

CHAPTER 7

Appellate Procedure

I. NOTICE OF APPEAL

§ 7.1 Generally

An appeal is initiated by filing a notice of appeal with the clerk of the district court. See §§ 12.5, 12.6, *infra*. Timely filing of a notice of appeal is jurisdictional. A notice of appeal must be served on all parties as provided in K.S.A. 60-205, but failure to do so does not affect the validity of the appeal. K.S.A. 60-2103(b).

§ 7.2 Chapter 60 Appeals

A notice of appeal must specify the parties taking the appeal, designate the judgment or part thereof appealed from, and name the appellate court to which the appeal is taken. K.S.A. 60-2103(b). The appellate court is without jurisdiction to hear arguments of a party not named either directly or by inference in the notice of appeal. *Anderson v. Scheffler*, 242 Kan. 857, Syl. ¶ 1, 752 P.2d 667 (1988). An appellate court only obtains jurisdiction over the rulings identified in the notice of appeal. *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, Syl. ¶ 1, 869 P.2d 598 (1994); *Anderson*, 242 Kan. 857 at Syl. ¶ 3; *In re Marriage of Galvin*, 32 Kan. App. 2d 410, 411, 83 P.3d 805 (2004).

PRACTICE NOTE: This is one area in which specificity can cause problems later. It is advisable to file an appeal generally from all adverse rulings.

“When there is but one court to which an appeal may be taken, the failure to correctly name that court in the notice of appeal is a mere irregularity to be disregarded unless the appellee has been misled or otherwise prejudiced.” *City of Ottawa v. McMechan*, 17 Kan. App. 2d 31, Syl. ¶ 2, 829 P.2d 927 (1992).

A notice of appeal must be filed within 30 days from “entry of the judgment.” K.S.A. 60-2103(a). Note, however, that a notice of appeal from an order appointing or refusing to appoint a receiver must be filed within 10 days of the entry of the order. K.S.A. 60-1305.

Entry of judgment occurs when a journal entry or judgment form is filed. K.S.A. 60-258. A judgment is effective only when a journal entry or judgment form is signed by the judge and filed with the clerk of the district court. Trial docket minutes or judge’s notes do not comply with K.S.A. 60-258 and do not constitute entry of judgment. See *In re Marriage of Wilson*, 245 Kan. 178, 180, 777 P.2d 773 (1989).

A notice of appeal filed after oral pronouncement of final judgment but before the filing of a journal entry is a premature notice of appeal that becomes effective upon the filing of the journal entry. A premature notice of appeal must identify the judgment appealed from with sufficient certainty to inform the parties of the rulings to be reviewed. Rule 2.03.

Rule 2.03 also validates a premature notice of appeal filed after a journal entry of final judgment but prior to the filing of a journal entry on a motion to alter or amend, or a motion to reconsider. See *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, Syl. ¶ 3, 836 P.2d 1142 (1992); *Cornett v. Roth*, 233 Kan. 936, 939-40, 666 P.2d 1182 (1983); *Hundley v. Pfuetze*, 18 Kan. App. 2d. 755, 756-757, 858 P.2d 1244, *rev. denied* 253 Kan. 858 (1993).

Another type of premature notice of appeal occurs when multiple parties or issues are involved in a case and judgment is entered that does not dispose of all the parties or claims. The Kansas Supreme Court has held that a notice of appeal filed after the interlocutory order becomes effective upon entry of final judgment. “If a judgment is entered disposing of all claims against one of multiple parties, and a premature notice of appeal is filed and has not been dismissed, then a final judgment disposing of all claims and all parties validates the premature notice of appeal concerning the matters from which the appellant appealed.” *Honeycutt v. City of Wichita*, 251 Kan. 451, Syl. ¶ 6, 836 P.2d 1128 (1992).

PRACTICE NOTE: A premature notice of appeal only applies to judgments entered before the notice of appeal was filed. Therefore, if a party wishes to appeal any orders or a final judgment occurring since the filing of the previous notice of appeal, another notice of appeal should be filed after entry of those orders or final judgment.

A district court may extend the time for filing a notice of appeal upon a showing of excusable neglect based on the failure of a party to learn of the entry of judgment. Such an extension may not exceed 30 days from the expiration of the original time for filing a notice of appeal. K.S.A. 60-2103(a); *Stanton v. KCC*, 2 Kan. App. 2d 228, 229, 577 P.2d 367, *rev. denied* 225 Kan. 845 (1978). In addition, if a court enters judgment without notifying the parties as required by K.S.A. 60-258 and Rule 134, the time for filing a notice of appeal does not begin to run until such compliance occurs. *Daniels v. Chaffee*, 230 Kan. 32, 38, 630 P.2d 1090 (1981); *U.S.D. No. 501 v. American Home Life Ins. Co.*, 25 Kan. App. 2d 820, 822, 971 P.2d 1210, *rev. denied* 267 Kan. 889 (1999).

In some circumstances, an untimely appeal will be retained by the appellate courts because of the unique circumstances doctrine. The unique circumstances doctrine involves judicial action that seemingly extended the time to file a notice of appeal or post-trial motions.

Three elements must be present before the unique circumstances doctrine applies in all appeals, except those seeming to extend the time to file post-trial motions:

- The appellant must reasonably and in good faith rely upon judicial action that seemingly extends the appeal period;
- The court order purporting to extend the appeal period was for no more than 30 days and was made and entered before the expiration of the official appeal period; and
- The appellant filed a notice of appeal within the period apparently judicially extended.

Nguyen v. IBP, Inc., 266 Kan. 580, 587, 972 P.2d 747 (1999).

Four elements must be present before the unique circumstances doctrine applies to judicial action seeming to extend the time to file post-trial motions:

- The appellant must have reasonably and in good faith relied upon judicial action seemingly extending the time to file post-trial motions;
- The court order purporting to extend the time to file post-trial motions was for no more than 10 days and was entered prior to the expiration of the official time period to file post-trial motions;
- The appellant filed the post-trial motions within the period apparently judicially extended; and
- The appellant filed a notice of appeal within 30 days of the denial of the post-trial motions.

