Richard P. Clem Continuing Legal Education
www.richardclem.com

Nuts and Bolts of Minnesota Appellate Practice
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This program covers the essentials of practice in civil cases before the Minnesota Court of Appeals. Much of what we will cover will also be relevant to criminal appeals, and other cases before the appellate courts. And while the specifics will vary considerably from court to court, this program will also help you recognize what to watch for when practicing in other appellate courts.

Most of what is stated here is from the perspective of the appellant–the losing party below who desires to have the judgment reversed. But most of the same material is also relevant if you are representing the respondent–you prevailed in the court below, and the opposing party has filed an appeal.

Whether you are representing the appellant or respondent, and appeal needn't be an overwhelming proposition.

Sources of Information:

Before you start working on your specific case, it is very helpful to give yourself a general education on how the civil appellate process works. In addition to re-reading these materials, the following resources will prove helpful. Most of this material is available online.

Court of Appeals Self-Help Center:
http://www.mncourts.gov/?page=3665

Provides information designed mostly for pro-se litigants, but gives a good overview of the process. This is very helpful information to make sure you're not forgetting something important!

Court Rules
Available in Minnesota Rules of Court book, or online at:
http://www.mncourts.gov/default.aspx?page=511

Minnesota Rules of Civil Appellate Procedure:
http://www.mncourts.gov/Documents/0/Public/Rules/Appellate_Rules_--_eff_01-01-2010.pdf

These are the specific rules that govern civil appeals in Minnesota. And in general, the same rules also apply to criminal cases. Early in the process, it is very helpful to browse through the entire rules to avoid surprises later! Most attorneys are familiar with the Rules of Civil Procedure, Rules of Evidence, etc. They might not have the exact contents memorized, but they know generally what's in there, enough to avoid surprises. If you don't routinely practice before the appellate courts, you don't have this background knowledge. Simply reading through the rules will get you up to speed on what to expect.

In these materials, the Rules of Civil Appellate Procedure are cited simply as "Rule ___".

Appendix of Forms:
http://www.mncourts.gov/rules/appellate/RCAP_Forms_Index.htm

The most common forms that you will need for your appeal are available online, and also in the Minnesota Rules of Court book. For most of the documents you will need to draft, you will be able to cut and paste most of what you need. In these materials, these forms will be cited simply as "Form ___".

Rules 28 and 29, Minnesota Rules of Criminal Procedure:

Criminal appeals are outside the scope of this CLE. However, most of the "nuts and bolts" are the same. Rule 28 covers appeals to the Court of Appeals, and Rule 29 covers direct appeals from the district court to the Minnesota Supreme Court (first-degree murder cases). Rules 28.01, subd. 2, and 29.01, subd. 2, both provide:

> To the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern appellate procedure unless these rules direct otherwise.

Clerk of Appellate Courts main page:
http://www.mncourts.gov/?page=156

In addition to the other resources above, this page has links to other helpful information.

Court of Appeals main page:
http://www.mncourts.gov/?page=551

Call the Clerk's Office or Visit in Person: (651) 296-2581

Occasionally, questions will arise! In my experience, if you simply call the clerk's office and identify yourself as an attorney, much time can be saved.

Bachman Legal Printing:
http://www.bachmanprint.com/servicecenter/products_services.html/title/legal-briefs

I've never had occasion to use them, and armed with the information from this CLE, you won't have to, either. But the majority of the appellate briefs in this state seem to be printed, bound, served, and filed by them. And as far as I can tell, they do an excellent job.

Outside Counsel?

Filing or defending an appeal need not be any more difficult than practicing in the district court. But bringing in an outside attorney to handle all or part of the appeal might be something to consider.

What Can be Appealed?

Generally, appeal may be taken from a final judgment (including a final judgment against one party under Minn. R. Civ. P. 54.02). There are, however, a number of appealable orders, which are listed in Rule 103.03.

Here is a partial list of appealable orders:

- Orders regarding injunctions (granting or denying)
- Orders vacating or sustaining an attachment
- Order denying a new trial
- Order granting or denying modification of custody, child support, etc.
- Orders denying summary judgment, but only if the question is certified by the trial court.

Time for Filing Appeal:

Rule 104.01:

> Unless a different time is provided by statute, an appeal may be taken from a judgment within 60 days after its entry, and from an appealable order within 60 days after service by any party of written notice of its filing.

Read the whole rule, because there are exceptions. But keep this general rule in mind: Little harm is done by filing the appeal too early. Much harm is done by filing it too late. These time limits are jurisdictional–no matter how compelling the reason, the Court will not entertain an untimely appeal. So err on the side of caution. (Even if the notice of appeal is filed prematurely, the filing fee is applied to the later timely appeal–See Rule 104.01 Subd. 3.)

As you prepare to file the appeal, you don't necessarily need every last part of your strategy mapped out. However, some of the requirements for the actual filing might take a little bit of time. For example, preparing the statement of the case might take a little bit of thought and research. You can probably do it in a day, but you probably can't do it in an hour. So don't wait until an hour before the post office closes!

The following things can't wait until the last minute:

1. Obtaining a certified copy of the order or judgment from the trial court. This will need to be filed along with the Notice of Appeal. See Rule 104.01.

2. Procuring the bond(s). See discussion below.

3. Consider ordering any transcript that might be required. If the issue is entirely legal, then a transcript might not be necessary. However, this does not need to be done prior to filing the notice of appeal.

