PRACTITIONER'S

HANDBOOK FOR APPEALS

to the

UNITED STATES COURT OF APPEALS

for the

EIGHTH CIRCUIT

1996 Edition

NOTICE

The Federal Rules of Appellate Procedure, the Eighth Circuit Rules of Appellate Procedure, the Statement of Internal Operating Procedures of the Eighth Circuit, the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964 and the Eighth Circuit Plan to Expedite Criminal Appeals are current to January 1, 1996. Amendments to the Eighth Circuit's Rules and the Federal Rules of Appellate Procedure are issued from time to time; counsel should always check the latest versions of these rules for amendments affecting practice issues.

The Eighth Circuit Rules of Appellate Procedure supplement the Federal Rules of Appellate Procedure. Counsel should be familiar with both sets of rules and the federal statutes governing appeals, particularly 28 U.S.C. §§ 1291 and 1292.

Counsel should note that the Eighth Circuit Rules are numbered to correspond to the Federal Rules of Appellate Procedure.

TABLE OF CONTENTS

HANDBOOK

PREFACE

Former Chief Judge Donald P. Lay promoted the concept of the Federal Advisory Committee for the Eighth Circuit Court of Appeals, developing an Eighth Circuit Practitioner's Handbook based upon his review of a similar publication issued in the Seventh Circuit. The Seventh Circuit's Practitioner's Handbook was in turn inspired by a similar publication, Appeals to the Second Circuit, prepared by the Committee on Federal Courts of the Association of the Bar of the City of New York (Rev. Ed. 1970), and the Practitioner's Handbook for the Sixth Circuit, prepared by the Committee on Federal Courts of the Cincinnati Chapter of the Federal Bar Association (1971), which, in turn, was largely based on the Second Circuit publication. The Sixth and Seventh Circuit Courts of Appeals and also the Record Press, Inc., 95 Morton Street, New York, New York 10014, owner of the copyright on the Second Circuit publication, have been good enough to consent to the incorporation of substantial portions of their prior work in the handbook for the Eighth Circuit. Several of the subject-matter areas in the publication from other circuits have already been addressed in this circuit in the Statement of Internal Operating Procedures for the United States Court of Appeals for the Eighth Circuit, the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964 and the Eighth Circuit Plan to Expedite Criminal Appeals. Reference will be made to those publications as appropriate.

The Federal Advisory Committee members who were kind enough to begin work on this project in 1993 included Dorothy L. McMurtry, Professor David S. Day, and Committee Chair, George E. Feldmiller. Allison Murdock, an associate of Mr. Feldmiller, at Stinson, Mag & Fizzell, P.C., provided invaluable drafting and research assistance.

The Committee members who assisted in revisions to this project in 1996 included Theresa Levings, Michael Gans, and Committee Chair, Douglas R. Herman.

INTRODUCTORY NOTE

The number of appeals docketed in the Eighth Circuit has greatly increased and the number of filings that take place in each appeal has also greatly proliferated. This has placed a heavy burden on the court. The judges must read the appellant's brief, the appellee's brief, the reply brief, if any, and the pertinent portions of the appendix or record on appeal. Further, the average appeal will have at least a few motions on its docket sheet both prior to and subsequent to oral arguments. Responses are filed to many of these motions. In some instances, replies to the responses are also tendered.

All of these documents must be carefully reviewed, consuming a vast amount of judicial time. For this reason, verbiage is looked upon with great disfavor by the Eighth Circuit. Briefs should be kept as short as is reasonably possible. Motions and all other papers filed should be succinct. Every failure to honor this request reduces the amount of judicial time available for work that must be done.

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 April 1, 1992. Later amendments must be checked for revisions.

JUDGES AND OFFICERS
UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

CIRCUIT JUSTICE:

Clarence Thomas	Washington, D.C.

CHIEF JUDGE:

Richard S. Arnold	Little Rock, Arkansas

CIRCUIT JUDGES IN REGULAR ACTIVE SERVICE:

Theodore McMillian	St. Louis, Missouri
George G. Fagg	Des Moines, Iowa
Pasco M. Bowman, II	Kansas City, Missouri
Roger L. Wollman	Sioux Falls, South Dakota
Frank J. Magill	Fargo, North Dakota
C. Arlen Beam	Lincoln, Nebraska
James B. Loken	St. Paul, Minnesota
David R. Hansen	Cedar Rapids, Iowa
Morris Sheppard Arnold	Little Rock, Arkansas
Diana E. Murphy	Minneapolis, Minnesota

CIRCUIT JUDGES WHO HAVE TAKEN SENIOR STATUS:

Floyd R. Gibson	Kansas City, Missouri
Donald P. Lay	St. Paul, Minnesota
Gerald W. Heaney	Duluth, Minnesota
Myron H. Bright	Fargo, North Dakota
Donald R. Ross	Omaha, Nebraska
J. Smith Henley	Harrison, Arkansas
John R. Gibson	Kansas City, Missouri

CIRCUIT EXECUTIVE:

June L. Boadwine — St. Paul, Minnesota
Telephone: (612) 290-3311

CLERK:

Michael Gans — St. Louis, Missouri
Telephone: (314) 539-3600

CHIEF DEPUTY CLERK:

Dana McWay — St. Louis, Missouri
Telephone: (314) 539-3600

DEPUTY-IN-CHARGE, ST. PAUL OFFICE:

Maureen Watz
Telephone: (612) 290-3341

LIBRARIAN:

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

Joyce Larson Schampel — St. Paul, Minnesota
Telephone: (612) 290-3177

MEMBERS OF FEDERAL ADVISORY COMMITTEE:

(1993 Edition of Handbook)	**(1996 Edition of Handbook)**
George E. Feldmiller, **Chairman**	Douglas R. Herman, **Chairman**
Jill Robb Ackerman	Lawrence C. Brown
Lawrence C. Brown	Raymond C. Conrad, Jr.
Robert Chaloupka	Steven D. Davidson
David R. Freeman	David E. Funkhouser
David A. Gerdes	Barbara A. Hering
William S. Gibb	Professor Mark Killenbeck
Douglas R. Herman	Theresa Levings
Honorable Henry L. Jones, Jr.	Anne S. Parker
Professor Mark Killenbeck	Douglas R. Peterson
Ronald D. Lahners	Jane Wipf Pfeifle
Dorothy L. McMurtry	Michael J. Schaffer
Douglas R. Peterson	Joy Ann Shiffermiller
Anne P. Richey	Honorable Beverly R. Stites
Michael J. Schaffer	Angela D. Turner
Diane M. Stahle	

Advisor to the Committee:	**Advisor to the Committee:**
Honorable Frank J. Magill	Honorable C. Arlen Beam
Ex Officio:	**Ex Officio:**
Honorable Richard W. Peterson	Honorable Richard W. Peterson
June L. Boadwine	June L. Boadwine
Michael E. Gans	Michael E. Gans
	Edward J. Klecker

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 appealability, see 15A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §§ 3905-3919 (1992)(discussing the final judgment rule).

