

Appellant's counsel should take the designation and counter-designations and prepare a master list, in chronological order, of all of the documents to be included in the joint appendix. See Fed. R. App. P. 30(b)(1). Appellant's counsel should then prepare copies of each item and compile them into the joint appendix. The appendix should be indexed and consecutively paginated. Three (3) copies of the joint appendix are filed with the clerk of the court of appeals at the time appellant files the opening brief. See 8th Cir. R. 30A(b)(2). One copy of the appendix should be served on counsel for each party separately represented. See Fed. R. App. P. 30(a)(3).

Appellant must pay the cost of producing the joint appendix. See 8th Cir. R. 30A(c). However, appellee must advance the cost of including parts of the record appellee designates if the appellant deems them unnecessary to the issues. If appellee prevails on the appeal, the costs appellee advances are recoverable. See 8th Cir. R. 30A(c).

2. Separate Appendices. Appellant may dispense with the process of preparing a joint appendix and choose the separate appendix method. The main benefits of separate appendices are: (1) they eliminate the designation and counter-designation process and any disputes as to whether a document should be included in the joint appendix, and (2) counsel can wait until their briefs are complete before deciding what goes into the separate appendices, thereby eliminating documents which they might have included out of an abundance of caution during the joint appendix designation process. The court does not have a preference for joint or separate appendices.

If appellant's counsel decides to choose the separate appendices method, counsel must send a letter to opposing counsel and the clerk within fourteen days of filing the notice of appeal; designations of individual record items are not exchanged. See 8th Cir. R. 30A(b)(3). Appellant's counsel files three copies of appellant's separate appendix at the time appellant's brief is filed; one copy is served on counsel for each party separately represented.

Appellee files its separate appendix (assuming any additional record items are needed) at the time counsel files the appellee's brief. Again, three copies are filed with the clerk of the court of appeals, and one copy is served on counsel for each party separately represented. See 8th Cir. R. 10A(b)(3). All separate appendices should be indexed and consecutively paginated. See 8th Cir. R. 30A.(b)(3).

3. Supplemental Appendices. If the parties conclude after the opening briefs are filed that relevant materials have been omitted from either the joint appendix or the separate appendices, they may agree to file a joint supplemental appendix. See 8th Cir. R. 30A(b)(4). If the parties cannot agree, either party may file a motion asking the court to direct the district court to transmit additional parts of the record. See 8th Cir. R. 30A(b)(4). Alternatively, either party can prepare a supplemental appendix containing the documents and submit it to the clerk of the court of appeals, together with a motion for permission to file the appendix.

4. Deferred Appendix. While Fed. R. App. P. 30(c) provides that the court of appeals may, either by rule or order, permit the parties to defer filing a joint appendix until after all briefing has been completed, the court has not adopted such a rule and rarely permits the parties to file a deferred appendix.

5. Failure to Include Materials in the Appendix. The entire district court original file is considered part of the record on appeal, and counsel will not be penalized for failing to include a district court pleading or order in the appendix, nor will an issue be considered waived. See Fed. R. App. P. 10(a). In the event the court determines that it needs to review additional documents in a case under submission, the panel will direct the clerk to contact the district court clerk and obtain the documents. The purpose of this policy is to encourage counsel to file concise appendices, and counsel should attempt to pare the record to only those pleadings and orders they believe the court will need to resolve the issues on appeal.

6. Joint Statement of the Record. In the event a record is lost or if a case is unusually simple, Fed. R. App. P. 10(d) provides that the parties may prepare a written statement of the case showing how the issues presented in the appeal arose and how they were decided. The district court may then approve the statement and certify it to the court of appeals. This method of record preparation is seldom used.

7. Format and Contents of the Appendix. All appendices should have a white cover containing the name of the court, the case number, the caption of the case, the appendix type (e.g., "Joint Appendix" or "Appellant's Separate Appendix") and the names, addresses and phone numbers of counsel. See Fed. R. App. P. 30(d) and 32(b). The appendix should begin with a table of contents identifying the page at which each separate document begins. See Fed. R. App. P. 30(d). The lower court docket entries should follow the table of contents. Other relevant documents should follow in chronological order. The Eighth Circuit discourages counsel from including the transcript in the appendix.

F. Composition And Transmission Of Administrative Agency Records.

Within 40 days of the filing of the petition for review or application for enforcement (unless the statute authorizing review fixes a different time), the agency must transmit the record, or a certified list of what is included in the record, to the court of appeals. Fed. R. App. P. 17(a) and (b). The record on review consists of the order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence, and other parts of the proceedings before the agency. Fed. R. App. P. 16(a). The parties may stipulate that less than the entire record be transmitted to the court of appeals. Fed. R. App. P. 17(b). The record may be corrected or supplemented by stipulation or by order of the court of appeals. Fed. R. App. P. 16(b). The NLRB usually follows this latter procedure. The parties may also stipulate to dispense with the filing of the record or the certified list. Fed. R. App. P. 17(b). However, where the record itself is not filed, the appendix must contain a copy of the parts of the record the court will need to

review the case. Three (3) copies of the administrative agency record in social security appeals must be filed. 8th Cir. R. 30A(a)(1).

XX. WRITING A BRIEF

The judges must rely on the opposing advocates to state the facts of record, point out the applicable rules of law, and make the court aware of the equities of a particular case. Most appeals are decided largely on the basis of the briefs.

In writing the brief, counsel must bear in mind that when the brief is read in advance of oral argument, as in the Eighth Circuit, it is the first and most important step in persuasion. After oral argument, the brief is usually reexamined by the judges and will be used in the writing of the opinion.

In general, briefs should contain all that the judges will want to know, including references to anything in the record or in the precedents. Fed. R. App. P. 28(a) sets forth specifically the appropriate subdivisions of a brief. These requirements are supplemented by 8th Cir. R. 28A, and 30A. A summary of the required brief contents is contained in Table B.