Johnson v. American Cyanamid Co., 243 Kan. 291, Syl. ¶ 1, 758 P.2d 206 (1988).

If the appellate court determines the unique circumstances doctrine applies, the appeal will be retained and addressed on its merits.

Certain post-trial motions extend the time for filing a notice of appeal. If these post-trial motions are filed within 10 days of entry of judgment, the appeal time stops running and begins running in its entirety on the date of the entry of the order ruling on the post-trial motion. K.S.A. 60-2103(a). The following timely post-trial motions extend the time for appeal: motion for judgment notwithstanding the verdict (K.S.A. 60-250[b]); motion to amend or make additional findings of fact (K.S.A. 60-252[b]); motion for new trial (K.S.A. 60-259[b]); and motion to alter or amend the judgment (K.S.A. 60-259[f]). The 3-day mailing rule applies to post-trial motions if the entry of judgment is mailed to the parties. K.S.A. 60-206(e).

PRACTICE NOTE: One jurisdictional oddity exists. K.S.A. 60-259(b) provides that a motion for new trial shall be *served* not later than 10 days after the entry of judgment; whereas, under subsection (f), a motion to alter or amend must be *served and filed*. It is a better practice to serve and file all post-trial motions within the required time.

A K.S.A. 60-260 motion for relief from judgment or order for clerical mistakes and for mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other statutorily enumerated reasons does

not extend the time for filing a notice of appeal. *Giles v. Russell*, 222 Kan. 629, Syl. ¶ 2, 567 P.2d 845 (1977); *Beal v. Rent-A-Center of America, Inc.*, 13 Kan. App. 2d 375, 377, 771 P.2d 553, *rev. denied* 245 Kan. 782 (1989). A trial court does, however, retain broad discretion under K.S.A. 60-260(b) and 60-260(b)(6) to relieve a party from final judgment for any reason justifying relief from the operation of the judgment if such power is exercised prior to the time for docketing the appeal. *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 11-12, 687 P.2d 603 (1984).

§ 7.3 Chapter 61 Appeals

The rules governing appeals in Chapter 61 cases depend on whether the case was heard by a magistrate or a district judge and whether the case was filed in small claims court.

A notice of appeal in Chapter 61 cases must be filed within 30 days after entry of a district judge's order, ruling, decision or judgment, and the procedure specified in K.S.A. 60-2103(a) and (b) applies. However, if a defendant desires to appeal an action for forcible detainer granting restitution of the premises, a notice of appeal shall be filed within 5 days after entry of judgment. K.S.A. 61-3902. Timely post-trial motions extend the time to appeal. *Nolan v. Auto Transporters*, 226 Kan. 176, Syl. ¶ 1, 597 P.2d 614 (1979); *Squires v. City of Salina*, 9 Kan. App. 2d 199, Syl. ¶ 1, 675 P.2d 926 (1984).

All appeals from orders, rulings, decisions, or judgments of district magistrate judges in limited actions must be filed in district court within 10 days after entry of the order. K.S.A. 60-2103a(a). Post-trial motions do not extend the time to appeal from a district magistrate's orders. See K.S.A. 60-2103a(b). Compare K.S.A. 60-2103(a).

Appeal from any judgment under the small claims procedure act may be taken by filing a notice of appeal with the clerk of the district court within 10 days after entry of judgment. Such appeals are tried de novo before a district court judge other than the judge from whom the appeal is taken. K.S.A. 61-2709(a). An appeal may be taken from the decision of the district court judge within 30 days of entry of that judgment. K.S.A. 61-2709(b).

§ 7.4 Juvenile Appeals

Any party or interested party (terms defined in K.S.A. 38-2202(u) and (l) respectively) may appeal from “any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights” under the Revised Kansas Code for Care of Children, effective January 1, 2007. K.S.A. 38-2273(a). If the order was entered by a district magistrate judge, the appeal is to district court and the notice of appeal must be filed with the clerk of the district court within 10 days of entry of judgment. K.S.A. 38-2273(b) and (c); K.S.A. 60-2103a(a). The appeal must be heard *de novo* by the district court within 30 days of filing of the notice of appeal. K.S.A. 38-2273(b). Notice of appeal from district court must be filed within 30 days. K.S.A. 38-2273(c); K.S.A. 60-2103(a).

Pursuant to the Revised Kansas Juvenile Justice Code, effective January 1, 2007, a juvenile offender may appeal from an order authorizing prosecution as an adult but only after conviction and in the same manner as criminal appeals. K.S.A. 38-2380(a)(1). An appeal from an order of adjudication or sentencing must be taken within 30 days of entry of the order appealed from. K.S.A. 38-2380(b); K.S.A. 38-2382(c); K.S.A. 60-2103.

§ 7.5 Probate Appeals

Notice of appeal must be filed within 30 days from the entry of the judgment, pursuant to article 21 of chapter 60 of the Kansas Statutes Annotated. K.S.A. 59-2401(b); K.S.A. 59-2401a(b); K.S.A. 60-2103(a). A timely post-trial motion extends the time to appeal. *In re Estate of Burns*, 227 Kan. 573, 575, 608 P.2d 942 (1980).

The court from which the appeal is taken may require a party, other than the state of Kansas or any subdivision thereof or any city or county in this state, to file a bond of sufficient sum or surety “to ensure that the appeal will be prosecuted without unnecessary delay” and to ensure payment of all judgments, damages or costs. K.S.A. 59-2401(d); K.S.A. 59-2401a(d). See also § 5.22, *supra*.

§ 7.6 Mortgage Foreclosure Appeals

A party must appeal within 30 days of the following specific orders or the issue may not be raised later:

- Determination of lien priorities. *Stauth v. Brown*, 241 Kan. 1, 4-6, 734 P.2d 1063 (1987);
- Order of foreclosure. *Stauth v. Brown*, 241 Kan. 1, 5-6, 734 P.2d 1063 (1987); *L.L.P. Mortgage, Ltd. v. Hayse*, 32 Kan. App. 2d 579, 586, 87 P.3d 976 (2004); and
- Confirmation of sheriff's sale. *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 486, 748 P.2d 905 (1988) (order of sale cannot be appealed until after sale is confirmed); *L.L.P. Mortgage, Ltd.* 32 Kan. App. 2d. at 586 (an order confirming a sheriff's sale is not a repetition of the judgment of foreclosure).