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 is granted leave to file in forma pauperis. Fed. R. App. P. 3(e); 8th Cir. IOP § III(B). 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. Pursuant to Fed. R. App. P. 4, the notice of appeal must be filed within the following time limits:

> Thirty days from the entry of judgment in civil cases .....
>
> Sixty days from the entry of judgment in civil cases in which the United States or an officer or agency thereof is a party .....
>
> Fourteen days from the date on which the first notice of appeal was filed in civil cases for any other party desiring to appeal .....

Ten days from the entry of judgment for appeal by defendants in criminal cases .....

Thirty days from the entry of judgment for appeal by the United States in criminal cases, when authorized by statute .....

An extension of up to 30 days may be granted by the district court upon a showing of excusable neglect .....

2. Petition for permission to appeal from an interlocutory order. Fed. R. App. P.

5.

Ten days after the entry of an interlocutory order containing statement prescribed by 28 U.S.C. § 1292(b) or of an amended order containing such statement. Filed with clerk of court of appeals .....

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

B. Other Filing At Time Of Appeal.

1. Appeal Information Form. 8th Cir. R. 3B.

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 .....

2. Bond for Costs on Appeal.

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

Costs bonds no longer automatically required; however, district court may require appellant to file bond in 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, bond must be filed within 10 days after entry of order granting permission to appeal by the court of appeals .....

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

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 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. Certificate Of Interested Persons. 8th Cir. R. 26.1A.

Within 10 days after receipt of notice that the appeal has been docketed, each nongovernmental party must certify, in the form set forth in 8th Cir. R. 26.1A, a

complete list of all persons, associations, firms, partnerships, or corporations with a pecuniary interest in the outcome of the case .....

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 immediately .....

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

Appropriate cases are referred by the clerk to the prehearing conference director to explore the possibility of settlement .....

H. Designation Of Record.

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

   Within 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 same time, the appellant must file with the clerk and serve on the opposing parties: (1) election of method; (2) designation of record, if required; and (3) statement of issues .....

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

2. Criminal Cases. 8th Cir. Plan § III(A)(1)(b).

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 days after a notice of appeal is filed. Appellee may file supplemental designation by requesting the same of the district court clerk within 14 days after a notice of appeal is filed .....

I. Ordering Of Transcript.

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

Within 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 .....

Within 10 days after appellant orders a transcript, appellee must order additional portions of the transcript if necessary and arrange for payment of costs .....

The court reporter must file the transcript within 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).

Within two 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 or, if proceeding in forma

pauperis, file with the notice of appeal a completed CJA Form 24, authorizing government payment for the transcript .....

In cases not tried or tried in less than three 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 .....

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 appendix with its brief.

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

   Within two 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 40 days after docketing of appeal (regardless of completeness of the record); appellee's brief 30 days after appellant's brief is filed; and reply brief 14 days after appellee's brief. Briefs are considered filed on the date they are mailed.

No additional time is allowed where service is by mail; briefs are to be filed on the dates set forth in the court's order.....

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 reply brief within seven 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 the classification. Criminal cases are given priority on argument calendar .....

M. Judgment. 8th Cir. IOP § IV(A).

The court strives to issue an opinion within 90 days after oral argument or submission to a nonargument panel .....

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

Fourteen days after entry of judgment unless time is shortened or extended by order .....

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

Issued by the clerk automatically 21 days after entry of judgment or seven days after a voluntary dismissal or the denial of a petition for rehearing unless time is shortened or extended by order .....

P. Petition For Writ Of Certiorari.

Ninety days from entry of judgment in civil cases unless the Supreme Court allows additional time not exceeding 60 days. 28 U.S.C. § 210(c) .....

Sixty days from entry of judgment in criminal cases unless the Supreme Court allows additional time not exceeding 30 days. S. Ct. R. 20.1 .....

II. ORGANIZATION OF THE COURT

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. Although all of the judges have offices in St. Louis and St. Paul, each judge's primary chambers are 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, (314) 539-3600. 8th Cir. IOP § I(C)(1); 8th Cir. R. 45A(b). The clerk's office is open for filing and rendition of 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 525, 316 North Robert Street, St. Paul, Minnesota 55101, (612) 290-3971. 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. The chief judge is the most senior active judge on the court under the age of 70. A judge may continue as an active member of the court after reaching 70 years of age, but not as chief judge. 28 U.S.C. § 45(a).

The chief judge presides over any panel on which the chief judge sits. If the chief judge does not sit, the most senior Eighth Circuit active judge on the panel normally presides. The presiding judge assigns the writing of opinions at a conference held at the conclusion of the day's oral arguments.

8th Cir. IOP § IV(A). 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 10 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 circuit judges on the court of appeals and seven 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).

Upon retirement, a judge becomes a "senior" judge. 28 U.S.C. § 37(b). Senior judges who continue to perform substantial duties, as most do, may 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 a panel 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 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 only 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 certificate of probable cause under 28 U.S.C. § 2254 when the district court has denied a certificate; (4) motions for appointment of counsel; (5) motions for production of the transcript at the government's expense; (6) motions for bond pending appeal; (7) applications for stay pending appeal and applications for preemptory writs of mandamus and prohibition; (8) motions to dismiss for lack of jurisdiction, see 8th Cir. R. 47A; (9) procedural issues; and (10) 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.

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 $30.00. Checks should be made payable to the "Attorney Admission Fee Fund." Admission to the Eighth Circuit may be granted in open court, but most 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[1] from the 10 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). Alternatively, a magistrate's decision can be appealed to the district court if all parties consent; the parties then may petition the court of appeals to review the district court's decision. 28 U.S.C. § 636(c)(4) and (5). See Gleason v. Secretary of Health and Human Services, 777 F.d 1324 (8th Cir. 1985).

In addition, the court has jurisdiction to review decisions of the United States Tax Court (see 26 U.S.C. § 7482(a), (b)) 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. §1338. Also, there are a few classes of cases 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) and 28 U.S.C. §1252 (decisions holding federal statutes unconstitutional).