A. Appellant's Brief:

An appellant's brief should contain the following:

1. A summary of the case and a request for or waiver of oral argument. 8th Cir. R. 28A(f).

2. Corporate Disclosure Statement (if required). Fed. R. App. P. 28(a)(1); 8th Cir. R. 26.1A(a).

3. Table of Contents. The table of contents should contain argument headings in full, with the page number on which each argument begins. Fed. R. App. P. 28(a)(2).

4. Table of Authorities. This table should contain alphabetically arranged cases, statutes, and other authorities. This table should include page references in the brief for each citation. Fed. R. App. P. 28(a)(4).

5. A Concise Jurisdictional Statement. The summary must explain the statutory basis for appellate and district court jurisdiction; the filing dates establishing timeliness of the appeal; and an assertion that the appeal is from a final order or judgment or establishing jurisdiction on some other basis. Fed. R. App. P. 28(a)(4).

6. Statement of Issues With Four Most Apposite Cases. Statement of the issue or issues upon which the appeal turns. Each issue must be accompanied by a list of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions. 8th Cir. R. 28(f)(2).

Effective statement of issues requires careful selection and choice of language. The main issue should be stressed and an effort made to present no more than two or three questions. The issues selected should be stated clearly, simply, and with specificity. The issues should not be too general or too vague. Examples of ineffective statement of the issues follows:

> Did the district court err in granting (or failing to grant) a directed verdict? Was summary judgment improperly granted because material facts in dispute exist? Was there sufficient evidence to support the jury's verdict?

On occasion, although not usually, the questions may be better understood, or stated more simply, if preceded by an introductory factual paragraph. Sample briefs with statement of the issues are available in the clerk's office.

7. Statement of Case. A concise statement of the case indicating the nature of the case, the course of proceedings, and the disposition in the court below. Fed. R. App. P. 28(a)(6).

8. Statement of Facts. The statement of facts must contain a concise and objective account of the facts relevant to the issues presented. Every fact must be supported by a reference to the page or pages of the record or appendix where the fact appears. Fed. R. App. 28(a)(7).

The statement should be a narrative chronological summary, rather than a digest or an abstract of what each witness said. The judges view the statement of facts as a key part of the brief. Great care should be taken that the facts are well marshalled and accurately stated. If this is done, the facts themselves will often develop the relevant and governing points of law. An effective statement summarizes the facts so that the reader is persuaded that justice and the precedents both require a decision for the advocate's client.

A long factual statement should be suitably divided by appropriate headings. Nothing is more discouraging to the judicial reader than a great expanse of print with no guideposts and little paragraphing. Short paragraphs with topic sentences and frequent headings and subheadings assure that the court will follow and understand the points that are being made.

9. Summary of Argument. A narrative summary of the argument with references to the pages of the brief at which the principal contentions are made. Fed. R. App. P. 28(a)(8).

10. Argument. The argument should be suitably broken up into the main points with appropriate headings and contain the reasons in support of the party's position, including an analysis of the evidence, if that is cause for appeal, and a discussion of the authorities with citations thereto. Every issue

must be accompanied by a statement of the applicable standard of review. Fed. R. App. P. 28(a)(9)(B). Where possible, the emphasis should be on reason, not merely on precedent, unless a particular decision is controlling. A few good cases on point, with a sufficient discussion of their facts to show how they are relevant, are preferred over a profusion of citations. Quotations should be used sparingly. If a case is worth citing, it usually has a quote which will drive the point home, and one or two good cases are ordinarily sufficient. If the case cited does not have a good quote, a terse summary in a sentence or two will show the court that the case should be read. A long discussion of the facts of the cases cited is usually not needed, except where there is a precedent so closely on point that it must be distinguished if the party is to prevail.

Where state law is applicable, the federal courts must take the law as it has been established by the highest state courts. The state court interpretation of state law will control and a federal court cannot disregard state decisions even though it may disagree with them. However, if the law of the state appears to be uncertain, it is desirable not to confine discussion of the law to the particular state involved if helpful precedents exist elsewhere. The circuit is not bound by the district court's interpretation of state law and will reverse the district court if it concludes the district court incorrectly applied the law. See Salve Regina College v. Russell, 499 U.S. 225, 231 (1991); Royal Ins. Co. of Am. v. Kirksville College of Osteopathic, 191 F.3d 959 (8th Cir. 1999). References to and quotations from law reviews and legal writers are always permissible and desirable.

The brief writer should never forget that the judges are reading the briefs in several cases in preparation for each day of oral argument. In writing the brief, the writer must select and address only what is important, ruthlessly discarding all else. Except in unusually complicated cases, a brief that raises more than three or four issues runs a serious risk of becoming too diffused

and giving the overall impression that no one claimed error can be very serious.

The writing style in a brief should be simple, graceful, and clear. To achieve these qualities, the writer will usually need to revise carefully the initial draft and subsequent drafts. Italics and footnotes should be used sparingly. Accuracy is imperative in statements, record references, citations, and quotations.

11. Conclusion. The precise relief sought should be set forth clearly and briefly. Fed. R. App. P. 28(a)(10).

12. Certificate of Compliance. If required by Fed. R. App. P. 32(a)(7)(c). Fed. R. App. P. 28(a)(11). A certificate of compliance must also include the name and version of the word processing software used to prepare the brief and a certification that the diskette has been scanned for viruses and is virus-free. 8th Cir. R. 28A(c)(d).

In addition to providing the clerk of court with an original and nine paper copies of the appellant's brief, counsel also must provide a copy of the brief in electronic format on a 3 ½ inch diskette. See 8th Cir. R. 28A(d). The label on the diskette should show the case number and caption (a short version of the caption is acceptable) and must indicate the kind of brief contained on the diskette (appellant's brief). If there is more than one appellant, the filer should also provide the name of the party filing the brief (e.g., appellant Smith's brief).

Additionally, the court asks that the text of the brief on the diskette be named as the case number and that it be saved and formatted as a single document rather than as a series of individual brief components (summary, statement of the case, argument, etc.). If counsel has access to Adobe Acrobat, the file should be saved as a PDF file; if counsel cannot format the

document as a PDF file, the court will convert it at the time the electronic version of the brief is posted.