4. Start articulating your grounds for appeal. To put it in legal terms, if you want the Court of Appeals to reverse the lower court, you need to give them a "reason". When you file the Notice of Appeal, you will need to include a Statement of the Case, which will include the legal issues on appeal. They aren't carved in stone at that point, but that is as good a time as any to be able to state the compelling issue(s) in the case that mandate reversal. If you can't do that, you need to stop and think about whether you really want to appeal. Articulating the issues early in the process will make the whole process much easier for you.

Note: If one party files a notice of appeal, then another party may file a related notice of appeal within 14 days. See Rule 104.01, Subd. 4.

The time for filing of the notice of appeal runs from the date of entry of judgment. Period. It is not extended by the addition of costs or disbursements. (Although I suppose maybe the order granting costs is an appealable order, if you're appealing only the costs, and not the underlying judgment.) See Rule 104.02.

Bad News for the Procrastinators:

The airport post office, formerly open 24 hours per day, now closes at 11:00 PM! Plan accordingly!
http://www.usps.com/communications/newsroom/localnews/mn/2010/mn_2010_0322.htm

One possible option for procrastinators seeking a late-night postmark are USPS automated postal stations at some post offices. Many (but not all) are available 24 hours per day, and allow you to pay with a credit card. For locations, call (800) ASK-USPS.

Rule 125.01 states:

> Filing may be accomplished by United States Mail addressed to the clerk of the appellate courts, but filing shall not be timely unless the papers are deposited in the mail within the time fixed for filing. Filing may be

accomplished by use of a commercial courier service, and shall be effective upon receipt by the clerk of the appellate courts.

I've never run the risk of depositing something in a mailbox at 11:59 PM, knowing that it won't be touched by a postal employee until the next day, although an argument can be made that it was "deposited in the mail" in time. If that was the only option, then I guess I would try it. If you think you might need to do this sort of thing, then keep lots of stamps on hand.

But it's better not to get in that position in the first place. I feel much better when I see a postal clerk apply a postmark with the correct date, and look at it to make sure that it's legible. I feel even better when I hand deliver it to the clerk's office in time.

If you're running around filing papers at 11:59 the night they are due, and can't find anyone to notarize your affidavit of service, keep in mind that the "clerk of the appellate courts may permit papers to be filed without proof of service, but shall require proof of service to be filed promptly after filing the papers." Rule 125.04. So get it in the mail, and worry about the affidavit the next day.

"Service by any party of written notice of its filing"

If you are anticipating a possible appeal by an adverse party, the clock for filing the notice of appeal of an appealable order (as opposed to appealing the judgment) begins to run after "service by any party of written notice of its filing." The district court administrator is not "party" to the case, so even the notice given by the court does not begin the running of the time to appeal. An adverse party (the party who will be respondent for any subsequent appeal) needs to serve this notice, in order to limit the time to appeal.

No particular form is specified for giving this written notice.

> **Practice tip**: The adverse party is probably somewhat aware of this rule, and they will recognize the purpose if you send them an official-looking document drafted to look like a pleading, especially if it contains a title such as "notice of filing of order". This will remind them that the order in question might be appealable, and might even cause them to note the date on their calendar.
>
> If you can come up with an excuse for sending a letter, this will satisfy the "written notice" requirement without inadvertently encouraging them to appeal. So if you send a letter for some other purpose, you may wish to simply include language such as, "as you are aware, on [date], the court filed an order in this matter, a copy of which is enclosed." Prepare an affidavit of service for your letter in case the issue later comes up. Also, your letter might later become a part of the court's file, so keep that in mind when you're writing it, and keep the tone of this letter particularly civil.

Bonds on Appeal

There are two types of bonds involved in filing an appeal. One is almost always required. With rare exceptions, a **cost bond** is required in all cases. In addition, if you want to suspend the effect of the judgment during the pendency of the appeal (in other words, there is a money judgment against your client and you want to make sure the opposing party doesn't execute against it before the appeal is decided), you will also need a supersedas bond.

Cost Bond: Rule 107.01 requires a cost bond in the amount of $500. In the alternative, the appellant may deposit $500 with the trial court administrator. The cost of obtaining this bond is typically about $75 (10% of the amount of the bond, plus a fee of about $25). I have previously obtained these bonds from: Patrick J. Thomas Agency, 625 2nd Avenue South, Suite #410, Minneapolis, MN 55402, 612-339-5522, pjtagency.com.

In my experience, the agent issues these bonds very readily, and I've never been questioned as to whether my client

or I had sufficient financial resources to cover the amount of the bond. In one case when a pro se litigant obtained such a bond for a pro se appeal, he was asked to post some collateral with the bondsman.

This bond can also be waived by the opposing party, in which case you'll need the opposing attorney's signature on a consent to do so. I've never tried asking for one.

As noted above, you can also satisfy the bond requirement by depositing $500 cash with the district court administrator. I've never used this option, but I suspect that getting the money back at the end of the case will be a lot more work than just paying $75 up front to the bondsman. If you forgot to get the bond, and the notice of appeal needs to be filed tonight, then you have little choice other than to get out your checkbook. But that won't happen to you, because you took this CLE!