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

B. Appealability.

1. Criminal Cases.

Ordinarily, a criminal appeal may not be taken until a sentence has been entered. Pollard v. U.S. 352 U.S. 354, 358 (1957); Fed. R. Crim. P. 32(b)(1). A pretrial detention order, however, is appealable, 18 U.S.C. § 3145(c), but should be challenged by motion instead of filing briefs on the merits. Fed. R. Civ. P. 9(a). 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). In addition, 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); United States v. Brown, 926 F.2d 779, 781 (8th Cir. 1991) (denial of nonfrivolous motion to dismiss on double jeopardy grounds may be raised in interlocutory appeal). 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. See United States v. Indrelunas, 411 U.S. 216 (1973). 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), cert. denied, 429 U.S. 885 (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. Dist. No. 9 of the Int'l Ass'n of Machinists and 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. The denial of a prejudgment motion for costs and fees is a nonappealable interlocutory order. See Martenson v. Comm'r of Internal Revenue Service, 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. See Gates v. Central States Teamsters Pension Fund, 788 F.2d 1341, 1342-43 (8th Cir. 1986).

(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 left with nothing 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. In re Gaines, 932 F.2d 729, 731 (8th Cir. 1991). The caselaw should be carefully reviewed to determine appealability.[2] The court of appeals does not have jurisdiction to consider direct appeals from the bankruptcy court. Id.; Hubbard v. Fleet Mortgage Co., 810 F.2d 778, 780, n.3 (8th Cir. 1987).

(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 just 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

---

See, e.g., In re Dahlquist, 751 F.2d 295, 297 (8th Cir. 1985); In re Olsen, 730 F.2d 1109, 1109-10 (8th Cir. 1984); In re Leimer, 724 F.2d 744, 745 (8th Cir. 1984).

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.[3] See Mooney v. Frierdich, 784 F.2d 875, 876 (8th Cir. 1986). An appeal will be dismissed if the district court fails to indicate that there is no just reason for delay. Bullock v. Baptist Memorial Hospital, 817 F.2d 58, 59 (8th Cir. 1987). The findings required by Rule 54(b) must be entered on a separate document to qualify for appealability. 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. Bullock, 817 F.2d at 59, n.2. 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.; Burlington Northern R.R. Co. v. Bair, 754 F.2d 799, 800 (8th Cir. 1985).

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. Fed. Deposit Ins. Corp. v. Tripati, 769 F.2d 507, 508 (8th Cir. 1985); 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); Martinez v. Arrow Truck Sales, Inc., 865 F.2d 160, 161 (8th Cir. 1988).

The court may accept a 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); Bergstrom v. Sears, Roebuck & Co., 599 F.2d 62 (8th Cir. 1979).

(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.[4] 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 the TRO is not limited in time as Fed. R. Civ. P. 65(b) requires, the grant or denial of a temporary restraining order is not appealable. In re Champion, 895 F.2d 490, 492 (8th Cir. 1990); Quinn v. State of Missouri, 839 F.2d 425, 426 (8th Cir. 1988). See Sampson v. Murray, 415 U.S. 61, 86-88 (1974); Nordin v. Nutri/System, Inc., 897 F.2d 339, 343 (8th Cir. 1990).

(c) Enelow-Ettelson. This doctrine, under which orders granting or denying stays of "legal" proceedings on "equitable" grounds were considered to be immediately appealable injunctions, was overruled by Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

See Carson v. American Brands, Inc., 450 U.S. 79, 83-84 (1981); Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966).

(d) 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 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. Fed. R. App. P. 5(a). 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), cert. denied, 484 U.S. 917 (1987).

(e) Collateral Order Doctrine. The collateral order doctrine is a narrow exception which permits immediate appeal under 28 U.S.C. § 1291 of an interlocutory decision if the decision conclusively determines an important issue, collateral to the merits of the action, which would be effectively unreviewable if immediate appeal were not available and which threatens the appellant with irreparable harm if no appeal is permitted.[5] If a party fails to take an immediate interlocutory

---

See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

For examples of types of orders held appealable under the collateral order doctrine, see Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of motion to dismiss on grounds of qualified immunity); United States v. Dixon, 913 F.2d 1305 (8th Cir. 1990) (denial of nonfrivolous motion to dismiss on grounds of double jeopardy); Swenson v. Management Recruiters Int'l., Inc., 872 F.2d 264 (8th Cir. 1989) (order refusing to stay arbitration); Towers Hotel Corp. v. Rimmel, 871 F.2d 766 (8th Cir. 1989) (denial of motion to enforce settlement agreement).

(continued...)

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). McIntosh, 810 F.2d at 1411, n.7.

(f) 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.[6]

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); Johnson v. Hay, 931 F.2d 456, 459, n.2 (8th Cir. 1991); United States v. Ledbetter, 882 F.2d 1345, 1347 (8th Cir. 1989). 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

---

(...continued)

For examples of orders held nonappealable under the collateral order doctrine, see Richardson-Merrell v. Koller, 472 U.S. 424 (1985) and Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (orders denying motion to disqualify counsel); In re Russell, 957 F.2d 534 (8th Cir. 1992) (dismissal of trustee's claim for punitive damages based on debtor's fraudulent concealment of assets); In re Gaines, 932 F.2d 729 (8th Cir. 1991) (order reopening and extending time for objecting to debtor's discharge).

See Coopers & Lybrand v. Livesay, 437 U.S. at 477, n.30; see also Barnes v. Bosley, 790 F.2d 718, 718-19 (8th Cir. 1986).

in aid of the appeal,[7] to correct clerical errors under Rule 60(a) or to deny relief under Rule 60(b), see supra at ____. 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 Central, Inc., 799 F.2d 1219, 1229 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987). (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. Brown, 926 F.2d 779, 781 (8th Cir. 1991); United States v. Grabinski, 674 F.2d 677, 679 (8th Cir. 1982), cert. denied, 459 U.S. 829 (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, Illinois 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 or petition 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).

Such as entering judgment pursuant to Rule 54(b) while the appeal is pending, see supra at ___, deciding a motion for stay pending appeal, see Fed. R. App. P. 8(a), or ruling on matters related to a criminal defendant's custody pending appeal of the conviction.