13. Addendum. Every appellant's brief must contain an addendum. At a minimum, the addendum should contain the district court or administrative agency opinion or order and all supporting memoranda, including the magistrate judge's report and recommendation. The addendum may also contain up to an additional fifteen (15) pages of materials from the district court or administrative agency record to include short excerpts from the record, other than transcript of testimony, that would be helpful in reading the brief, and other relevant rulings of the district court. For example, if an instruction is at issue, counsel would include the text of the instruction as given or proposed. Likewise, a section of a contract or other document may be included if its provisions are in question, or if reference to it while reading the brief would aid in the understanding of the argument. There is no requirement that the full text of a document be included; counsel may select only those portions which are relevant to the discussion of the issue. See 8th Cir. R. 28A(b).

B. Appellee's Brief:

An appellee's brief should conform to the requirements of Fed. R. App. P. 28(a)(1)-(9) and (11) as discussed in Section XVIII(A), supra, except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

1) Concise Jurisdictional Statement. The appellee/respondent should check the appellant/petitioner's statement of jurisdiction to see if it satisfies the rule and establishes jurisdiction. If it does not, the appellee-respondent must include a correct statement of jurisdiction in the brief.

2. Issues Presented.

3. Statement of Case.

4. Statement of the Facts. While Fed. R. App. P. 28(c) provides that appellee need not make any statement of the case or of the facts unless appellee is dissatisfied with appellant's statements, the appellee should include the statements if the relevant facts have not been fairly or fully presented by the appellant.

5. Statement of the Standard of Review for each issue in the argument. Fed R. App. P. 28(b).

The appellee's brief should squarely meet the appellant's points. The same care should be taken by the appellee to avoid diffusion and yet present all substantial additional arguments available in support of the judgment below. Appellee may also include an addendum with its brief; this addendum is likewise limited to fifteen (15) pages. Fed. R. App. P. 28(b); 8th Cir. R. 28A(b).

In addition to providing the clerk with an original and nine paper copies of the appellee's brief, counsel also must provide a copy of the brief in electronic format on a 3 ½ inch diskette. See 8th Cir. R. 28A(d). The label on the diskette should show the case number and caption (a short version of the caption is acceptable) and must indicate the kind of brief contained on the diskette (appellee's brief). If there is more than one appellee, the filer should also provide the name of the party filing the brief (e.g., appellee Jones's brief).

The court requires that all diskettes be checked for viruses, and counsel must certify that the diskette is virus-free. See 8th Cir. R. 28A(d). Additionally, the court asks that the text of the brief on the diskette be named as the case number and that it be saved and formatted as a single document rather than as a series of individual brief components (summary, statement of the case, argument, etc.). If counsel has access to Adobe Acrobat, the file should be saved as a PDF file; if counsel cannot format the document as a

PDF file, the court will convert it at the time electronic version of the brief is posted.

C. Reply Brief:

A reply brief shall be limited to matters in reply. A reply brief must contain a table of contents, and a table of authorities with page references. Fed. R. App. P. 28(c).

Appellant's counsel must also provide an electronic version of the reply brief on a 3½ inch diskette, and this diskette is subject to the same requirements set out in the discussion of appellant's brief, supra Section XXA.

XXI. CERTIFICATION OF STATE LAW

When the state statute or rules of the highest court of a state provide for certification to that court by a federal court questions of state law which will control the outcome of an appeal, the court of appeals, sua sponte or on motion of one of the parties, may certify such a question to the state court. Motions to certify may be included in the brief, but the moving party should call the certification issue to the clerk's attention by noting it on the cover of the brief. The preferred practice, however, is to submit a separate motion. See generally David G. Knibb, Federal Court of Appeals Manual, §23.3 (4th ed. 2000) (sample motion and discussion of when a court of appeals can certify questions to a state court).

XXII. FILING AND SERVING BRIEFS

A. Time For Filing And Serving Briefs.

Briefs must be filed and served as set forth in the federal rules, or scheduling order. If there has been no scheduling order, the appellant or petitioner (except in NLRB proceedings based upon an application for enforcement, in which case the private party

respondent must file the first brief) has 40 days from the docketing of the appeal to file and serve a brief even if the record was incomplete at the time that the appeal was docketed. Fed. R. App. P. 31(a).

The appellee or respondent then has 30 days from the service of the brief to file and serve a brief. Within 14 days after service of the appellee's or respondent's brief, and at least three (3) days before oral argument, appellant or petitioner may file and serve a reply brief. Fed. R. App. P. 31(a). In cross-appeals the appellant's combined reply and cross-appellee's brief shall be filed within thirty (30) days after the filing of the cross-appellant's brief unless otherwise ordered by the court.

A party who has a set number of days to file a responsive brief or other document in response to a document served on him by mail will have three (3) additional days. For example, if service of appellant's or appellee's brief is by mail, the appellee or appellant has three (3) additional days to file his responsive brief. If appellant's brief is filed by mail on the 40th day, the appellee's brief is due 33 days thereafter, Fed. R. App. P. 26(c).

A brief is considered filed for purposes of the rules on the date that it is mailed. Fed. R. App. P. 25(a). For administrative efficiency it is filed as of the date of receipt if there is compliance with all other prerequisites; it is not back-dated for filing by the court of appeals clerk's office.

A brief or other document due on a Saturday, Sunday, or holiday is due on the next weekday. Fed. R. App. P. 26(a).

Counsel must serve one copy of the diskette containing the electronic version of the brief on each of the parties separately represented.

B. Extension Of Time.

See Fed. R. App. P. 26(b) for permitted motions for extensions of time. The number of copies of motions and the process for filing motions are covered by Fed. R. App. P. 27(d) and 8th Cir. R. 27A. Counsel should seek extensions only in exceptional circumstances for good cause.

C. Failure Of A Party To Timely File A Brief.

If appellant's retained counsel fails to file a brief, an order to show cause may be entered. See generally Fed. R. App. P. 31 (c) and 46(c).