§ 7.7 Criminal Appeals

A notice of appeal must specify the parties taking the appeal, designate the judgment or part thereof appealed from, and name the appellate court to which the appeal is taken. K.S.A. 22-3606; K.S.A. 60-2103(b). Appellate review is limited to the rulings specified in the notice of appeal. *Hess v. St. Francis Regional Med.Center*, 254 Kan. 715, Syl. ¶ 1, 869 P.2d 598 (1994); *Anderson v. Scheffler*, 242 Kan. 857, Syl. ¶ 3, 752 P.2d 667 (1988). However, when “there is but one court to which an appeal may be taken, the failure to correctly name that court in the notice of appeal is a mere irregularity to be disregarded unless the appellee has been misled or otherwise prejudiced.” *City of Ottawa v. McMechan*, 17 Kan. App. 2d 31, Syl. ¶ 2, 829 P.2d 927 (1992).

When a crime is committed on or after July 1, 1993, the defendant has 10 days from the oral pronouncement of sentence in the district court to file a notice of appeal. K.S.A. 22-3608(c). In addition, both the defendant and the State may appeal a departure sentence. K.S.A. 21-4721(a).

PRACTICE NOTE: Parties should file a notice of appeal from a departure sentence within 10 days of sentencing, the same time a defendant is allowed to file a notice of appeal. See *State v. Miller*, 260 Kan. 892, 898, 926 P.2d 652 (1996).

An exception to the time limits has been recognized when an indigent defendant (1) is not informed of his or her rights to appeal, (2) is not furnished an attorney to exercise that right, or (3) was furnished an attorney who failed to perfect and complete an appeal. *State v. Ortiz*, 230 Kan. 733, Syl. ¶ 3, 640 P.2d 1255 (1982). See also *State v. Patton*, 287 Kan. 200, 195 P.3d 753 (2008).

A criminal defendant has the right to appeal to district court any conviction in municipal court for violations of municipal ordinances. Notice of appeal must be filed with the clerk of the district court within 10 days after the date of the judgment appealed. K.S.A. 22-3609(2).

A criminal defendant also has the right to appeal a judgment of a district magistrate judge. Notice of appeal must be filed with the clerk of the district court within 10 days after the date of the judgment appealed. K.S.A. 22-3609a. A post-trial motion for new trial from a magistrate's judgment does not extend the time for appeal. *State v. Wilson*, 15 Kan. App. 2d 308, 313, 808 P.2d 434 (1991).

Appeals by the State in situations other than those authorized by statute are not permitted. The State may take an interlocutory appeal to the Court of Appeals from an order “quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission.” K.S.A. 22-3601(a) and K.S.A. 22-3603. In a case before a district magistrate judge, the State may appeal any of the above orders to a district judge. K.S.A. 22-3602(d).

In *State v. Newman*, 235 Kan. 29, 34, 680 P.2d 257 (1984), the court construed the term “suppressing evidence” to include suppression of evidence that would “substantially impair the State’s ability to prosecute the case.” The *Newman* threshold test does not apply to “quashing a warrant or a search warrant” or “suppressing a confession or admission.” *State v. Mooney*, 10 Kan. App. 2d 477, 479, 702 P.2d 328, *rev. denied* 238 Kan. 879 (1985).

PRACTICE NOTE: The *Newman* threshold test is jurisdictional. Therefore, in its brief, the State should argue how the suppression substantially impairs its ability to prosecute the case.

In an interlocutory appeal by the State, the notice of appeal must be filed within 10 days after entry of the order. K.S.A. 22-3603. The

order may be entered by oral pronouncement if such entry is on the record and expressly states whether the announcement alone is intended to constitute entry of the order or whether the trial court expects the order to be journalized and approved by the court before it is deemed to have been formally entered. *State v. Michel*, 17 Kan. App. 2d 265, Syl. ¶ 3, 834 P.2d 1374 (1992); *State v. Bohannon*, 3 Kan. App. 2d 448, Syl. ¶ 1, 596 P.2d 190 (1979).

The State also may appeal to the Court of Appeals from (1) an order dismissing a complaint, information, or indictment, (2) an order arresting judgment, (3) a question reserved, or (4) an order granting a new trial in any case involving an A or B felony or, for crimes committed on or after July 1, 1993, in any case involving an off-grid crime. K.S.A. 22-3602(b). The general rule is a notice of appeal must be filed within 30 days of entry of the order. K.S.A. 22-3606 and K.S.A. 60-2103(a). See *State v. Freeman*, 236 Kan. 274, 277, 689 P.2d 885 (1984). The rule differs, however, on questions reserved. If the defendant is found not guilty, the appeal time begins to run when the defendant is found not guilty and discharged from custody and bond with the State's knowledge. If the defendant is found guilty, the appeal time begins to run when sentence is imposed. See *City of Wichita v. Brown*, 253 Kan. 626, 627-28, 861 P.2d 789 (1993). Appeals to a district judge may be taken by the State as a matter of right from cases before a district magistrate judge from these same orders. K.S.A. 22-3602(d).

§ 7.8 Cross-Appeals

If an appellee desires to have an appellate court review adverse rulings and decisions made by the lower court, the appellee must file a notice of cross-appeal to preserve that right. K.S.A. 60-2103(h). See § 12.7, *infra*. The filing of a docketing statement answer alone is not sufficient to raise additional issues the appellee intends to raise. See Rule 2.041(b), Examples 2 and 4; *Board of Meade County Comm'rs v. State Director of Property Valuation*, 18 Kan. App. 2d 719, 722, 861 P.2d 1348, *rev. denied* 253 Kan. 856 (1993). The rules on docketing and motions to docket out of time also apply to docketing a cross-appeal. See Rule 2.04 and Rule 2.041.