1. Criminal Cases.

(a) Time Prescribed. A notice of appeal by a defendant must be filed within 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 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 time for appeal runs from the date on which the order disposing of the motion(s) is entered on the docket, see Fed. R. App. P. 4(b):

(i) a motion for a new trial on the grounds of newly discovered evidence, provided it is filed within 10 days of the entry of judgment;

(ii) a motion for a new trial on grounds other than newly discovered evidence, provided it is made within the time prescribed by Fed. R. Crim. P. 33;

(iii) a motion for arrest of judgment, provided it is made within the time prescribed by Fed. R. Crim. P. 34;

(iv) for judgment of acquittal.

(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, in certain circumstances, extend the time for appeal for up to 30 days. Fed. R. App. P. 4(b). Unlike civil appeals, a motion for extension of time to file a notice of appeal in a criminal case can be filed at any time. 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 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 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, see Wycoff v. Menke, 773 F.2d 983, 985 (8th Cir. 1985), cert. denied, 475 U.S. 1028 (1986), within 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).

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 days of receipt of notice of the judgment, reopen the time for appeal. The time for appeal will then be 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.[8] 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); see also Fed. R. Civ. P. 77(d) advisory committee's note (1991 amendment); Fed. R. App. P. 4(a)(6) advisory committee's note (1991 amendment).

(c) Effect of Certain Post-Judgment Motions. If one of the motions listed below is timely made, 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 Dept. of Health and 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:

See Cohen v. Curtis Publishing Co., 333 F.2d 974, 977 (8th Cir. 1964).

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

(iii) a motion under Fed. R. Civ. P. 50(b) for judgment n.o.v. (must be made within 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 10 days from the entry of judgment);

(v) a motion for attorneys' fees under Fed. 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 days after entry of judgment.

The district court cannot extend the time for making or serving any of the above motions. Fed. R. Civ. P. 6(b); Fairway Center Corp. v. U.I.P. Corp., 491 F.2d 1092, 1093, n.1 (8th Cir. 1974). 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, 862 F.2d at 170-71. 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.[9]

See Thompson v. INS., 375 U.S. 384 (1964); Insurance Co. of North America v. Bay, 784 F.2d 869, 872 (8th Cir. 1986).

Subsequent post-judgment motions not made or served within 10 days of the entry of the judgment are of no effect. Sanders, 862 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 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. Sanders, 862 F.2d at 169.

(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 Scarella v. Midwest Federal Savings & Loan, 536 F.2d 1207, 1209-10 (8th Cir. 1987), cert. denied, 429 U.S. 885 (1976).

(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 10 days from the date on which the district court enters the order containing a proper § 1292(b) certification, see supra at ____. 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 at ____, 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. McIntosh v. Weinberger, 810 F.2d at 1431, n. 7.

(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 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 60 days after the entry of judgment. Fed. R. App. P. 4(a)(5); Bartunek v. Bubak, M.D., 941 F.2d 726, 728 (8th Cir. 1991). The "good cause" standard will be applied only during the first 30-day period, during which a timely notice of appeal could still be filed. Id. The more stringent "excusable neglect" standard will be applied during the second 30 days. Id. Fed. R. App. P. 4(a)(5) allows the district court to grant an extension of no more than 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 Hable v. Pairolero, 915 F.2d 394, 395 (8th Cir. 1990).

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. Section 1558(a) of the Tax Reform Act of 1986 (P.L. 99-514) amends the Internal Revenue Code to provide for interlocutory appeals of certain tax court orders. The statute works just like 28 U.S.C. § 1292(b), discussed supra at ____. See 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.

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 which he or she has made. 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).

VII. MOTIONS AND DOCKET CONTROL

All motions should be filed in accordance with Fed. R. App. P. 27 and 32(b), 8th Cir. R. 27A, 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(b). Motions should be typewritten on 8½" x 11" paper, and copies should be reproduced by photocopy. 8th Cir. R. 27A(c). 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"). If a motion is supported by briefs, memoranda, affidavits, or exhibits, these attachments must also be served and filed. 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. 8th Cir. R. 27A(a). Oral hearing is rarely granted. Since the judges rule on numerous motions each week, brevity in motion procedure is becoming increasingly 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.

Some procedural motions are decided by court staff. 8th Cir. R. 27B; Fed. R. App. P. 27(b). Presubmission motions and preliminary issues which the clerk is not authorized to handle will be considered and decided by an administrative panel. 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. 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 seven days to respond to any other type of motion. Fed. R. App. P. 27(a). Responses filed after a ruling will be considered a motion to reconsider.

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), 9(b) 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 must be accompanied by a copy of the judgment, order, decree or decision in question and any accompanying opinion. 8th Cir. R. 8A. 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. §§ 3142, 3143 and 3144 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(b); 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 response. Fed. R. App. P. 9(b).

2. After Sentencing.

Fed. R. Crim. P. 38(a) 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.

The court conducts a voluntary Civil Appeals Briefing Program. If the court selects a case for participation in the program, briefs in the case, whether printed or typed, are limited to 25 pages. Reply briefs are limited to 10 pages. The appellant's brief must be filed within 28 days after the briefing schedule is established; appellee's brief within 21 days after service of appellant's brief; and appellant's reply within 10 days after service of appellee's brief. 8th Cir. R. 28A(g). If an appeal is otherwise expedited, either by motion of the parties or on the court's own motion, the page limits imposed in the Civil Appeals Expediting program do not apply. In such cases, the clerk will establish an expedited schedule tailored to the case.

Rule 28A sets forth detailed requirements regarding the form of briefs, the numbers of briefs to be filed, the contents of briefs, and the order of contents in briefs. In the event a party's brief does not comply with the rule, the clerk shall, nevertheless, file the brief. The party will then be given notice of the noncompliance and will be afforded an opportunity to remedy the defect. Additionally, the clerk may refer the matter to an administrative panel for further action, including entry of an order striking the brief. 8th Cir. R. 28A(a).

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 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.[10] Within two 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 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 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 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

---

See Section XII of this handbook regarding general duties of counsel for a discussion of the procedure for seeking withdrawal in a criminal case.

brief; and the reply brief is due within seven 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 § IV(A).

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. But a party cannot attack the judgment, either to enlarge his own rights thereunder or to lessen the rights of his adversary, unless he files a cross-appeal. 8th Cir. IOP § III(F)(1). A cross-appeal is always necessary when a party seeks to modify or alter the lower court's decision. Wycoff v. Menke, 773 F.2d 938, 985 (8th Cir. 1985), cert. denied, 475 U.S. 1028 (1986). No obligation to cross-appeal exists when a party seeks only to sustain the lower court's decision on grounds other than those relied on by the court below. Id. 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 30 days after service of the appellant's brief and must not exceed 50 pages. Appellant's reply/cross-appellee's brief must be filed within 30 days after service of cross-appellant's brief and must not exceed 35 pages. Appellee/cross-appellant's reply brief must be filed within 14 days after service of appellant/cross-appellee's brief and is limited to 25 pages. 8th Cir.