D. Additional Authority.

Pertinent and significant authorities coming to the attention of a party after its brief has been filed or after oral argument but before decision may be cited to the court by a letter to the clerk (original and nine (9) copies) with a copy to the adversary. The letter must refer either to a page of the brief or a point orally argued to which the citations pertain but may not contain argument or explanation. A copy of any authority not yet published must accompany each copy of the letter. Fed. R. App. P. 28(j).

E. Brief Of An Amicus Curiae.

To avoid repetition or restatement of arguments, counsel for an amicus curiae should ascertain, before preparing a brief, the arguments that will be made in the brief of any party to be supported. The brief of an amicus curiae generally can be filed only with the written consent of all parties or with leave of court. The United States, an agency or officer thereof, or any state may file an amicus brief without consent of the parties or leave of court. Absent consent by all parties or leave of court, an amicus curiae brief must be filed within seven (7) days after the principal brief of the party whose position it supports is filed. The brief may not exceed one-half of the maximum page length authorized for a party's principal brief. Fed. R. App. P. 29. A motion for leave to fill an amicus brief must be accompanied by the proposed brief, and must state the movant's interest and the reason why an amicus is desirable. The cover of the amicus brief must identify the part or parties supported and whether the brief supports affirmance or reversal. Fed. R. App. P. 29(b) and (c).

Participation by an amicus curiae in oral argument will be allowed only with the court's permission and usually only for extraordinary reasons. Fed. R. App. P. 29.

F. Citation Of Unreported Opinion.

While unpublished opinions are not precedent and parties should generally not cite them, they may be cited when relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case. Parties may also cite an Eighth Circuit unpublished opinion if the opinion has persuasive value on a material issue and no published opinion would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the citation of supplemental authority required by Fed. R. App. P. 28(j). When citing an unpublished opinion always indicate the opinion's unpublished status. 8th Cir. R. 28A(i).

G. Number Of Copies.

Ten (10) copies of each brief must be filed with the clerk, unless the court by order in a particular case directs a lesser number, and two (2) copies must be served on counsel for each party separately represented. 8th Cir. R. 28A(a).

H. Format. Fed. R. App. P. 32.

The cover of each brief must contain: (1) the docket number of the appeal centered at the top; (2) the name of the court; (3) the title of the appeal; (4) the nature of the proceeding, and the name of the court, agency or board below (e.g., Appeal from the United States District Court for the Northern District of Iowa; Petition to Review Order of the National Labor Relations Board); (5) the title of the document identifying the party for whom the brief is field, (e.g., Appellant's Reply Brief); and (6) the names, addresses, and telephone numbers of counsel representing the party filing the brief. Briefs may be printed, photocopied, or reproduced by any other process that produces a clear black image on light paper. Fed. R. App. P. 32(a).

A printed brief must be bound so that it is secure, does not obscure the text, and permits the brief to lie reasonably flat when open. Fed R. App. P. 32(a)(3). The text must be double spaced. The typeface must be either proportionally-spaced and 14-point

or larger or monospaced and no more than 10½ characters per inch. Fed. R. App. P. 32(a)(5).

Because of the problem of legibility, carbon copies may not be submitted except by parties allowed to proceed in forma pauperis. 8th Cir. R. 28A(a). Counsel should ensure that there are no missing pages in any copies of the brief.

Briefs must have covers colored as follows:

Appellant -- blue.

Appellee (or appellee/cross-appellant) -- red.

Intervenor or amicus curiae -- green.

Appellant's/Appellee's reply brief -- gray.

Appendix -- white.

Fed. R. App. P. 32(a) and (b).

A summary of the technical brief requirements is contained in Table A.

I. Special Requirements In Actions To Review Administrative Orders.

With regard to proceedings for review or enforcement of administrative orders, Fed. R. App. P. 15 through 20 should be consulted.

J. Contents.

Consult Fed. R. App. P. 28, 8th Cir. R. 28A, and supra Section XVIII.

K. Typeface and Length Of Briefs. Fed. R. App. P. 32(a)(5),(7) and 29(d); 8th Cir. R. 28A.

For technical requirements of briefs, including page length, word count, and line counts, see Table A. Examples of typeface and acceptable font sizes are set forth in Table C.

Without the court's permission, briefs cannot exceed the following lengths. In most cases, briefs should be substantially shorter than the lengths permitted. Either a proportionally spaced or a monospaced typeface may be used. ***Word counts*** apply to a

proportionally spaced typeface. A proportionally-spaced typeface must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger. ***Line counts*** apply to a monospaced face. A monospaced typeface may not contain more than 10½ characters per inch.

Appellant's brief and Appellee's brief: 30 pages or 14,000 words or 1,300 lines.

Appellant's reply/Cross-appellee brief: 25 pages or 10,000 words or 1,000 lines.

Reply brief: 15 pages or 7,000 words or 650 lines.

Amicus brief: 15 pages or 7,000 words or 650 lines.

These page/count limits do not include the Corporate Disclosure Statement, table of contents, table of citations, any addendum containing other authorized material and certificates of counsel. Fed. R. App. P. 28(a)(7). The appealed decision must always be bound with the appellant's brief as part of the required addendum.

Permission to submit a brief in excess of the page or count limits may be obtained from the court on motion. Such motions are strongly discouraged and seldom granted; only when exceptional circumstances are shown may an overlength brief be granted. Counsel should never anticipate the court's granting leave to file an oversized brief. In a word, do not put an oversized brief in final form, whether by printing or any other form of reproduction, unless the court's permission to file such a brief has already been sought and granted. Counsel are well-advised to seek permission for an overlength brief at the earliest possible moment so that they can shorten the brief in the event the motion is denied.

L. References To The Record.

No fact should be stated in the statement of facts unless it is supported by a reference to the page or pages of the record or appendix where the fact appears.

M. Agreement Of Parties To Submit Without Oral Argument.

Fed. R. App. P. 34(f) provides that the parties may agree to submit a case without oral argument but the court in its discretion, may still decide that oral argument is appropriate despite the parties' agreement otherwise.