It is also possible to make a motion with the trial court (prior to filing the notice of appeal) waiving this requirement. I've never heard of this being done. Again, it seems a lot easier just to pay the $75.

This bond is required in almost all civil cases, but there are a handful of exceptions, listed in Rule 107.02.

Supersedeas bond: The filing of a notice of appeal does not affect the enforceability of the judgment being appealed. A successful plaintiff can execute on the judgment, notwithstanding the fact that the defendant has appealed. Rule 108.01. Until such time as the judgment is reversed, it is still a valid judgment.

In order to stay the judgment pending appeal, the appellant must make a motion to that effect with the trial court. Rule 108.02. Any bond (which will probably be required by the trial court) must be approved by the trial court. Rule 108.02, subd. 6, states the procedure by which the Court of Appeals may review such an order.

Ordering the Transcript

A transcript can be expensive, but it isn't always needed. In cases (for example, a motion for summary judgment) where all of the facts of the case are found in documents in the record, it's probably not necessary to order a transcript, since the only thing you can have transcribed are the arguments of the attorneys in the lower court, which are probably of little interest to the court of appeals.

A final decision on whether to order a transcript doesn't need to be made until ten days after filing the notice of appeal. But because it's a time-consuming activity and expensive, you should give this matter some thought very early in the process.

If you decide you do need a transcript, you will need to order it from the court reporter, and you and the court reporter will need to execute a certificate regarding the transcript. The transcript needs to be ordered within ten days after the notice of appeal, and the certificate must be filed within ten days thereafter. See Rule 110.02.

A sample of a letter ordering the transcript and the certificate is included in the appendix. If I don't know the name of the reporter, I generally address this letter to "Court Reporter for Hon. _____" in care of the Courthouse.

Invariably, the court reporter will require a deposit before signing the certificate, and he or she will contact you to make arrangements. Typically, this deposit will be a very accurate estimate of the final cost, although you will likely receive a bill for a small additional amount after the transcript is completed.

It goes without saying that court reporters are among the people with whom it's valuable to maintain a good relationship.

Within the ten days, you will also need to notify opposing counsel and the court of which portions of the transcript you will be ordering (or that you will not be ordering them). See Rule 110.02, subd. 1. The opposing party then has

the option of ordering additional portions of the transcript.

Always keep in mind that the Court of Appeals will have in its possession the entire original file from the trial court, and the Judges deciding your appeal can easily consult it. There is usually very little to be gained by flooding the Court of Appeals with additional pieces of paper.

In some cases, Rule 110.03 and 110.04 provide an alternative to ordering a transcript. I've never had occasion to use either of these methods.

Also, if the opposing party wishes to order additional portions of the transcript after you have designated them, he or she may do so.

Filing the Appeal

Use the forms in the Appendix of Forms, and the documents included with these materials, as a guide when filing the appeal. In general, you will be preparing five sets of copies of the documents, and each recipient will get various numbers of copies:

1. District Court Administrator
2. Clerk of Appellate Courts
3. Opposing Counsel
4. Your client
5. Your file

To keep everything organized, I generally just include a list on the cover letter to each of these parties and/or on the affidavit of service, and as I make copies, I add them to the pile under the cover letter and check off the item. (When you're at the post office mailing everything, keep in mind that each envelope will have a different number of papers in it, so even though the envelopes might appear to be the same size, they might require different amounts of postage.)

You will be serving and filing the following documents on the following people. You may wish to simply cut and paste these checklists into each cover letter and/or your affidavit of service.

TO CLERK OF APPELLATE COURTS:

1. Two copies of Notice of Appeal. Must contain "statement specifying the judgment or order from which appeal is taken" and "names, addresses, and telephone numbers of opposing counsel, indicating the parties they represent." Rule 103.01 Subd. 1. The rule is unclear on whether these are two originals, or whether one is a copy of the other one. To avoid any surprises, I simply make sure that each of these contains my original signature.

While it the most critical document in the case, the Notice of Appeal is very short and will probably take only a few minutes to draft. The only required contents are shown above. You can simply download Form 103A from the Court's website (in either WordPerfect or PDF format) and fill in the blanks on your word processor.

2. Certified copy of judgment or order being appealed. This is the certified copy with the district court's official seal.

3. Two copies of statement of the case (See Rule 133.03, and discussion below)

4. Filing fee of $550, payable to "Clerk of Appellate Courts.

NOTE: Any motion to proceed in forma pauperis (to waive the filing fee and cost bond) must be filed with the trial court, prior to the time for appealing. See Rule 109.02.

5. Certificate as to Transcript, etc. Rule 110.02. Note: The transcript can be ordered up to ten days after filing the notice of appeal, and the certificate can be filed up to ten days thereafter. I have filed it along with the notice of appeal, but it is not necessary to do so.

6. The Rules don't seem to require it, but I generally add a copy (usually marked "copy" to avoid confusion) of the cost bond, and file it with the clerk of appellate courts.

7. Proof of service on adverse party or parties, and proof of filing with trial court. Rule 103.01 Subd. 1. (If you hand deliver everything to the Clerk of Appellate Courts, you can have them notarize your affidavit of service.) This will probably be two separate documents: An affidavit that you filed a copy of the notice of appeal and original cost bond with the district court, and an affidavit that you served everything on opposing counsel.