A notice of cross-appeal must be filed within 20 days after the notice of appeal has been served and filed. K.S.A. 60-2103(h). As with a notice of appeal, a notice of cross-appeal should specify the parties taking the

appeal, designate the judgment or part thereof appealed from, and name the appellate court to which the appeal is taken. See K.S.A. 60-2103(b).

II. FILING OR SERVICE OF PAPERS: TIME COMPUTATIONS

§ 7.9 Generally

Rule 1.05 governs the form and service of papers in the Kansas appellate courts. All petitions, briefs, motions, applications, and other papers brought to the court's attention must be typed on standard size (8 1/2" by 11") sheets with at least a one-inch margin on all sides. Rule 1.05(a). All such papers must include the name, address, and telephone number of the person filing the paper. If the paper is filed by counsel, the counsel's Kansas attorney registration number and an indication of the party represented must be included. If multiple attorneys appear on behalf of the same party, one must be designated lead counsel for purposes of subsequent filings and notices. Rule 1.05(b).

PRACTICE NOTE: All such documents should be filed with the clerk of the appellate courts and not sent to individual justices or judges.

K.S.A. 60-206 contains the general rules on time computation and applies to all filings in the appellate courts. Rule 1.05(c). The date the order or judgment is filed is not included in the computation of time. The last day of the period is included unless it is a Saturday, Sunday or a legal holiday in which case the period of time runs until the end of the next business day. "Legal holiday" includes holidays designated by the congress of the United States, the legislature of this state, or observed as a holiday by order of the Kansas Supreme Court. When the period prescribed or allowed is 10 days or less, intervening Saturdays, Sundays and holidays are excluded from the computation of time. K.S.A. 60-206(a). When the period of time prescribed or allowed is more than 10 days, all days are counted.

PRACTICE NOTE: An easy way to remember this rule is to distinguish between business days and calendar days. If the time allowed is 10 days or less, only business days are counted. If the time allowed is more than 10

days, all calendar days are counted.

Most judgments and orders now are served by first class mail. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper by mail, 3 mailing days are added to the period of time. K.S.A. 60-206(d). This rule also applies to judgments. *Danes v. St. David's Episcopal Church*, 242 Kan. 822, 825-27, 752 P.2d 653 (1988). These mailing days are calendar days. When the period of time in which to do some act is more than 10 days, the 3-mailing-day extension simply is added to the original period of time. When the period of time is 10 days or less, the business days are counted first and then the three mailing day extension is counted. *In re J.D.B.*, 259 Kan. 872, 875-76, 915 P.2d 69 (1996); *Hundley v. Pfuetzze*, 18 Kan. App. 2d 755, Syl. ¶ 7, 858 P.2d 1244, *rev. denied* 253 Kan. 858 (1993).

PRACTICE NOTE: Even when a motion is faxed to the clerk of the appellate courts, the motion normally is served by mail and, if served by mail, the 3-day mailing rule applies.

Note that the 3-day mailing rule applies only when the measuring event is *service*. For example, the mail rule does not apply to petitions for review because Rule 8.03(a)(1) requires the petition to be served and filed within 30 days after the *date of the decision* of the Court of Appeals, not within 30 days after the date of service of the decision. Therefore, even if the opinion is mailed, the 30 days will be counted from the date of decision.

III. STAYS PENDING APPEAL

§ 7.10 Generally

The filing of a notice of appeal does not automatically stay the effectiveness of the judgment from which the appeal is taken. An appellant may, however, seek a stay pending appeal.

§ 7.11 Chapter 60 Appeals

The general rule is that a judgment may not be executed and proceedings may not be taken to enforce a judgment until 10 days after

the entry of judgment. K.S.A. 60-262(a). To extend the temporary 10-day stay, the appellant may file an application for a supersedeas bond with the district court at the time of or after the filing of the notice of appeal. The stay becomes effective upon the district court's approval of the supersedeas bond. K.S.A. 60-262(d). Once an appeal is docketed, application for leave to file a bond may only be made in the appellate court. K.S.A. 60-2103(e). However, once the appellate court grants permission to file a supersedeas bond, the bond itself normally is filed with the district court and approved by a judge of that court.

An exception to the general rule states that no automatic 10-day stay applies after judgment in actions for injunctions or receiverships. K.S.A. 60-262(a). However, when an order discharges, vacates, or modifies a provisional remedy, or modifies or dissolves an injunction, an aggrieved party may apply to the district court to suspend the operation of the order for up to 10 days in order to file a notice of appeal and obtain approval of a supersedeas bond. K.S.A. 60-2103(d). The granting of a stay in injunction actions and receivership actions is otherwise not a matter of right but is discretionary with the court. K.S.A. 60-262(a) and (c).

When the State or an office or agency thereof takes an appeal and the operation or enforcement of the judgment is stayed, no bond or other security is required from the appellant. K.S.A. 60-262(e).

§ 7.12 Chapter 61 Appeals

K.S.A. 61-3901 *et seq.*, contain the general rules of procedure for appeals in limited actions, including a stay of proceedings on appeal. See K.S.A. 61-3905.

§ 7.13 Juvenile Appeals

Any order appealed from continues in force unless modified by temporary orders by the appellate court. K.S.A. 38-2274(a); K.S.A. 38-2383(a). The appellate court, pending a hearing, may modify the order appealed from and make any temporary orders concerning the care and custody of the child. K.S.A. 38-2274(b); K.S.A. 38-2383(b).

§ 7.14 Probate Appeals

Effective July 1, 2006, orders appealed from in any case arising under the Probate Code continue in force unless modified by temporary orders

entered by the appellate court and are not stayed by a supersedeas bond filed pursuant to K.S.A. 60-2103. K.S.A. 59-2401(c); 59-2401a(c). Also, the court from which the appeal is taken may require a party, other than the State of Kansas or a subdivision thereof or any city or county in this state, to file a bond of sufficient sum or surety “to ensure that the appeal will be prosecuted without unnecessary delay” and to ensure payment of all judgments, damages or costs. K.S.A. 59-2401(d); K.S.A. 59-2401a(d). See also § 5.22, *supra*.