N. Sequence Of Briefing In NLRB Proceedings.

Each party adverse to the NLRB in an enforcement or a review proceedings shall proceed first on briefing and at oral argument. Fed. R. App. P. 15.1. Even though a party adverse to the NLRB in an enforcement proceeding is actually the respondent, it must file the opening blue-covered brief. That same party is allowed to file a gray-covered reply brief in response to the red-covered responsive brief of the NLRB. The same party will also proceed first at oral argument.

XXIII. Electronic Filing and Noticing:

The court of appeals has instituted a voluntary program, entitled *VIA*, for serving all papers on counsel of record electronically, either by fax or e-mail. Counsel who agree to accept notices electronically agree that the electronic notice will be the only notice provided by the clerk. Once counsel provides the clerk of the court with a fax number or an e-mail address, all correspondence, orders, and notices from the court will be sent electronically on the date of issuance, for all cases in which that attorney is counsel of record. Opinions may be issued electronically only to an e-mail address. 8th Cir. R. 25A.

The court's opinions are posted daily on the court's web page: http://ca8.uscourts.gov.

XXIV. ORAL ARGUMENT AND SCREENING FOR ORAL ARGUMENT

A. 8th Cir. R. 34A - Screening For Oral Argument.

Cases may be screened for disposition without oral argument pursuant to 8th Cir. R. 34A(d). The parties may also agree, with the court's approval, to submit a case without oral argument. Fed. R. App. P. 34(f).

Cases screened for full oral argument usually will be allotted 15 or 20 minutes per side. Extended argument of 30 minutes or more per side, and abbreviated argument of 10 minutes per side occasionally will be allotted.

Oral argument is to be allowed unless a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed for one of the following reasons:

1. the appeal is frivolous;
2. the dispositive issue or set of issues have been authoritatively decided; or
3. the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed. R. App. P. 34(a).

B. Scheduling Oral Argument.

The time between the filing of the appellee's brief and oral argument may vary depending on the type of case and the size of the court's docket. Criminal cases and other matters entitled to priority by statute or by their nature are given preference. The appeal will usually be scheduled for oral argument 8 to 10 weeks after the last brief is due. In criminal cases the setting of oral argument may occur shortly after the appellant's brief is filed, and in civil cases after the appellee's or respondent's brief is filed. Counsel for the parties are notified of the setting approximately one month before the scheduled date of oral argument. 8th Cir. IOP § III(J). All oral arguments scheduled for a certain day will be heard on that day.

A motion requesting extra time for oral argument may be filed at the time after the oral argument calendar is published.

8th Cir. R. 34B provides guidance on the hearing of companion cases.

C. Preparation For Argument.

Counsel who will argue the appeal should study the case again even though counsel has worked on the brief and tried the case in the court below. It does not necessarily follow that counsel who tried the case below is best equipped to handle the appeal. Only counsel who will take the time to become thoroughly familiar with the record will be able to do justice to the argument.

The oral argument and brief complement each other. For counsel, the oral argument provides an opportunity to point out the key facts and to summarize the principal contentions and supporting reasoning, with all the advantages of face-to-face communication. For the judges, the oral argument provides not only the benefits of this kind of presentation but also an opportunity to seek answers to questions remaining in their minds after they have read the briefs and cited authorities, and looked at the record. The oral argument is ordinarily not a suitable medium for a detailed recital of the facts or a painstaking analysis and dissection of authorities. These are matters best left to the brief, where a detailed and documented statement of facts and a complete argument with supporting reasoning and precedent may more effectively be made. In preparing and presenting an oral argument, counsel should be mindful of the limitations inherent in an oral communication of short duration.

If possible, counsel should become familiar with the court by listening to other arguments. Counsel should know the names of the judges. There are several good source books on oral argument written by members of the Eighth Circuit. Sources that can be consulted are *Oral Arguments: The Continuing Conversation*, 25 No. 2 Litigation 12 (1999) (available on LEXIS and Westlaw); *The Ten Commandments of Oral Argument,* 67 A.B.A.J. 1136 (1981), by Judge Myron H. Bright and *Oral Argument On Appeal - "Where the Action Really Is",* 63 F.R.D. 453, 508 (1974), by Judge Donald P. Lay.

D. The Opening Statement.

Counsel should introduce themselves in their opening statements.

Appellant's counsel should normally tell the court in the first few words how the case got to the court of appeals, the nature of the case, the issues, and the relief requested.

A statement that counsel intends to save a portion of the allotted time for rebuttal is unnecessary. Whether time for rebuttal is saved depends entirely on how much time the opening consumes. It is counsel's responsibility to watch the time. Unless otherwise requested, a white light on the rostrum will go on when five (5) minutes remain, and a red light will go on when the total time has expired. 8th Cir. IOP § III(K)(6).

E. The Statement Of Facts.

Because the judges will have already read the briefs before oral argument, it is unnecessary for counsel to state the facts in detail. The oral argument should, however, cover facts which bear specifically upon the issues to be argued and should omit extraneous and immaterial matter. Usually a chronological statement is easiest for the court to follow. But sometimes the facts on each point should be incorporated into the discussion of that point instead of being placed at the beginning. The court will not wish to hear a reading of any testimony unless counsel first explains the necessity of doing so. The facts pertaining to a point should be fairly stated from the record and, of course, unfavorable but relevant facts should not be omitted.

F. The Argument.

1. <u>The applicable law</u>.

Counsel should state the applicable rules of law. If any precedents are discussed, enough should be said about them so that the court may see at once that they are on point. These rules of law should be stated in general terms. A minute dissection of precedents should be avoided except where one or a few cases clearly would control the outcome. Quotations from cases should be avoided and citation of cases is better left to the brief.

2. <u>Emphasis</u>.