R. 28A(f). 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.

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). 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, he or she may continue his or her status 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 district court or the court of appeals need only determine that the parts of the transcript requested are necessary to the issues to be raised on appeal. See 18 U.S.C. § 3006A(d)(1)(6); 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. Absent such a determination, the Administrative Office of the United States Courts will not pay for the transcript. See 28 U.S.C. § 753(f); Fed. R. App. P. 10(b).

Briefs by 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. 32(a); 8th Cir. R. 28A(a) and (c). 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 carbon copies with the clerk and serve one legible copy on counsel for each party. 8th Cir. R. 28A(d).

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 defendants in criminal cases. The amount of compensation authorized was increased by 18 U.S.C. § 3006A(d), as amended effective March 14, 1987. The statute also allows compensation for discretionary appointment of counsel in habeas corpus cases, motions to vacate sentences, and certain other proceedings not formerly falling within the terms of the statute. 18 U.S.C. § 3006A(g).

The Criminal Justice Act of 1964 authorizes the payment of some compensation to counsel appointed to represent indigents in criminal cases, habeas corpus cases, and other designated proceedings. 18 U.S.C. § 3006A(d). 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 probable cause, trial counsel is reappointed automatically on appeal. 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 enter an appearance, 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). See 8th Cir. IOP § II(C)(1).

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 habeas corpus cases in which a certificate of probable

cause 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. 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 Circuit Rules of the United States Court of Appeals for the Eighth Circuit, the Federal Rules of Appellate Procedure and procedural orders of the court issued in most appeals. Consistent and strict compliance with these rules and orders is required of all attorneys handling appeals in this court. This enables the court to handle its cases effectively and efficiently, while lack of compliance causes needless delay and can result in dismissal of appeals or disciplinary action.

When an appeal is docketed by the court of appeals, an appearance form is sent to all counsel of record below. Attorneys are required to 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. If counsel wishes to withdraw, a motion for withdrawal identified as a court of appeals pleading must be filed with the notice of appeal. The motion will be forwarded to the court of appeals clerk. The clerk may grant the motion only if another attorney has entered an appearance on behalf of the defendant or if the motion for withdrawal states that another attorney has agreed to enter his appearance on behalf of the defendant and the defendant has consented to the appearance of the new attorney. 8th Cir. Plan § II. For a discussion of counsel's duty in appointed cases, see Section XI of this handbook regarding appeals in forma pauperis.

The court of appeals takes a hard line on matters involving the timeliness and content of briefs. Counsel are wise to review and follow closely rules and orders governing this important stage of the appellate process.

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. Counsel must strictly adhere to all schedules. The court strictly enforces these 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. Limited extensions may be granted for good cause, but extensions for more than 14 days are granted rarely. 8th Cir. R. 26A.

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. Plan § III(I); and Section XX of this handbook. Lack of compliance with these rules, or attempts to circumvent them (e.g., using smaller than 11-point type, not double spacing, or using improper margins) can result in rejection of the brief by the clerk's office or sanctions.

In practice, almost all motions are supported by an affidavit, brief or memorandum. Counsel should bear in mind that the provisions of Federal Rule of Civil Procedure 11, prohibiting groundless assertions and allowing severe penalties for non-compliance, applies to all pleadings filed in the court of appeals.

All pleadings must be signed by the attorney or party pro se filing it. This signature "constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . ." Fed. R. Civ. P. 11. Appellate filings inconsistent with the standards of Rule 11 are considered a violation of the rules of the court. Attorneys who file pleadings in this court which do not comport with the requirements of Rule 11 can be disciplined under the general disciplinary

powers of Fed. R. App. P. 46(c). In addition, the court may sanction attorneys (or litigants proceeding pro se) for making frivolous arguments on appeal. See, e.g., Harlow v. Bergson, 893 F.2d 187 (8th Cir. 1990); Galvan v. Cameron Mutual Ins. Co., 831 F.2d 804, 805-06 (8th Cir. 1987); Hipsher v. Lund, 827 F.2d 337, 340 (8th Cir. 1987).

Careful review of the procedural and substantive rules of practice and vigilant compliance with them fosters a smooth and effective appeal process. Attorneys handling cases in this court must proceed accordingly.

XIII. 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. 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. 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 prosecute the appeal with diligence until the court grants leave to withdraw. Even if appointed counsel believes an appeal is without merit, counsel 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). 8th Cir. IOP § II (C)(1). See supra Section XIV. 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.

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.

If counsel was appointed by the district court, he 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, he 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 he insists upon doing so after having been advised of his constitutional right to counsel. If a defendant does so insist, his trial counsel must advise him of the requirements concerning the filing of his own brief.

B. 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 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 $5.00 filing fee and $100.00 docketing fee to the district court clerk unless defendant has been granted leave to proceed in forma pauperis. Fed. R. App. P. 10(b).

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 (b). Counsel is not required to prepare and file a designation of the record. See 8th Cir. R. 30A(a)(2). Within seven 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 a certificate of interest within 10 days of notice of appeal. 8th Cir. R. 26.1A.

XIV. DISMISSAL OF ANY TYPE OF APPEAL AND WITHDRAWAL OF COURT-APPOINTED COUNSEL

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 applicant fails to comply with the Federal Rules of Appellate Procedure or the Eighth Circuit Rules. If the applicant is not in compliance, the clerk shall notify the applicant 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).

C. **Withdrawal Of Court-Appointed Counsel.**

Appointed counsel who wishes to withdraw because he believes that the appeal is frivolous must nonetheless file a brief in accord with Anders v. California, 386 U.S. 738 (1967), along with his 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. 1988), cert. denied 488 U.S. 985 (1988). The motion to withdraw must also be served on the client. The court will only authorize withdrawal for good cause. 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).

XV. 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 enforcement by the National Labor Relations Board ("NLRB") in accordance with Fed. R. App. P. 15(b), the respondent before the NLRB shall be the petitioner and the NLRB shall be the respondent for briefing the case unless the court orders to the contrary. 8th Cir. R. 15.1A. 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 _____, Petitioner. The caption shall not contain the name of the judge. 8th Cir. R. 21A.

This handbook attempts to set forth as much information as possible concerning appeals before the Eighth Circuit. However, since this handbook cannot be exhaustive, parties should also consult the Federal Rules of Appellate Procedure and the Circuit Rules for all rules applicable to Eighth Circuit appeals.