TO TRIAL COURT ADMINISTRATOR:

1. Copy of Notice of appeal
2. Cost bond (see Rule 107, and discussion above) or written waiver

TO OPPOSING COUNSEL, YOUR CLIENT, AND YOUR FILE:

These will receive copies of everything you filed. For your convenience, these are:

1. Notice of Appeal
2. Copy of the Certified Copy. This probably isn't necessary, but I include an uncertified copy (a copy I made myself) of the district court's certified copy of the order or judgment.
3. Statement of the Case
4. Certificate of transcript, etc.
5. Copy of the cost bond
6. Copy of the proof of service.

Note: I'm always a little bit mystified when I open an envelope, and inside there is a copy of an affidavit saying that the sender "did mail" me the very thing that was also in the envelope. Obviously, the affidavit was literally false when executed–the envelope containing the affidavit had not yet been mailed to me. I avoid this curious situation by including an unsigned copy of the affidavit of service.

Statement of the Case

Along with the notice of appeal, you will need to file the "Statement of the Case". This should not be confused with a section in the brief with the same name, as the two are somewhat different. Drafting this document is a bit more time consuming than the Notice of Appeal, but is mostly self-explanatory

You can start by downloading Form 133 from the Court's website, and filling in the blanks. Most are self-explanatory, but I have reproduced the form on the following pages, along with a few comments (underlined) on some of these sections.

SAMPLE STATEMENT OF THE CASE TAKEN FROM FORM 133
With my comments underlined.

STATE OF MINNESOTA
(IN SUPREME COURT
OR
IN COURT OF APPEALS)

CASE TITLE:

Appellant, STATEMENT OF THE CASE OF
(APPELLANT) (RESPONDENT)

TRIAL COURT CASE NUMBER:

vs.

APPELLATE COURT CASE NUMBER:

Respondent.

1. Court or agency of case origination and name of presiding judge or hearing officer.

District Court, — Judicial District, — County, the Honorable -------, J.

2. Jurisdictional statement

(A) Appeal from district court.

Statute, rule or other authority authorizing appeal:

In most cases, the answer to this question will be, “Minn. R. Civ. App. P. 103.01"

Date of entry of judgment or date of service of notice of filing of order from which appeal is taken:

This will usually be the date of the entry of the judgment. If there is an order for judgment, the entry of judgment is usually stamped by the district court administrator onto the last page of this document, and the date on that stamp is the date to be used.

Authority fixing time limit for filing notice of appeal (specify applicable rule or statute):

In most cases, the answer to this question will be, “Minn. R. Civ. App. P. 104.01" (60 days)

Date of filing any motion that tolls appeal time:

If any motions were filed in the district court which extend the time for appeal (which are rare), they would be mentioned here. These motions are discussed in Rule 104.01, subd. 2. If, as in most cases, there is no such motion, answer “none” or “N/A”.

Date of filing of order deciding tolling motion and date of service of notice of filing:

If such a motion was filed, the date that the motion was decided. If there was no such motion, answer “none” or “N/A”.

(B) Certiorari appeal.

The scope of this CLE covers appeals in civil cases. This section of the statement of the case is not used.

Statute, rule or other authority authorizing certiorari appeal:

Authority fixing time limit for obtaining certiorari review (cite statutory section and date of event triggering appeal time, e.g., mailing of decision, receipt of decision, or receipt of other notice):

(C) Other appellate proceedings.

The scope of this CLE covers appeals in civil cases. This section of the statement of the case is not used.

Statute, rule or other authority authorizing appellate proceeding:

Authority fixing time limit for appellate review (cite statutory section and date of event triggering appeal time, e.g., mailing of decision, receipt of decision, or receipt of other notice):

(D) Finality of order or judgment.

Does the judgment or order to be reviewed dispose of all claims by and against all parties, including attorney fees? Yes ( ) No ( )

In most cases, the answer will be "yes". If there was a final judgment against one party, but not against other parties, answer "no" and see the second paragraph of Rule 104.01 and Minn. R. Civ. P. 54.02 for the procedure that needs to be followed **in the district court** prior to filing the notice of appeal.

If no:

Did the district court order entry of a final partial judgment for immediate appeal pursuant to MINN. R. CIV. APP. P. 104.01? Yes ( ) No ( ) or

If yes, provide date of order:

If no, is the order or judgment appealed from reviewable under any exception to the finality rule? Yes ( ) No ( )

If yes, cite rule, statute, or other authority authorizing appeal:

(E) Criminal only:

Has a sentence been imposed or imposition of sentence stayed? Yes ( ) No ( )

If no, cite statute or rule authorizing interlocutory appeal:

3. State type of litigation and designate any statutes at issue.

Here, include a very brief description of the case. Note that you are writing this mostly for the benefit of the clerk's office to properly categorize the case. You don't need to go into great detail. For example:

This is a personal injury case in which the plaintiff alleges that he was injured by plaintiff's negligence in an automobile accident. Plaintiff was struck by defendant's vehicle while defendant was making a left turn in front of oncoming traffic. Defendant moved for summary judgment on the grounds that he was immune from liability under

Minn. Stat. 123.456, the statute at issue in this appeal. The trial court granted this motion, and plaintiff brings this appeal.

4. Brief description of claims, defenses, issues litigated and result below. For criminal cases, specify whether conviction was for a misdemeanor, gross misdemeanor, or felony offense.