While the brief may cover several points for the sake of completeness, counsel's oral argument should be limited to the major points that can be adequately handled in the time allowed. At the same time, counsel must be

prepared to answer questions that may be asked about any point. By rehearsing the argument aloud, counsel will learn how best to allocate the time among the points to be covered, leaving ample time for questioning. Trivia and unnecessary complexity must be avoided. Through preparation and rehearsal of the argument, counsel will be better able to separate the important from the unimportant.

3. Answering questions.

Counsel should answer questions as directly and as categorically as possible. Never postpone an answer until later in the argument. If counsel does not know the answer, counsel should not hesitate to say so. If the questioning has been extensive, the presiding judge may allow additional time upon request, depending on such factors as whether the main issues have been covered and the state of the calendar. Counsel may be besieged by numerous questions, allowing insufficient time to complete the planned argument. This should not disturb counsel for the main purpose of oral argument is to answer the court's questions. Counsel may be assured that the court will have studied all points made in the written briefs even if all are not discussed orally. The etiquette of oral argument requires that an attorney never interrupt a judge's question, either by answering before the judge has finished posing it or by continuing to make a point after a judge has begun to ask a question.

4. Delivery.

Never read your argument; points are more forcefully made by speech that has at least the appearance of spontaneity. When counsel reads the argument, a veil is drawn between the court and the advocate. Moreover, counsel is likely to be unable to deal effectively with questions from the court. Notes, an outline, or key words may be used to remind counsel of the points to be covered. Of course, where the precise wording is important, as in

statutes or contracts, they may have to be read. The reading of a few short significant quotations from cases or the record may occasionally be justifiable.

A memorized argument, like one that is read, will probably sound mechanical, and may disintegrate when counsel is interrupted. Seldom does an oral argument ever follow an exact, prepared pattern; the advocate must be so well-prepared that the argument can be reworked according to the questions asked, the court's interest, and what adversary counsel has said, leaving off at any point and picking up the threads again.

In delivering the argument, the techniques of good public speaking should be kept in mind. Counsel should speak clearly and loud enough to be heard. Counsel should avoid speaking in a monotone and should not race through the argument so rapidly as to make it unintelligible. Oral arguments in the Eighth Circuit are tape-recorded. A well-presented oral argument should be clearly understandable, even on tape.

5. Avoid personalities.

Do not speak disparagingly of opposing counsel or the district court - although you may, of course, criticize their reasoning.

6. Know the record.

Counsel should know the record from cover to cover. There are very few arguments which do not produce some question regarding the record. It is critical that counsel be thoroughly familiar with the record; it is never acceptable to respond to a question: "I did not try the case, so I do not know." All too often counsel does not know whether something is in the record or the appendix or where it may be found. Nothing wins the confidence of the court more than an ability to answer accurately, and immediately, questions from the bench about the record.

7. Rebuttal.

It is customary for appellant to reserve a few minutes of the allotted time for rebuttal. Occasionally an opportunity for rebuttal becomes important, but it is the court's experience that statements on rebuttal seldom make points that the judges do not already have in mind.

8. Guidelines for the appellee.

Although the above suggestions have been mainly concerned with the appellant's presentation, most of them also apply to the appellee. While appellant's counsel knows in advance what ground he must cover, the appellee's counsel can never be sure how much will need to be said in reply, as it cannot be known what appellant will say, and the court's reaction to the appellant's argument cannot be foretold. As to facts, usually the appellee should be content with correcting or adding to the appellant's statement.

Frequently the appellee must change the order of the response to meet, at the outset, points which have been raised in the court's questions. If the judges have asked any questions to which the appellant has given answers at variance with the appellee's views, it is often advisable for the appellee to answer those questions before proceeding with the planned opening argument. Occasionally a particular point, or even an entire appeal, is in such a posture, by reason of the court's questions and the attitudes of the

judges, that appellee's counsel is well-advised to say as little as possible. Above all, the appellee must be flexible, with sufficient mastery of the case to know how much more or how little more to say.

G. Oral Reference To Cases Which Have Not Already Been Cited To The Court In Writing.

If in preparing for oral argument, counsel becomes aware of a case that should be cited, counsel should file a written citation of supplemental authority and provide a copy of the decision to the other parties and the court if it is unreported. See Fed. R. App. P. 28(j). If time does not permit filing the citation prior to the oral argument, counsel may file the citation on the day of argument at the time counsel checks in with the clerk's office; the clerk will see that the materials are distributed to the judges before the case is called. Counsel may refer to the authority at oral argument if it has been filed and served on opposing counsel. See also 8th Cir. Rule 28A(i) which controls citation of unpublished opinions.

H. Order Of Oral Argument In NLRB Proceedings.

Fed. R. App. P. 15.1 requires parties adverse to the NLRB, even in enforcement proceedings wherein such parties are designated as respondents, to proceed first at oral argument. The rationale is that a party challenging a NLRB decision should logically proceed first and carry the burden of stating the reasons why the order should not be enforced. The NLRB attorney, like the appellee in the appeal of a district court appeal, will then defend the NLRB's order.

XXV. DECIDING AN APPEAL

Although the court will occasionally decide the case from the bench, it usually takes a case under submission at the conclusion of the oral argument. A conference of the panel is held promptly after oral arguments, almost always on the same day. Normally a

tentative decision is reached at this conference. Additional conferences sometimes are necessary. The presiding judge of the panel assigns the cases for preparation of the signed opinions, per curiam opinions, or orders. Copies of a proposed opinion or order are circulated to members of the panel, who may approve, offer suggestions, or circulate a concurring or dissenting opinion.

Whether the decision will be by published opinion or unpublished order is determined by the court, based on the guidelines set forth in 8th Cir. R. 47(b).

If the decision is by opinion, it will be printed and then released. If the decision is by order, the typewritten original will be duplicated and released. A copy of the opinion or order is mailed to every party who has filed an appearance. Copies of opinions (but not orders) are forwarded to the various legal publishers.