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.

XVI. 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); 8th Cir. R. 3B. 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 to state that the appeal is filed on behalf of the class whether or not the class has been certified. Id. It is also sufficient under this rule for the notice to name one person qualified to bring the appeal as a representative of the class. 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 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 or from the clerk of the Eighth Circuit.

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).

XVII. 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.

XVIII. 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 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. Fed. R. App. P. 5(b). Petitioner has 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). No docketing fee is required at that time. The adverse party may answer the petition within seven days. Unless otherwise ordered by the court, the application and answer are submitted without oral argument. Fed. R. App. P. 5(b).

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 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. 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.

XIX. Bankruptcy Appeals.

Pursuant to 28 U.S.C. § 158(a), final judgments and orders of bankruptcy judges are appealable to the federal district court "for the judicial district in which the bankruptcy judge is serving." The district court'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.

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

A notice of appeal, and a $100.00 appellate docketing fee, are filed 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). Filing by mail is permitted. Fed. R. App. P. 13(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. of App. P. The 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).

XXI. 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. 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).

A. 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, any reported citation of the order, the facts upon which venue is based, and the relief prayed. 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 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 prayed. Fed. R. App. P. 15(b).

B. 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 _____, Petitioner. 8th Cir. R. 21A. Proof of service is required on the respondent 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.

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. 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.

XXII. 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 $5.00 filing fee and a $100.00 appellate 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.

XXIII. 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 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).

A. Certificate Of Interest.

Within 10 days after receipt of notice that the appeal has been docketed, each nongovernmental party or amicus curiae must furnish a certificate of interest. The certificate shall state:

[number and name of case.]

The undersigned certifies that the following listed persons or entities have a pecuniary interest in the outcome of this case.

[List names of all interested persons or entities and identify their connection of interest.]

_____
Party or Attorney of
Record for Party

See 8th Cir R. 26.1A.

XXIV. Preconference Hearing Program.

The Eighth Circuit Preconference Hearing Program is a voluntary program which provides parties an opportunity to explore settlement and to clarify particular issues. 8th Cir. IOP § I(C)(2).[11] 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

[11] 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); federal or state agency cases; and federal income tax cases. Cases arising under Title VII and 42 U.S.C. § 1983, labor arbitrations, and suits under ERISA are also excluded unless there is a specific money judgment involved. 8th Cir. R. 33A.

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. They 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).

XXV. RECORD ON APPEAL

A. Ordering And Filing The Transcript.

Within 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); 8th Cir. § IOP III(H)(1). If electronic recording was used in the district court, the transcript should be ordered from the district court clerk. Failure to comply with these responsibilities can result in dismissal of the case. See Fed. R. App. P. 3(1); 8th Cir. R. 3C. The appellee must file and serve a designation of additional parts to be transcribed within 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 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); Fed. R. App. P. 11(b).

B. 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 probable cause has been granted in a direct criminal appeal or a state 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).

C. Composition And Transmission Of Trial Court Record.

District Court or Tax Court Cases

The record on appeal includes the original papers and exhibits and the transcript of proceedings. In addition, a certified copy of the docket entries prepared by the clerk of the trial court must be included. Fed. R. App. P. 10(a).

Certain types of exhibits and procedural filings in the trial court will not be included in the record unless specifically designated or ordered by the court of appeals. See Fed. R. App. P. 11(b). If not ready when the record is sent to the court of appeals, the transcript is due 30 days after it is ordered by counsel. Later filed transcripts are sent to the court of appeals as soon as they are filed in the district court.

The parties should be sure that anything conceivably relevant to the issues on appeal is included in the record. This does not mean that all such items will have to be reproduced in an appendix. An appendix, if filed, should include only the material significant enough for the court to read. See Fed. R. App. P. 30 and 8th Cir. R. 30A, discussed supra Section XXI.

For the rare case in which no transcript is available, see Fed. R. App. P. 10(c). For the seldom-used procedure whereby parties prepare and sign a statement of the case in lieu of the record on appeal, see Fed. R. App. P. 10(d).

After the record is filed in the court of appeals, if the record is incomplete, counsel should seek an agreement of opposing counsel to file a stipulation in the district court that a supplemental record be prepared and sent to the court of appeals by the district court clerk. Counsel may also so move in the district court or in the court of appeals. However, if there is a dispute as to

what should be considered part of the record, the parties should resolve such a dispute in the district court. See Fed. R. App. P. 10(e).

D. Transmission Of The Record On Appeal.

In place of transmitting the entire record, a certified copy of all docket entries in the proceeding below shall be transmitted. 8th Cir. R. 11A; Fed. R. App. P. 11(e). Any party may request at any time during the pendency of an appeal that designated parts of the record be transmitted. Fed. R. App. P. 11(e). The appellant's brief is due 40 days after filing of the docket entries. 8th Cir. R. 11A; See Fed. R. App. P. 31(a).

An appendix shall be prepared and filed as the designated record on appeal with the clerk of the court. 8th Cir. R. 11A(b). See 8th Cir. R. 30A(b).

The parties may also agree that parts of the record be retained in the trial court. Unless the court of appeals or any party requests their transmittal, those parts of the record will never be sent to the court of appeals. Fed. R. App. P. 11(f). Although not transmitted, they are still considered part of the records before the court of appeals.

XXVI. 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 transcript of 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 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.

XXVII. 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 other than the briefs that may have to be consulted 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 Circuit Rules 28, 19A and 30(a). A brief should contain the following:

(1) A summary of the case and a request for or wavier of oral argument.

(2) Certificate of interest.

(3) Table of contents. The table of contents should contain argument headings in full, with the page number on which each argument begins.

(4) Table of cases (alphabetically arranged), statutes, and other authorities. This table should include page references for each citation.

(5) Questions presented. Statement of the issue or issues upon which the appeal turns. This 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 questions selected should be stated clearly and simply.

Examples of appropriate questions include the following:

(a) Which court, the district court or the court of appeals, has jurisdiction to review certain regulations promulgated under the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376?

(b) Does a police officers' removal of heroin from the defendant's automobile after stopping him for a traffic violation and the subsequent introduction of the heroin at trial violate defendant's rights under the Fourth Amendment?

(c) Does a private cause of action for damages against corporate directors imply in favor of a stockholder under 18 U.S.C. § 610, which makes it an offense for a corporation to make "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors . . . are to be voted for?"