§ 7.15 Criminal Appeals

A defendant who has been convicted of a crime may be released by the district court, pursuant to the same conditions as those available for release before conviction, while awaiting sentencing or after filing a notice of appeal. To grant the application, the district court must find that “the conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.” K.S.A. 22-2804(1). The application for release after conviction must be made to the district court even if an appeal has been docketed in an appellate court. K.S.A. 22-2804(2). If the district court denies the application or the court does not grant the relief sought, the defendant may file an application for release after conviction with the appellate court having jurisdiction over the appeal. K.S.A. 22-2804(2).

Rule 5.06 governs applications for release after conviction filed with the appellate courts pursuant to K.S.A. 22-2804(2) or K.S.A. 21-4721(b) (departure sentences). The application must include the following information:

- Disposition of the application by the district court;
- Nature of the offense and the sentence imposed;
- Amount of any appearance bonds previously imposed in the case;
- Defendant’s family ties;
- Defendant’s employment;
- Defendant’s financial resources;
- Length of defendant’s residence in the community;
- Any record of prior convictions;

- Defendant's record of appearance at court proceedings, including failure to appear; and
- Copy of the district court order setting forth the reasons for its decision.

PRACTICE NOTE: A large number of applications for release after conviction do not include all the required information or a copy of the district court order. This failure usually results in denial of the application. Numbering each paragraph is the easiest way to ensure that all required information is contained in the application. See § 12.9, *infra*.

If the district court's order merely denies bond without reflecting the reason, the appellate court may remand the matter for the district court to make additional findings. The appellate court will then not review the merits of the application until the district court enters these additional findings. During the remand for additional findings, the status quo remains in effect. Therefore, to reduce the amount of time an application remains pending, counsel should seek a district court order that articulates specific reasons for the denial of the application for release.

IV. DOCKETING THE APPEAL

§ 7.16 Generally

The appellant shall docket the appeal with the clerk of the appellate courts within 21 days after filing the notice of appeal in the district court. The address is:

Clerk of the Appellate Courts
Kansas Judicial Center, Room 374
301 SW Tenth Avenue
Topeka, KS 66612-1507

An appeal is docketed when an original and one copy of the docketing statement (Rule 2.041); a file-stamped certified copy of the notice of appeal; a file-stamped certified copy of the final order or decision; a copy of the request for transcript (or a statement that no transcript is

requested); a file-stamped certified copy of any post-trial motions and ensuing rulings; a file-stamped certified copy of any certification pursuant to K.S.A. 60-254(b); and the \$125 docket fee are received by the appellate court clerk. See Rule 2.04. Effective July 1, 2009, Supreme Court Administrative Order 2009 SC 31 imposed a Judicial Branch Surcharge of \$10 to appellate docket fees, bringing the total docket fee to \$135.

Docketing statements are required in all appeals except appeals pursuant to Rule 10.01. Docketing statement forms appear at §§ 12.10-12.13, *infra*. Rule 2.041 requires citation to statutory authority for appeal.

If the appeal has been taken from a decision of a municipal judge or a district magistrate judge, file-stamped certified copies of the municipal or district magistrate judge's order and the notice of appeal to the district court must also be included. If the appeal is from an administrative tribunal, the appellant must also include in the filing to the appellate court clerk file-stamped certified copies of the agency decision, any motions for rehearing or reconsideration and resultant rulings, and the petition for judicial review. See Rule 2.04.

The docket fee or excuse for nonpayment must accompany the documents. The docket fee is nonrefundable and is the only cost assessed for the clerk's office for each appeal. It covers the cost of docketing and processing the appeal through the clerk's office. A check in payment for the docket fee should be made payable to the clerk of the appellate courts. The docket fee shall be excused when:

- The appellant has previously been determined to be indigent by the district court, and the attorney for appellant certifies to the clerk of the appellate courts that the appellant remains indigent;
- The district judge certifies that the judge believes the appellant to be indigent and it is in the interest of the party's right of appeal that an appeal should be docketed *in forma pauperis*; or
- In accordance with K.S.A. 60-2005, the State of Kansas and its agencies and all Kansas cities and counties are exempt in any civil action from a docket fee. If on final determination costs are assessed against the state, its agencies, or a city

or county, the costs shall include the docket fee. See Rule 2.04.

PRACTICE NOTE: An indigent individual proceeding *pro se* must have the district judge's certification as outlined above to have the docket fee waived. In original actions, an affidavit of indigency signed by the litigant is sufficient to waive the docket fee. In a habeas corpus action no docket fee is assessed, whether filed as an original action or filed as an appeal from district court. As a practical matter, the State does not have to pay docket fees in criminal matters.

Where unusual fees or expenses are anticipated, the appellate court may require a deposit in advance to secure the same. Rule 7.07(a).

When the appeal is docketed, notice is mailed to the clerk of the district court and also to the attorneys of record for the parties stating that the appeal has been docketed, the date the appeal was docketed, the appellate court in which the appeal was docketed, the appellate case number assigned, and the district court case number. Parties designated to receive notice shall include the attorney or party who signed the docketing statement and those on whom the docketing statement is served. Others who wish to receive notice must file a separate entry of appearance. See Rule 2.04.

The clerk's office will prepare an appellate case file that is open to the attorneys of record but may not be taken from the clerk's office. Files are generally also open to the public unless specifically closed by statute, rule, or order of the court.

PRACTICE NOTE: The appellate courts may close those files that would be closed in the district court, such as child in need of care proceedings and adoptions. The files do remain open to attorneys of record.

Timely docketing is not a jurisdictional requirement, but the appellant is required to file a motion to docket out of time if beyond the 21-day period. See § 12.14, *infra*.

PRACTICE NOTE: Although motions to docket out of time are granted with some frequency, the likelihood of success diminishes the farther one is past the 21-day period.

Failure to docket within 21 days may result in the appeal being dismissed by the district court. Failure to docket the appeal in compliance with Rule 2.04 shall be presumed to be an abandonment of the appeal, and the district court may enter an order dismissing the appeal. The order shall be final unless the appeal is reinstated by the appellate court. To have the appeal reinstated, an appellant must make an application to the appellate court having jurisdiction within 30 days after the order of dismissal was entered by the district court. The application must comply with Rules 5.01 and 2.04. Rule 5.051.