XXVI. PETITION FOR REHEARING

A party may file a petition for rehearing within 14 days after entry of the judgment. Fed. R. App. P. 40(a). There is no grace period for mailing. The petition must be received in the clerk's office by the due date. Motions for extension of time may be filed before the due date. The clerk is authorized to approve extension of time, not to exceed 14 days. Note that in the case of a decision enforcing an administrative agency order, the date on which the court enters an order or files an opinion holding that an agency order should be wholly or partially enforced, is the date of the entry of judgment for the purpose of starting the running of the 14 days for filing a petition for rehearing in accordance with Fed. App. P. 40(a), notwithstanding the fact that a formal detailed judgment is entered at a later date.

Petitions for rehearing en banc must begin with a statement which complies with Fed. R. App. P. 35(b). The statement must state that either (1) the panel decision conflicts with a Supreme Court or Eighth Circuit decision, or (2) the proceedings involve questions of exceptional importance, each which must be concisely stated.

Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted. Note that the filing of such a petition is not a

prerequisite to the filing of a petition for writ of certiorari in the Supreme Court of the United States. However, the time for such filing in the Supreme Court is tolled by the timely filing of a petition for rehearing in the court of appeals. Time for filing a petition for writ of certiorari does not begin to run until the court of appeals has disposed of the petition for rehearing. United States v. Healy, 376 U.S. 75 (1964).

The petition for rehearing shall be in a form proscribed by Fed. R. App. P. 32. A party must file five (5) copies of a petition for rehearing by a panel. 8th Cir. R. 40A(a). Twenty-one (21) copies of a petition for rehearing en banc must be filed. 8th Cir. R. 35A(1). The petition may not exceed fifteen (15) pages. Fed. R. App. P. 40(b). No cover is required. No answer may be filed to a petition for rehearing unless the court calls for one, in which event the clerk will so notify counsel. Fed. R. App. P. 40(a). A ten-day time limit for the answer is usually set. In the absence of such a request, a petition for rehearing will "ordinarily not be granted." Fed. R. App. P. 40(a).

Under 8th Cir. Rule 40A(b), a petition for rehearing on the request of any judge on the panel will be treated as a petition for rehearing en banc. A petition for rehearing en banc, however, shall automatically be deemed to include a petition for rehearing by the panel. In the relatively rare instance in which a petition for rehearing is granted, the procedure to be followed from that point forward is entirely discretionary with the court. The grant of a petition for rehearing vacates the panel opinion.

8th Cir. R. 40A(c) prohibits successive petitions for rehearing and motions to reconsider the court's rulings and a petition for rehearing or rehearing en banc.

XXVII. EN BANC PROCEDURE

En banc hearings or rehearings, e.g., hearings by all of the judges currently in regular active service on the court, are infrequent. "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Such a hearing or rehearing

will be held only if a majority of the active judges so determine. Although the judges may order a hearing en banc on their own initiative before the oral argument, this rarely occurs in the Eighth Circuit.

A request for a hearing initially en banc is to be made by the filing date of the appellee's brief. Fed. R. App. P. 35(c). En banc hearings are even rarer than en banc rehearings.

Almost invariably the rehearing en banc occurs after a decision of an appeal by a panel of three judges. The appropriate method for counsel to request a rehearing en banc is by a petition to that effect. The petition for rehearing en banc may be made in the petition for rehearing if one is filed but may be made independently. However presented, the petition for rehearing en banc must be made within the fourteen (14) days after judgment allowed for the filing of a petition for rehearing. Fed. R. App. P. 35(c). Twenty-one (21) copies must be filed. 8th Cir. R. 35A(1). The title page and cover should reflect that a petition for en banc consideration is being made in order to facilitate its distribution.

If petitioner suggests that an appeal be reheard en banc, he must state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict. Fed. R. App. P. 35(b).

When a petition for rehearing en banc is made, the petition is distributed to each active judge on the court, including the panel that originally heard and decided the appeal. Unless a judge in regular active service or a judge who was a member of the initial panel requests that a vote be taken on the petition, no vote will be taken. Fed. R. App. P. 35(f). Only active circuit judges are authorized to vote. Rehearing en banc will be granted only if a majority of the active judges (not merely a majority of those voting) vote to grant such a rehearing. 28 U.S.C. § 46(c), Fed. R. App. P. 35(a).

Only active Eighth Circuit judges and senior circuit judges who were members of the original panel or designated pursuant to 28 U.S.C. § 294(c) will sit on a rehearing en banc. 28 U.S.C. § 46(c). The order granting rehearing en banc vacates the panel decision.

Thus, if the court en banc should be equally divided after the case is heard, the judgment of the district court and not the judgment of the panel will be affirmed.

It bears repeating that hearings and rehearings en banc are very rare.

XXVIII. COSTS

A bill of costs will ordinarily not be allowed unless it is filed within 14 days after entry of the judgment. If there is a reversal, the docket fee may be taxed against the losing party. Fed R. App. P. 39(d). The cost of printing or otherwise reproducing the briefs and appendix is ordinarily recoverable by the successful party on appeal. Fed. R. App. P. 39(c). So is the cost of reproducing parts of the record pursuant to Fed. R. App. P. 30(a) and 30(f).

Various costs incidental to appeal must be settled at the district court level. Among such items are the cost of: (1) the reporter's transcript; (2) the fee for filing the notice of appeal; (3) the preparation and transmittal of the record; and (4) the premiums paid for any required appeal bond. Fed. R. App. P. 39(e). Application for recovery of these expenses by the successful party on appeal must be made in the district court after that court has received the mandate of the court of appeals.

XXIX. ISSUANCE OF MANDATE

Unless stayed, the mandate of the court of appeals will ordinarily issue twenty-one (21) days after entry of judgment or seven (7) days after a voluntary dismissal or denial of a petition for rehearing. Fed. R. App. P. 41(b). The trial court record is usually returned to the clerk of that court with the mandate. A stay of mandate may be sought pending the filing of a petition for certiorari in the Supreme Court, but a motion for such a stay must be filed before the regularly scheduled date for issuance of the mandate. Generally, the court will deny a stay of a mandate in criminal cases if the question would not likely be appropriate for determination by the Supreme Court.