Again, you're writing at this point mostly for the benefit of the clerk's office, so keep your description concise. For example:

Defendant alleged that he was immune from liability under Minn. Stat. 123.456, which grants immunity to extraterrestrial aliens. Plaintiff's position was: (1) The statute does not apply to motor vehicle accidents, and (2) there was a genuine issue of material fact as to whether the defendant was an extraterrestrial alien, or whether he was a citizen of France.

5. List specific issues proposed to be raised on appeal.

This is the first time in the case when you have to tell the court why you are appealing. So you should have given some thought. If you do a reasonably good job at this point, you will probably find yourself cutting and pasting these issues into the brief you will be writing in a few short weeks.

Generally, the issue should be presented in neutral terms, but you needn't go overboard in being neutral. Even at this stage in the process, it's good to be able to write the issue in such a way as it suggests the "correct" answer. For example:

Did the trial court err in granting defendant's motion for summary judgment, when there was evidence that the defendant was making an illegal left turn in front of plaintiff's vehicle?

The issues that you list here are not necessarily cast in stone. If you find you need to tweak the wording slightly when you write your brief, there is no harm in doing so. Also, failure to list an issue isn't necessarily jurisdictional, so you **might** be able to add to them. But personally, I wouldn't want to test the court's patience by doing so. If you include an issue here, you **can** later drop it and not include it in your brief. But it's not a good idea to use this as an invitation to use the shotgun approach and include frivolous issues. The clerk's office, the staff attorneys, and possibly the judges deciding your case will read what you write here, and you want to make a good first impression.

6. Related appeals.

List all prior or pending appeals arising from the same action as this appeal. If none, so state.

List any known pending appeals in separate actions raising similar issues to this appeal. If none are known, so state.

In most cases, the asnwers to these questions will be "none".

7. Contents of record.

Is a transcript necessary to review the issues on appeal? Yes ( ) No ( )

In many cases, "no" is a perfectly acceptable answer to this question. A transcript is generally only necessary for **testimony**. If the case was decided on summary judgment, then there probably is no testimony, and a transcript is probably an unnecessary expense.

If yes, full ( ) or partial ( ) transcript?

Even if a transcript is necessary, a **full** transcript might not be. If there was a trial, do you really need to pay to have your arguments transcribed? As eloquent as you were, it's unlikely that the court will bother reading them. And you can make the same arguments again in your brief.

One exception might be if the other side's arguments were particularly poor, or if you want to argue during the appeal that they need to stay with the same theory of the cases that they used in the trial court. Even in this case, however, it might be possible to present this based upon their written arguments, which are already part of the record.

If the trial judge made all or part of his or her ruling on the record orally in court, then this should probably be transcribed.

Has the transcript already been delivered to the parties and filed with the trial court administrator? Yes ( ) No ( )

In most cases, you will be ordering the transcript about the same time as the appeal (or within the next few days), so the answer will be "no".

If not, has it been ordered from the court reporter? Yes ( ) No ( )

I like to order the transcript prior to filing the notice of appeal, in which case you would answer "yes". However, you have an additional ten days to order the transcript, in which case you will answer "no".

If a transcript is unavailable, is a statement of the proceedings under Rule 110.03 necessary? Yes ( ) No( )

In lieu of the record as defined in Rule 110.01, have the parties agreed to prepare a statement of the record pursuant to Rule 110.04? Yes ( ) No ( )

Again, I have never done either of these, but if instead of a transcript you proceed under Rule 110.03 or 110.04, answer "yes" accordingly.

8. Is oral argument requested? Yes ( ) No ( )

I almost always request oral argument, so the answer is "yes".

If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2? Yes ( ) No ( )

For cases from the Twin Cities area, oral argument almost always takes place at the Judicial Center in St. Paul. For cases from outlying areas, the argument is sometimes scheduled at a courthouse in the same county or a nearby county. I always answer "no" to this question. If the court has a good reason to have the oral argument someplace, I'm not going to be the one to ask them to go somewhere else.

If yes, state where argument is requested:

If you're bold enough to ask them to hold oral argument in International Falls, this is where you would make that request.

9. Identify the type of brief to be filed.

Formal brief under Rule 128.02. ( )

Informal brief under Rule 128.01, subd. 1 (must be accompanied by motion to accept unless submitted by claimant for reemployment benefits). ( )

Trial memoranda, supplemented by a short letter argument, under Rule 128.01, subd. 2. ( )

I always request the "formal brief", and I've never heard of a case that used either of these other methods. Remember, you've taken this CLE, and you know how to make a high-quality formal brief at minimal cost. Your opponent probably hasn't, so why make this concession to save him or her the trouble?

10. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

NAME, ADDRESS, ZIP CODE, TELEPHONE NUMBER, AND ATTORNEY REGISTRATION LICENSE NUMBER OF ATTORNEY(S) FOR (APPELLANT) (RESPONDENT)

Your name, address, phone, and attorney ID, **and the same information for opposing counsel.**

_____
SIGNATURE

Of course, paste in the normal signature block that you use on pleadings.

OR, IF NOT REPRESENTED BY COUNSEL:

NAME, ADDRESS, ZIP CODE AND TELEPHONE NUMBER OF (APPELLANT) (RESPONDENT)

_____
SIGNATURE (OF APPELLANT) (OF RESPONDENT)

Dated:

Don't forget to include the date.