PRACTICE NOTE: A rush to the district court on the 22nd day is not advisable because the appellate court will likely reinstate the appeal if the appropriate application is made. Also note that the filing of a motion with the appellate courts to docket an appeal out of time deprives the district court of jurisdiction to consider a pending motion to dismiss. *Sanders v. City of Kansas City*, 18 Kan. App. 2d 688, 692, 858 P.2d 833, *rev. denied* 253 Kan. 860 (1993), *cert. denied* 511 U.S. 1052, 114 S.Ct. 1611, 128 L.Ed.2d 339 (1994).

§ 7.17 Parental Notice Waiver Requirements — Rule 10.01

The only documents needed to docket an appeal by an unemancipated minor for waiver of parental notice (under Rule 173) are (1) the notice of appeal and (2) the district judge’s decision. These documents should be certified by the district court clerk. No docketing statement is required.

The appeal process is expedited, and counsel for the minor must file the appellant’s brief within 5 days of docketing. There is no appellee or appellee brief. Unless ordered by the Court of Appeals, there is no oral argument. The Court of Appeals decision shall be filed within 10 days after the appeal is docketed. In all appellate proceedings, the anonymity of the minor shall be protected, and the minor is to be referred to at all times only as “Jane Doe.”

If the Court of Appeals affirms the district court's decision, the appellant may petition for discretionary review by the Kansas Supreme Court under Rule 8.03. There is no motion for reconsideration or modification in the Court of Appeals. The petition for review is deemed denied if there is no action by the Supreme Court within 10 days after filing.

If the petition is granted, the Supreme Court will review the matter on the record and file its opinion within 15 days from granting the petition.

If the Court of Appeals reverses the decision of the district judge, there is no discretionary review by the Supreme Court, and the clerk of the appellate courts shall issue the mandate immediately.

V. APPEARANCE AND WITHDRAWAL

§ 7.18 Appearance

The appearance of the attorney for the appellant will be entered as a matter of course upon the filing of the docketing statement containing the attorney's name, address, telephone number, Kansas attorney registration number, and an indication of the party represented. The attorney or party on whom the docketing statement was served also will be entered. See Rule 2.04. An attorney entering a case for the first time during the appeal should file an entry of appearance with the clerk of the appellate courts. Rule 1.09(a)

PRACTICE NOTE: Entries of appearance, and withdrawal when appropriate, are critical to an orderly appellate process.

An attorney not admitted to practice law in Kansas may participate in any proceeding before a Kansas appellate court upon motion and payment of a \$100 fee to the clerk of the appellate courts. See Rule 1.10 and §§ 12.15 and 12.16, *infra*.

A motion *pro hac vice* must be filed not later than 15 days before the brief due date or oral argument date.

To be admitted to practice in a case pending before an appellate court, the out-of-state attorney must be regularly engaged in the practice of law in another state or territory, must be in good standing pursuant to

the rules of the highest appellate court of that state or territory, and must have professional business before the court. In addition, the attorney must associate with a Kansas attorney of record who is regularly engaged in the practice of law in Kansas and in good standing under all the applicable rules of the Kansas Supreme Court. All pleadings, documents and briefs must be signed by the Kansas attorney of record. Rule 1.10.

PRACTICE NOTE: Out-of-state counsel will receive notices as a courtesy, but that does not relieve the Kansas attorney of record of obligations pursuant to Rule 1.10.

§ 7.19 Withdrawal

An attorney who has appeared of record in an appellate proceeding may withdraw. To do so, the attorney must serve a motion to withdraw on the attorney's client and on opposing counsel, and file a copy of the motion and proof of service with the clerk of the appellate courts. See § 12.18, *infra*. The withdrawal is effective only when a justice or judge of the appellate courts enters an order approving the withdrawal. Rule 1.09(b).

PRACTICE NOTE: Even if the client requests the withdrawal, the motion to withdraw still must be served on the client. It should also be noted that the appellate version of this rule differs from Rule 117, the district court rule. Rule 117 does not require an order allowing the withdrawal if another attorney authorized to practice law in Kansas is appearing of record to represent the client. Rule 1.09(b) requires judicial approval of every withdrawal.

VI. RECORD ON APPEAL

§ 7.20 Record of Proceedings Before the Trial Court

The entire record shall consist of all the original papers and exhibits filed in district court, the court reporter's notes, transcripts and other authorized records of the proceedings, and the appearance docket. Rule 3.01. The record on appeal, however, only includes that portion of the

entire record filed with the clerk of the appellate courts in accordance with the Supreme Court Rules. The appellate court may, of course, order any or all additional parts of the entire record to be filed. Rule 3.01 and Rule 3.02.

PRACTICE NOTE: Rule 3.02 sets out what the clerk of the district court includes in the record on appeal. Note, in particular, that jury instructions and exhibits are not included in the record on appeal unless specifically requested.

§ 7.21 Transcript of Proceedings

If the appellant considers a transcript of any hearing necessary to the appeal, a request shall be served on the court reporter within 21 days of filing the notice of appeal in district court. Unless the parties stipulate as to specific portions that are not required for the appeal, the request shall be for a complete transcript of any such hearing (except for jury voir dire, opening statements and closing arguments, which shall not be transcribed unless specifically requested). However, counsel for both parties should make a good faith effort to stipulate when possible to avoid unnecessary expenses. A refusal to stipulate may be considered by the appellate court in apportioning costs under Rule 7.07(c). Rule 3.03(a).

Within 10 days after service of appellant's request for transcript, the appellee may request a transcript of any hearing not requested by the appellant. The appellee is responsible for payment for such additional transcripts, just as the appellant is responsible for payment of the main transcript. Rule 3.03(b).

The request for transcript(s) should reflect the judicial district case number, the division of the district court, the date(s) of the hearing, and the name of the court reporter. See § 12.19, *infra*. The request must be served on the court reporter and all parties. A copy of the order and any agreed upon stipulations must be forwarded to the appellate court clerk when the appeal is docketed pursuant to Rule 2.04. Rule 3.03(c).