If, during the period of the stay, the party who obtained the stay files a petition for writ of certiorari, the party may move the court to continue the stay until final disposition by the Supreme Court. Fed. R. App. P. 41(d).

The issuance of the mandate by the court of appeals does not affect the right to apply for a writ of certiorari or the power of the Supreme Court to grant the writ.

In a civil case, a party has 90 days from the date of the judgment or, if a petition for rehearing was filed, from the date of the denial of rehearing, within which to file a petition for writ of certiorari in the United States Supreme Court. In a criminal case the time limit is also 90 days. The court of appeals has no authority to enlarge these times, but the Supreme Court itself may, on application, allow up to 60 additional days in civil cases and criminal cases. 28 U.S.C. § 2101(c) and S. Ct. R. 13.

It is important to note that the successful party on appeal cannot enforce its judgment in the district court until the issuance of the mandate has formally revested jurisdiction in that district court.

XXX. CASES REMANDED TO DISTRICT COURT

Pursuant to 28 U.S.C. § 2106, an appellate court may remand an action to the court from which review was sought and direct the entry of an order in accordance with its decision or require further proceedings. There is no Eighth Circuit rule which governs remands to the district courts.

XXXI. CASES REMANDED FROM THE SUPREME COURT

An order remanding a case for entry of judgment or further proceedings is expressly authorized by 28 U.S.C. § 2106. There is no Eighth Circuit rule which governs cases remanded from the Supreme Court

XXXII. ADVISORY COMMITTEE

Pursuant to the Federal Courts Improvement Act of 1982, and subsequent amendments, each court of appeals appoints an advisory committee for the study of rules

of practice and internal operating procedures and to make recommendations to the court concerning its rules and procedures. See 28 U.S.C. § 2077(b). Suggestions for consideration by the advisory committee may be filed with the clerk of the court.

TABLE A - Summary of Technical Requirements

Document	Copies	Cover Color	Time	Service	Length Page Option	Length Line Option	Length Word Option
Appellant's Brief	10	Blue	40 days	2 copies	30 pages (see Table B for what is included)	1300 Lines	14,000 words
Appellee's Brief & Appellee/ Cross-Appellant	10	Red	30 days	2 copies	30 pages (see Table B for what is included)	1300 Lines	14,000 words
Appellant's Reply/ Cross-appellee Brief	10	Gray	30 days	2 copies	25 pages	1000 Lines	10,000 words
Reply Briefs	10	Gray	14 days	2 copies	15 pages	650 Lines	7,000 words
Cross-Appellant's Reply Brief	10	White	14 days	2 copies	15 pages	650 Lines	7,000 words
Amicus Curiae & Intervenor Briefs	10	Green	7 days of filing of principal brief whose position it supports	2 copies	15 pages	650 Lines	7,000 words
Joint Appendix	3	White	40 days	1 copy			
Separate Appendices	3	White	When principal brief is filed	1 copy			
Petitions for Panel Rehearing	5	No Cover required	14 days 45 days if U.S. a party (note: no time for mailing)	2 copies	15 pages		
Petitions for Rehearing en banc	21	No Cover required	14 days 45 days if U.S. a party (note: no time for mailing)	2 copies	15 pages		

Table B -- BRIEF REQUIREMENTS				
BRIEF SECTION	**APPELLANT**	**APPELLEE**	**REPLY**	**COUNTED IN 30-PAGE LIMIT**
Summary of Case and oral argument. 8th Cir. R. 28A(f)(1).	YES	YES	NO	NO
Corporate Disclosure Statement	YES	YES	NO	NO
Table of Contents	YES	YES	YES	NO
Table of Authorities	YES	YES	YES	NO
Jurisdictional Statement	YES	NO	NO	NO
Statement of Issues – 4 most apposite cases-8th Cir. R. 28A(f)(2)	YES	NO	NO	NO
Statement of Case	YES	NO	NO	YES
Statement of Facts	YES	NO	NO	YES
Summary of Argument	YES	YES	NO	YES
Argument (with standard of review)	YES	YES, but w/o std. of rev.	YES	YES
Conclusion with relief requested	YES	NO	NO	YES
Certificate of Compliance (type/volume and word processing version; virus check on diskette - 8th Cir. R. 28A(c) & (d))	YES	YES	YES	NO

TABLE C – Typeface and Font Size

The technical requirements for font size and typeface in briefs and motions changed dramatically under the revised 1998 Federal Rules of Appellate Procedure.

Rule 32(a)(5)(B) requires that monospaced typeface not contain more than 10 ½ characters per inch. An example:

> This Line is prepared using WordPerfect for Windows 8.0 Courier Font Face in Font Size 12. This is monospaced typeface. Every letter takes the same amount of space.
> abcedfghijklmmopqrstuvwxyz
> ABCDEFGHIJKLMNOPQRSTUVWXYZ
> For this type of spacing, briefs may be counted by the number of lines.
> The font size must be no smaller than 10½ characters per inch
> 12345678910

Rule 32(a)(5)(A) requires that proportionally spaced face be 14-point or larger. Proportionally spaced type must also contain serifs. An example:

> This Line is prepared using WordPerfect for Windows 8.0 Times New Roman Font Face in Font Size 14. This is proportional spacing typeface. Every letter does not take the same amount of space. For this type of spacing the brief may be counted by the number of words. For this typeface, the type size may be no smaller than 14 point.
> abcdefghijklmnopqrstuvwxyz
> ABCDEFGHIJKLMNOPQRSTUVWXYZ
> This typeface uses SERIFS.

Proportionally spaced type that does not contain serifs (sans-serif) may be used for headings and captions. An example:

> This Line is prepared using WordPerfect for Windows 8.0 Arial Font Face in Font Size 14. This is proportional spacing type. This type does not use SERIFS. This font may be used only in headings and captions. In proportionally spaced type, every letter does not take the same amount of space.
> abcdefghijkmnopqrstuvxyz
> ABCDEFGHIJKLMNOPQRSTUVWXYZ