(The Statement of Case is not a jurisdictional document, but it is important to the proper and efficient processing of the appeal by the appellate courts. The "jurisdictional statement" section is intended to provide sufficient information for the appellate court to easily determine whether the order or judgment is appealable and if the appeal is timely. The nature of the proceedings below and the notice of appeal determine the jurisdiction of the appellate court. The sections requesting information about the issues litigated in the lower court or tribunal, and the issues proposed to be raised on appeal are for the court's information, and do not expand or limit the issues that might be addressed on appeal. Likewise, the section asking counsel to identify and prior or pending appeals from the same case, and any separate appeals that raise similar issues is intended to provide more information about the procedural history of the case and to ensure that the court has early notice of other pending related matters in case consolidation is appropriate.)

The Next Step: Filing the Brief

Unlike many appellate courts, the Minnesota Court of Appeals does not send out a “briefing schedule” telling you the date your brief is due. You might receive something that looks like a schedule at some point, but you are responsible for calculating when the brief is due, and you need to file it by that time. If the Court tells you when to file the brief, that probably means that it is already late!

The time for filing the brief is specified by Rule 131.01, subd. 1. It is due 30 days after the transcript is delivered to the Court of Appeals, plus three days, if the court reporter mailed the transcript. Don't count on those extra three days, since the transcript is bulky, and the court reporter might have hand delivered it.

If there is no transcript, or if it was obtained prior to appeal, then the brief is due 30 days after filing the notice of appeal. Note, this is shorter than many courts, so if you have experience in other appellate courts, don't take a break after filing the notice of appeal. The brief is due soon! Don't wait to get a "briefing schedule" in the mail, because you won’t get one!

The respondent has thirty days after the appellant's brief is filed.

The appellant then has ten days after that brief to file any reply brief.

For more complicated situations involving multiple parties, there are further rules.

Under Rule 134.01, oral argument will not be allowed in a case when "a party has failed to file a timely brief." The Court of Appeals takes this very seriously! If one party files their brief late, then there is no oral argument! And the three judges deciding your case know which party caused the oral argument to be cancelled. Yes, someone in the clerk's office does look at the dates the briefs were received, and compares it with the date for the receipt of the notice of appeal or of the transcript. If your brief is a day late, you will probably find out when you receive an order stating that there will be no oral argument, and the order will recite the fact that it was your fault.

How Many Copies?

When it comes time to print the briefs, Rule 131.03 tells you how many copies you will need. For the court, you will need seven copies. "One copy of the seven shall be unbound." You will also need two copies to serve on each party separately represented (Rule 131.02, subd. 2), and of course, extra copies for your file and for your client. So for appeals with a single opposing party, you'll usually need to make 11 copies, and have 10 of them bound.

The rule is unclear on which copy of the brief is the "original"--that is, which one contains your original signature (is it one of the six bound copies, or the one unbound copy). In my experience, the clerk's office doesn't seem to care. But since I'm having the copying done myself, I simply wait until they are copied and then sign all eleven copies with a blue pen. That way, there's no question about whether I signed the "right" copy.

Writing the Brief

As noted above, your opening brief will be due in as little as thirty days after filing the notice of appeal. The brief is the heart of your case. It is the single most important document in the case. The three judges deciding your case will most assuredly read it cover to cover, and they will probably decide the case based solely upon what you write.

The oral argument might perhaps sway one judge who is “on the fence”, but you can’t count on the short oral argument having very much persuasive power in the case. Treat your brief as if everything is riding on it. And because time is relatively short, you need to start writing the brief as soon as the ink is dry on the notice of appeal.

All of the requirements for the brief are contained in Rule 128 and Form 128. The easiest way to get started is to download Form 128, and use it as your template for writing the brief.

Here are the required parts of the brief. I usually just paste this list right into my word processor document, and then replace the names of the items with the actual item.

For example, the table of contents and table of authorities can't be written until the rest of the brief is done. To make sure that I don't forget them, I just include a blank page with the words "ADD TABLE OF CONTENTS HERE". When I prepare the final table of contents, I simply replace that page with the actual one.

Here's the checklist of what needs to be included:

☐ Cover--You can copy the template from Form 128, and then replace the names, case number, etc., with the correct information from your case.

☐ Table of Contents--Again, follow the template from Form 128.

☐ Table of Authorities--Again, just follow the template. You need to include all cases, statutes, and other authorities cited in your brief, and indicate the page number where each case appears.

☐ Legal Issues--"Precise statement of each legal issue", including "Trial court held: [Yes or no]" You can probably cut and paste this from your statement of the case, although you might want to re-word them somewhat after you've finished writing the brief. Each of these issues will become one of the subject headings (Roman numerals) in the Argument section of the brief.

☐ Statement of Facts--You should avoid being argumentative when you write the statement of facts, but within reason, you can present things in the light most favorable to your client. Everything should have a citation to the record. When I do this, I usually pick an abbreviation scheme (T. ___ for pages in the transcript; A. ___ for documents in the appendix; etc.) and then include a footnote explaining exactly what the abbreviations stand for.

☐ Argument--This is the core of the brief. Each of the issues identified above becomes a Roman Numeral, and the subject heading should be a well-written answer to that issue. For example,

> "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE STILL ISSUES OF MATERIAL FACT FOR THE JURY TO DECIDE",
>
> "II. THE TRIAL COURT ERRED IN DISMISSING BECAUSE OF SOVEREIGN IMMUNITY, BECAUSE THE DEFENDANT'S ACTION WAS NOT A DISCRETIONARY FUNCTION."