PRACTICE NOTE: The original of any transcript request is filed with the district court, with service on the court reporter and all parties. Delay can occur if the wrong court reporter is served. If you are unsure who to serve, check with the clerk of the district court. Rule

354 requires the district court judge to have entered on the appearance/trial docket the name of the court reporter taking notes of any proceeding. Remember that a copy of the request for transcript must be filed with the appellate clerk at the time of docketing.

Within 10 days of receipt of a request for transcript, a court reporter may demand prepayment of the estimated cost of the transcript. (No advance payment shall be required of the state or its agencies or subdivisions.) Failure to make the advance payment within 10 days of service of the demand shall be grounds for dismissal of the appeal. If, however, no demand is made within the 10-day period, the right to advance payment is waived. Rule 3.03(e).

PRACTICE NOTE: If advance payment is not made within 10 days of service of the demand, the court reporter notifies the appropriate appellate court. That court will issue an order to counsel to show cause why the appeal should not be dismissed for failure to make payment.

An indigent criminal defendant may obtain a free transcript for purposes of an appeal upon request. Most such requests are made by the Kansas Appellate Defender's Office.

§ 7.22 Filing of Transcripts

The transcript(s) should be completed within 40 days after the court reporter is served with a request. The court reporter may file for an extension of time with the appellate court under Rule 5.02. Upon completion of a transcript, the court reporter will file the original with the district court and mail to the appellate court clerk and all parties a certificate of completion of transcript, showing the date the transcript was filed in the district court, and the date and type of hearing transcribed. Rule 3.03(c),(d).

PRACTICE NOTE: Service of the last certificate of completion starts the running of appellant's time to file a brief. Rule 6.01(a).

§ 7.23 Unavailability of Transcripts

If a transcript cannot be made and no other official record is available, a party to an appeal may prepare a statement of the evidence or proceedings by the best available means, including personal recollection. Within 10 days after the filing of the notice of appeal, the statement shall be served on the adverse parties, who in turn have 10 days to serve objections or proposed amendments to the statement.

The statement with objections or amendments shall thereafter be submitted to the district court judge for settlement and approval. The statement as approved shall be included in the record on appeal by the district court clerk. Rule 3.04.

§ 7.24 Appeal on Agreed Statement

When the issues in an appeal can be determined without an examination of the evidence and proceedings in the district court, the parties may prepare and sign an agreed statement of the case. This statement must show how the questions arose, how they were decided in district court, and set out those facts essential to an appellate decision. This statement shall be accompanied by copies of the judgment appealed from, the notice of appeal, and a concise statement of the issues raised.

This statement is submitted to the district court judge for approval and, if approved, thereafter filed with the clerk of the district court. Filing must be made within 20 days after filing of the notice of appeal. The approved statement and inclusions shall constitute the record on appeal. Rule 3.05.

PRACTICE NOTE: To comply with Rule 6.02(d) and Rule 6.03(c), which require citation to the record in briefs, counsel should cite to appropriate sections of the agreed statement. For this reason, numbered paragraphs are advisable in the agreed statement.

§ 7.25 District Court Clerk's Preparation of the Record on Appeal

The clerk of the district court compiles the record in one or more volumes within 10 days after notice from the appellate clerk that the appeal has been docketed. Rule 3.02 sets out in detail a list of items that must be

included in the record for civil and criminal cases. Documents are filed chronologically when possible, and transcripts are added when filed by the court reporter, always as separate volumes. The clerk of the district court also prepares a table of contents showing the volume and page number of each document contained in the record on appeal. A copy of the table of contents is included in the record and also furnished to each party. If additions are made to the record after the initial compilation, an amended table of contents is furnished.

PRACTICE NOTE: A party cannot submit a brief without reference to the table of contents for citation to the record. See Rules 6.02(d) and 6.03(c). If the table of contents is not furnished or if it is incomplete, contact the district court clerk.

§ 7.26 Request for Additions to the Record on Appeal

Any document in the entire record, even if not specifically listed for inclusion under Rule 3.02, may be included in the record on appeal by written request of a party, stating with particularity what is to be added. Rule 3.02(c).

PRACTICE NOTE: Although the district court clerk bears the responsibility of compiling the record on appeal, each party bears the affirmative obligation of designating evidence within the record that supports his or her claims on appeal. See *Estate of Bingham v. Nationwide Life Ins. Co.*, 7 Kan. App. 2d 72, 73-74, 638 P.2d 352 (1981), *aff'd as modified* 231 Kan. 389, 646 P.2d 1048 (1982). Without the designation of error upon the record, an appellate court generally presumes the action of the trial court was proper.

Additions to the record on appeal may be made in one of three ways:

- If the record on appeal has not been transmitted to the clerk of the appellate courts, the party requesting the addition shall serve the clerk of the district court with a written request for the addition. Service should also be made on opposing counsel and the clerk of the appellate courts. The clerk of

the district court shall add the requested documents to the record on appeal. No court order is required. Rule 3.02.

- If the record on appeal has been transmitted to the clerk of the appellate courts, which occurs after briefing is completed, the party requesting the addition shall file a motion with the proper appellate court. See § 12.20, *infra*. Additions to the record on appeal shall be made only upon an order of the clerk of the appellate courts or a justice or judge of an appellate court. Rule 3.02.

PRACTICE NOTE: It is necessary to contact and make arrangements with the court reporter if you are adding an exhibit that is in the court reporter's custody.

- Upon its own motion, an appellate court may order any or all additional parts of the entire record to be filed in the record on appeal. Rule 3.01(b).

PRACTICE NOTE: It is to a party's advantage to add to the record on appeal prior to transmission of the record to the appellate court. If the document to be added is part of the entire record as defined in Rule 3.01(a), the district court clerk must add the document to the record on appeal; no discretion is exercised. Once the record is transmitted to the clerk of the appellate courts, the appellate court has discretion whether to grant the addition. Many motions for additions to the record on appeal are improperly filed in the appellate courts before transmission of the record. If such a motion is improperly filed, the appellate court probably will deny the motion.