(d) Are state regulations that permit welfare payments to workers on strike inconsistent with and, therefore, precluded by:

(i) federal labor policy (cite statute and regulations)

(ii) federal welfare policy (cite statute and regulations)?

(e) Was there a material issue of fact as to whether the contract had been revoked, thus precluding summary judgment?

On occasion, although not usually, the questions may be better understood, or stated more simply, if preceded by an introductory factual paragraph. For a discussion of this, see Supreme Court Practice. Stern & Gressman, § 13.8, (6th ed., 1986).

The given examples are concise without being too vague or too general. The following issues are not well stated:

> Did the district court err in granting (failing to grant) a directed verdict? Was summary judgment properly granted? Was there sufficient evidence to support the jury's verdict?
>
> Did the order obtained by the prosecutors after indictment (requiring defendant to furnish evidence directly to the prosecutors) grant the government a mode and manner of discovery not sanctioned by the law and in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendment rights of defendant, thereby rendering evidence relating thereto inadmissible?

(6) A concise jurisdictional summary in the Applicant's or Petitioner's brief explaining the statutory basis for appellate and district court jurisdiction. 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.

(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.

(8) Statement of Relevant Statutes or Regulations. The pertinent part of relevant statutes or regulations, with citations to the United States Code, Code of Federal Regulations, or state statutory compilation. If these are voluminous, they should be incorporated in the appendix.

(9) Statement of Facts. The statement of facts must contain a concise and objective account of the pertinent facts. Every fact must be supported by a reference to the page or pages of the record or appendix where the fact appears. 8th Cir. R. 28(d)(2). The statement must be a fair summary without argument or comment. 8th Cir. R. 28(d)(l).

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 very important part of the brief. Great care should be taken that the facts are well marshalled and 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. While Fed. R. App. P. 28(c) provides that the appellee need not make any statement of the case or of the facts unless he controverts that of the appellant, the appellee should give his own statement if he believes the relevant facts have not been fairly presented by the appellant or the appellee should point out what facts he believes the appellant has omitted or stated incorrectly.

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.

(10) Summary of Argument. A narrative summary of the argument with references to the pages of the brief at which the principal contentions are made is optional but often useful to the court if there is a long argument.

(11) 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. Every issue must be accompanied by a statement of the applicable standard of review. 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 so 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. It should be kept in mind that, ordinarily, the Eighth Circuit will accord "great weight" to the district court's interpretation of state law; however, the circuit is not bound by the district court's interpretation and will reverse the district court if it

concludes the district court incorrectly applied the law.[12] 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 treats more than three or four matters runs a serious risk of becoming too diffused and giving the overall impression that no one claimed error can be very serious.

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.

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.

A reply brief shall be limited to matters in reply.

(12) Conclusion. The precise relief sought should be set forth clearly.

(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

---

See Budget Marketing, Inc. v. Centronics Corp., 927 F.2d 421, 424-25 (8th Cir. 1991); Harbor Ins. Co. v. Essman, 918 F.2d 734, 738 (8th Cir. 1990).

may also contain up to an additional fifteen pages of materials from the district court or administrative agency record. 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.

Appellee may also include an addendum with its brief; this addendum is likewise limited to fifteen pages.

XXVIII. CERTIFICATION OF STATE LAW

When the 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.

XXIX. 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 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 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 additional days. For example, if service of appellant's or appellee's brief is by mail, the appellee or appellant has three 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). However, when the due dates for briefs are set by order of the court, this provision of Fed. R. App. P. 26(c) does not apply. All briefs are due by the dates ordered.

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).

XXX. Extension Of Time.

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

XXXI. 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).

XXXII. 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 10 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.

XXXIII. 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 leave of court. Absent consent by all parties or leave of court, an amicus curiae

brief must be filed within the time allowed the party whose position it supports. Fed. R. App. P. 29. The brief may not exceed 20 pages. 8th Cir. R. 29(a).

Participation by an amicus curiae in oral argument will be allowed only for extraordinary reasons. Fed. R. App. P. 29.

XXXIV. 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(k).

G. Number Of Copies.

Ten 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 copies must be served on counsel for each party separately represented. 8th Cir. R. 28(A)(d).

H. Format.

The cover of each brief must contain: (1) the name of the court; (2) the docket number of the appeal; (3) the title of the appeal; (4) the nature of the proceeding, the case number below, and the name of the court and trial judge or agency below (e.g., Appeal from the United States District

Court for the Northern District of Illinois; Petition to Review Order of the National Labor Relations Board); (5) the title of the document (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 white paper. Printed briefs must be bound and have pages 6-1/8" X 9-1/4" with type matter 4-1/6" by 7-1/6". Briefs reproduced in any other way must be bound, use 11 point type, have pages no larger than 8-1/2" by 11" and typed matter not exceeding 6-1/2" by 9-1/2", with double spacing between each line of text. No line of text may contain more than twelve characters per inch.

Briefs must be well bound with a stiff cover on the front and back so that they do not fall apart. Because of the problem of legibility, carbon copies are discouraged and may not be submitted without the court's permission except by parties allowed to proceed in forma pauperis. Fed. R. App. P. 32(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 reply brief -- gray.

Appellee/cross-appellant's reply brief -- white.

Appendix -- white.

I. Special Requirements In Actions To Review Administrative Orders.

With regard to proceedings for review or enforcement of

administrative orders, Rules 15 through 20 of the Federal Rules of Appellate Procedure should be consulted. The Eighth Circuit Rules provide for particular procedures in proceedings involving the National Labor Relations Board. 8th Cir. R. 15.1A. See subsection O. below.

J. Contents.

Consult Fed. R. App. P. 28.

K. Length Of Briefs.

Without the court's permission, the briefs cannot exceed the following lengths, and in most cases should be substantially shorter than the lengths permitted:

Appellant's brief and appellee's brief: 50 pages.

Reply brief: 25 pages.

Amicus brief: 20 pages.

These page limits do not include the certificate of interest, table of contents, table of citations, and any addendum containing statutory material. Fed. R. App. P. 28(g). 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 limit 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.

The amount of reading required of judges in preparation for oral argument is constantly increasing. As a result, the court favors concise briefs, and 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. Motions for permission to file an overlength brief must be submitted at least ten days in advance of the brief due date. 8th Cir. R. 28A(e). 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.