Under Rule 128.01, Subd. 1(d), each section of the argument shall include "the applicable standard of review for each issue." Unlike some courts, there is not a specific requirement that this discussion be at the beginning of the argument, but that is often a good practice. It needs to be stated fairly, but it's always best to do so from your client's point of view. For example, the appellant might say, "the trial court must be reversed because it abused its discretion in finding...." The respondent, on the other hand, would say, "the trial court's decision must be affirmed unless this court is convinced that the trial court abused its discretion." There should be a citation to the legal authority for the standard of review; however, there are generally many cases available, and it's usually possible to find one that words it in your client's best light. This is one case where quotation marks can add to the value of the brief.

☐ Conclusion--"A statement of the precise relief sought". I like to use the conclusion to make the argument one last time. But, as the rule states, you need to tell here exactly what relief you want. If you want the judgment reversed, this is where you need to say so. For example, the conlcusion might read something like, "Because there were still issues of material fact regarding defendant's negligence, the trial court erred in granting defendant's motion for

summary judgment. Accordingly, plaintiff respectfully requests that the judgment of the district court must be reversed, and the case remanded for further proceedings."

□ Signature--"Respectfully submitted", followed by a signature line, the date, your name, address, phone, attorney ID, and words such as "Attorney for Plaintiff-Appellant".

□ Appendix and Index--In most cases, the "appendix" is included as part of the same document as the brief, bound in to the end. The contents are actually found in two places in the rules. The contents of the "addendum" are stated in 128.02, subd. 3. These are: (1) A copy of the order or judgment being appealed from, and (2) Any other documents in the record (not the transcript) that would be helpful to the court. In short, you are encouraged to include any "smoking gun" document at the end of your brief, so that it's handy for the court to look at. If you have something really good--include it. But don't add things, because the court has plenty of paper in front of it, and they don't need more. The court does have access to the full district court file, and the judges do look at it when the need arises. A short addendum is better than a long one.

The additional contents of the appendix are found in Rule 130.01, subd. 1. These include the relevant pleadings, orders, etc. There is no need to go overboard with the appendix. Make your brief look like an inviting book to read; don't make it look like the phone book.

The appendix needs a separate index, which you place as the first page of the appendix.

The length of the brief is covered in Rule 132.01, subd. 3. If measured in pages, the briefs must not exceed the following limits:

Appellant's Brief: 45 pages
Respondent's Brief: 45 pages
Appellant's Reply Brief: 20 pages.

These page limits do not count the table of contents, table of citations, the addendum, or the appendix. As an alternative, the briefs can exceed these page limits, if they are below the limits for words or lines of text stated in Rule 132.01.

If you go by word or line count, you need to include a certificate described in the rule. This certificate is not required if you are under the page limits shown above.

Shorter is generally better. Except in the most complex of cases, there is rarely a need to be even close to these page limits. The whole idea is to persuade the judges. It’s hard to do this if you present them with a phone book that they need to read.

When you fire up your laser printer to print your manuscript, make sure that you have complied with the various requirements for font size found in Rule 132.01, Subd. 1.

Printing and Binding the Brief

Once you have written the brief, you will need to have it printed and bound. This is when many attorneys call in a commercial printer, and turn over the manuscript they have meticulously written to unknown hands. This is generally not necessary, since any copy shop, such as Kinko’s or the UPS Store will do an excellent job, as long as you tell them the exact requirements. Generally, binding costs about $2 per copy. Copying is usually about 10 cents per page. When you add up these costs, you will discover that you can save a fortune by doing it yourself, and you can be assured that the work is done right, because you will be right there supervising it, and inspecting each copy as it rolls off the presses.

Generally, most copy shops will be able to do a job of this size while you wait. Occasionally, they will be busy with another job, and you will have to wait. If that happens, you can either drop off your work (and carefully inspect it when you pick it up), or else simply offer to come back at another time when they're not so busy.

Of course, if you have a copier in your own office, you can do the copying there and then have it bound at a copy shop. (And if you do a lot of appeals, you might even wish to make the modest investment in the binding materials and equipment, and do it yourself.) However, keep in mind that the "cost" of printing the brief can be recovered by the prevailing party. It's easier to establish that you incurred this cost if you have a receipt showing exactly how much you paid for exactly how many copies.

As noted above, you will probably need eleven copies, and you will need to have ten of them bound.

Before heading to the copy shop, you will want to look over Rule 132.01, which specifies the form requirements.

The cover needs to be printed on colored card stock. The colors are as follows:

Appellant: Blue
Respondent: Red
Appellant's Reply Brief: Gray

While the rules are not clear, the back cover of the brief is a blank sheet of the same card stock used for the cover.

At one time, I used the "Lunar Blue" at Kinko's. Use fairly light versions of these colors. I have never had the court of appeals complain about the particular shade of blue that I used on my covers, and there does seem to be some variation.

The Clerk of appellate courts maintains a list of "approved" binding methods, and this is one area where they do expect you to adhere exactly to the requirements. Different courts prefer different bindings! So if you are familiar with the methods preferred by one court, these are not necessarily acceptable to other courts. For example, the Fifth Circuit prefers spiral "comb" bindings, but the Minnesota courts will not accept these.