O. Summary Of Certain Technical Requirements.

Document		Cover	Copies	Time	Size	Service
Appendix	White	10	40 days	No limit		1 copy
Appellant's Brief	Blue	10	40 days	50 pgs.		2 copies
Appellee's Brief	Red		10	30 days	50 pgs.	2 copies
Reply Brief	Gray	10	14 days	25 pgs.		2 copies
Amicus Brief	Green	10	*	20 pgs.		2 copies
Intervenor's Brief	Green	10	*	50 pgs.		2 copies
Petition for Re-Hearing	**	5 or	21	*14 days	15 pgs.	2 copies

* An intervenor or amicus brief is due on the same date as that of the party whose position it supports.

** Should be the same color as the party's main brief.

XXXV. PREPARING AND SERVING APPENDIX

8th Cir. R. 30A(a) and (b) provides a thorough discussion of what should be included in the appendix to a brief for appeal to the Eighth Circuit. That rule should be carefully reviewed by all appellants. The form and content of the appendix is covered by 8th Cir. R. 30A(c) and (d).

The parties may file a joint appendix or the appellee may file with his brief a supplemental appendix containing relevant material not included in an appendix previously filed. Deferred appendices filed pursuant to Fed. R. App. P. 30(c) are seldom allowed.

The parties may also choose to follow the procedures set forth in Fed. R. App. P. 30(a) and (b). If a stipulated appendix, developed as provided in Fed. R. App. P. 30, is used, counsel for the appellant should consult with the other parties as soon as the record is ready to be filed in order to reach agreement as to the contents of the appendix.

Fed. R. App. P. 30(e) permits the separate filing of a book of exhibits. This rule is rarely used. If used, a book of exhibits should contain only exhibits which are important to a consideration of the issues raised on appeal.

The appendix must include its own table of contents, describing each item included and listing the appendix page on which each item or portion of the transcript can be found. Fed. R. App. P. 30(d). References should also include the volume and the respective pages of the transcripts.

The court hopes to limit the expense and work of producing an appendix without sacrificing the material necessary for the judges' convenient consideration of the appeal. It is unnecessary to include everything in the appendix, as the entire record is readily accessible to each of the judges. Although both the appellant and appellee may pay for the preparation of the appendices,

those expenses are recoverable if the court awards costs to the winning party. However, the court will not award costs for a lengthy appendix. 8th Cir. R. 30(e).

XXXVI. 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 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 has been recently 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); 8th Cir. R. 34(d).

XXXVII. 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 precedence. The appeal will usually be scheduled for oral argument shortly after the last brief is due. In criminal cases the setting of oral

argument often occurs as soon as the appellant's brief is filed, and in civil cases after the appellee's or respondent's brief is filed. Counsel for the parties, or the parties themselves, if they are without counsel, 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 should be filed at the time the moving party's opening brief is filed.

8th Cir. R. 34b provides the framework in which the argument calendar is prepared.

XXXVIII. 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. One source that can be consulted is The Ten Commandments of Oral Argument, 67 A.B.A.J. 1136 (1981), by Judge Myron Bright and Oral Argument On Appeal - "Where the Action Really Is", 63 F.R.D. 453, 508 (1974), by Chief Judge Donald Lay.

XXXIX. 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 own responsibility to watch the time. Unless otherwise requested, a white light on the rostrum will go on when 5 minutes remain, and a red light will go on when the total time has expired. 8th Cir. IOP § III(K).

A. 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.

B. The Argument.

1. The applicable law.

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. Emphasis.

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 created 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 currently 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.

C. 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 28(d) which controls citation of unpublished opinions.

XL. 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.

XLI. 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.

XLII. 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). Note that in the case of a decision enforcing an administrative agency order, "[t]he 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 Rule 40(a), Fed. R. App. P., notwithstanding the fact that a formal detailed judgment is entered at a later date." 8th Cir. R. 40(d).

Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted. 8th Cir. R. 40(a) provides that parties should not file petitions for rehearing as a matter of course. 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), and copies shall be served and filed as prescribed by Fed. R. App. P. 31(b). Fed. R. App. P. 40(b). The petition may be no longer than 15 pages. Fed. R. App. P. 40(b). Five copies of a petition for rehearing by panel are required. 8th Cir. R. 40A(b)(1). Twenty-one copies of a suggestion for rehearing en banc must be filed. 8th Cir. R. 35A(c)(1). The cover to the petition should be the same color as was the party's main brief. Fed. R. App. P. 32(b). 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 40(b)(2), a petition for rehearing on the request of any judge on the panel will be treated as a petition for rehearing en banc. A suggestion for rehearing en banc, however, shall automatically be deemed to include a petition for rehearing by the panel. See 8th Cir. R. 35A(c)(4). 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.

XLIII. 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. "Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when 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 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 suggestion to that effect. The suggestion should be made in the petition for rehearing if one is filed but may be made independently. However presented, the suggestion must be made within the 14 days after judgment allowed for the filing of a petition for rehearing. Fed. R. App. P. 35(c). As stated above, 25 copies must be filed. The title page and cover should reflect that a suggestion 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.

Counsel should not mislabel the suggestion as a "Petition for Rehearing En Banc." There is no such thing. Depending on whether it is filed with a regular petition for rehearing, the correct label will be either "Petition for Rehearing, with Suggestion for Rehearing En Banc" or merely "Suggestion for Rehearing En Banc."

When a suggestion for rehearing en banc is made, the petition for rehearing with the suggestion (or the independent suggestion in the rare case in which there is one) 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 suggestion, no vote will be taken. Fed. R. App. P. 35(b). If no vote is requested, the panel's order acting on the basic petition for rehearing will bear the notation that no member of the court requested a vote. 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 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, 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.

XLIV. 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. The cost of printing or otherwise reproducing the briefs and appendix is also ordinarily recoverable by the successful party on appeal. Fed. R. App. P. 39(c). So also is the cost of reproducing parts of the record pursuant to Fed. R. App. P. 30(f) and 30(a).

Various costs incidental to appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript; (2) the fee for filing the notice of appeal; (3) the clerk's fee for 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.

XLV. ISSUANCE OF MANDATE

Unless stayed, the mandate of the court of appeals will ordinarily issue 21 days after entry of judgment or seven days after a voluntary dismissal or denial of a petition for rehearing. Fed. R. App. P. 41(a). 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. 8th Cir. Rule 41A indicates that 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 stay continues until final disposition by the Supreme Court. Fed. R. App. P. 41(b).

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 60 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 up to 30 additional days in criminal cases. 28 U.S.C. § 2101(c) and S. Ct. R. 13 and 20.1.

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.

XLVI. 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.

XLVII. 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.

XLVIII. ADVISORY COMMITTEE

Pursuant to the Federal Courts Improvement Act of 1982, 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.