The list of approved bindings is available online:
http://www.mncourts.gov/documents/0/Public/Clerks_Office/Brief%20Binding%20Requirements.pdf

The most common, which is readily available at Kinko's is "Velo Bind". This is a black plastic strip that runs the entire length of the front and back covers. There are plastic teeth which go through the paper (invisibly), which are melted to the strip on the other side.

Velo Bind is also acceptable to the Eighth Circuit, the last I checked. Again, other courts will vary considerably, so if practicing before a new court, this is one detail you need to check out.

Be sure to save your receipts when you have the brief printed and bound. If you represent the prevailing party, these costs will be borne by the opposing party.

ORAL ARGUMENT

Oral argument is governed by Rule 134. You will have only a short time (generally 15 minutes) to present your client's case, and you will almost immediately be interrupted by questions from the Court.

It's an added bonus if you get to say all of the things you want to say, but this will generally be impossible.

I like to make a list of several "talking points" that I want to make during oral argument, and be prepared to talk

about all of them. Orgainize these by importance, and start talking about the one you deem most important. But you generally won't get a chance to finish, because you will probably be interrupted by a question.

If you are well prepared for the oral argument, it is likely that the question can be answered by one of your talking points, although not necessarily the one you deemed most important. When you have finished answering, then move on to your first unanswered talking point.

Treat all questions as being friendly questions. Even if a question seems difficult, the judge asking the question might be doing so to head off some objection by one of his colleagues.

If you have never argued a case before the Court of Appeals (or if it has been a while), it is very helpful to sit in on another case on an earlier day.

It is also very important to arrive not just before your case, but before the first case being heard that morning or afternoon. You can check in with the in-court clerks, and they will show you how the lights on the rostrum work. They will also ask you how many minutes you want to reserve for rebuttal, if you are the appellant. I generally reserve one or two minutes of my time, so that I can have the "last word", and clear up any mis-statements by my opponent.

In front of you, there will be three lights, green, yellow, and red. The green light comes on when it is time for you to start talking. The yellow light comes on about one minute before your time has expired. The red light means that your time has expired. When the red light comes on, you need to sit down. Finish your sentence, and then say, "I see my time has expired. Unless the court has any further questions, thank you, your honors," and then sit down.

The Court runs a tight schedule, and they won't extend you extra time just because of your eloquence. You've already made your arguments in your brief, and all of the judges have read your briefs. Don't worry if you didn't have time to say everything you wanted--nobody ever does.

The judges will have name tags in front of them. You will know the names of your judges when you receive the oral argument schedule, so it's probably a good idea to make sure you can pronounce them properly. If in doubt, it's probably worth a call to the clerk's office. Even if you don't address the Judges by name directly, you might have to say something like, "as Judge ____ alluded in his earlier question." It's probably better if you don't have to point and say, "him, over there."

The presiding judge (the Chief Judge, if on your panel, or the most senior of the three judges) will be seated in the center, and will be the one to actually call your case. I usually begin my argument by saying something like, "Thank you, Your Honor. My name is _____, and it is my privilege to represent _____."

Parking is generally available at the metered parking lot across the street from the Judicial Center. You will need change to pay for parking, so make sure you bring quarters with you.

Costs–Rule 139

Assuming that you're the prevailing party, you are entitled to costs from the opposing party. This will include the filing fee, the cost of the transcript, and the cost of copying and binding your brief. The procedure for filing your bill of costs is covered in Rule 139.

There is no general provision for attorney fees for the prevailing party, and it is unusual to receive attorney fees on appeal. There might be provisions for attorney fees in a statute or case law, however.

If attorney fees were granted by the district court, and the appellant unsuccessfully appealed, this is one situation

where attorney fees will be awarded by the Court of Appeals: "To deny a prevailing plaintiff compensation for fees reasonably incurred in defending a judgment on appeal would defeat the intent of the legislature in providing for recovery of attorney fees." Bucko v. First Minn. Sav. Bank, F.B.S., 471 N.W.2d 95, 99 (Minn. 1991).

Notification of Attorney General when constitutionality of a statute is questioned:

"When the constitutionality of an act of the legislature is questioned in any appellate proceeding to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general within time to afford an opportunity to intervene." Rule 144.

SAMPLE LETTER TO COURT REPORTER

_____, 20__

Court Reporter to Hon. _____
_____ County Courthouse
_____, MN

Re: _____ v. _____
District Court File No. _____

Dear Court Reporter:

My client is considering [has filed] an appeal in the above-entitled matter. For purpose of that appeal, we need a transcript of the following portions of the proceedings:

[Trial held _____, 20___]
[Summary judgment hearing held _____, 20__]
[Motion for preliminary injunction held _____, 20__]

The transcript should meet the requirements of Minnesota Rule of Civil Appellate Procedure 110.02, subd. 4.

Please bill me for the cost of the transcript upon completion. If you require a deposit, please contact me immediately so that I can send you a check. [As we discussed previously, enclosed is a check in the amount of $____ as a deposit.]

Please sign and return to me the Certificate as to Transcript which is enclosed. I need to file this with the Court of Appeals within ten days, so it's very important that the certificate be returned promptly.

Please call me if you have any questions.

Sincerely yours,

_____

cc: Opposing counsel