§ 7.27 Transmission of the Record on Appeal

Upon expiration of time for filing of briefs, the clerk of the appellate court will notify the clerk of the district court to transmit the record on appeal to the appellate clerk. The district court clerk has 5 days from notification in which to transmit the record to the appellate clerk. Documents of unusual bulk and physical exhibits other than documents shall not be transmitted unless requested by a party, who shall then be

responsible for the transportation and cost of transportation of such items. Rule 3.07.

PRACTICE NOTE: Attorneys are often surprised when large exhibits that have been added to the record are not automatically forwarded to the appellate courts. The appellate court, on the other hand, often does not know that the exhibit has been made a part of the record on appeal. Remember that exhibits are in the custody of the court reporter, and you should contact the district court clerk and the court reporter about transportation arrangements for large or bulky exhibits.

Before a record is transmitted to the clerk of the appellate courts, a party may file a written request with the district court clerk that part or all of the record on appeal be duplicated, and such duplication be retained by the district court clerk. Upon advance payment for such duplication, the clerk of the district court shall copy those portions requested and then transmit the originals. Rule 3.08.

VII. CONSOLIDATION OF APPEALS

§ 7.28 Generally

Pursuant to Rule 2.06, two or more appeals may be consolidated into one appellate proceeding if one or more issues common to the appeals are so nearly identical that a decision in one appeal would appear to be dispositive of all the appeals, or the interest of justice would otherwise be served by consolidation. See § 12.21, *infra*. An appellate court may order consolidation upon motion by a party pursuant to Rule 5.01, or upon notice by the court on its own motion to show cause why the appeals should not be consolidated. If consolidation is ordered, further proceedings in the consolidated appeal are conducted under the lowest appellate case number.

PRACTICE NOTE: A motion to consolidate should state with specificity the grounds for consolidation. Some grounds to consider are any factual similarities, the types of issues, whether the same parties are involved, and whether judicial economy will be served by the

consolidation. In addition, a party should consider the status of each case. For example, if one case is ready for hearing and the other case was recently docketed, the court may be reluctant to consolidate the appeals.

Any party may file a separate brief and be heard separately upon oral argument.

PRACTICE NOTE: Additional time will not be allotted for argument unless granted on motion of a party. The parties must agree among themselves how to divide the time allotted or motion the court to allocate the time. Rule 7.01(e) and 7.02(e). See §§ 7.39 and 7.40, *infra*.

Rule 2.06 also provides an alternative to consolidation. The appellate court may stay all proceedings in an appeal to await determination of issues in a pending appeal that appears to be dispositive of multiple appeals.

PRACTICE NOTE: The appellate court is more likely to order consolidation than to order a stay.

VIII. MOTIONS

§ 7.29 Generally

Every application to an appellate court, unless made during a hearing, shall be by written motion stating with particularity the grounds and the relief or order sought. All motions filed with either court should be filed with the clerk of the appellate courts. Rule 5.01.

PRACTICE NOTE: The clerk of the supreme court is also the clerk of the court of appeals and should be referred to as the clerk of the appellate courts. Rule 1.01(d).

The original motion must be accompanied by eight copies if filed in the Supreme Court and three copies if filed in the Court of Appeals. A motion contained in an appellate brief will not be considered. *Muzingo v. Vaught*, 18 Kan. App. 2d 823, 859 P.2d 977 (1993).

Any party may respond to a motion. Any response to a motion, except a motion for involuntary dismissal or motion for summary disposition, must be filed with the clerk of the appellate courts within 5 days after service of the motion. Any response to a motion for involuntary dismissal or motion for summary disposition must be filed within 10 days after service of the motion. Rule 5.01; Rule 5.05; Rule 7.041.

PRACTICE NOTE: The 5 and 10 days are business days and are counted from the date of service indicated on the certificate of service. If the motion is mailed to the other party, 3 mailing (calendar) days are added to the end of the business days. K.S.A. 60-206(e). See § 7.9, *supra*.

The response must include the same number of copies as required for motions. Extensions of time up to 20 days may be granted by the clerk of the appellate courts or the court without waiting for a response. Oral arguments on motions are not permitted unless ordered by the court. Rule 5.01.

The clerk of the appellate courts may rule on any of the following motions unless the motion is opposed: timely motion for extension of time; motion to make corrections in a brief; motion to substitute parties; and motion to withdraw briefs for making corrections. Rule 5.03.

After the response time has expired and the motion has been ruled upon, the clerk of the appellate courts will issue the court's order.

PRACTICE NOTE: From time to time, each appellate court will, as a matter of policy, set the number of motions for extension of time on which the clerk may act. That number has never been higher than three.

§ 7.30 Motion for Additional Time

When a party has a deadline for taking action before an appellate court, a motion for additional time may be filed. Rule 5.02. For example, a motion for extension of time may be filed to extend a brief due date or the time to respond to a show cause order. Motions for additional time should be filed with the clerk of the appellate courts before the original time has expired. If the time has expired, a motion for extension must show excusable neglect. K.S.A. 60-206(b)(2). All out-of-time motions

are referred to the court for disposition. The following basic information should be included in a motion for extension of time: the present due date; the number of extensions previously requested; the amount of time needed; and the reason for the request. See § 12.23, *infra*.

PRACTICE NOTE: Generally, when motions for extension of time to file a brief are granted, the length of the extension is the length of time the rules originally allowed a party to file a brief. For example, an appellee is allowed 30 days after service of an appellant's brief to file a brief. Any extension, absent exceptional circumstances, would be for 30 days. Many attorneys assume an extension of time to file a reply brief will be for 30 days. However, an appellant is allowed only 15 days to file a reply brief so any extension will also be for 15 days. If the court grants an extension and the time granted is less or more than a party requested, the party probably miscalculated the due date.

§ 7.31 Motion to Make Corrections in Briefs

A motion to make corrections in a brief should be made before the case has been set for hearing. See § 12.26, *infra*. If the motion is granted, it is the duty of the movant to make the corrections requested. The order granting the motion will state a date by which the corrections must be made.

§ 7.32 Motion to Withdraw Briefs to Make Corrections

This motion is granted by the clerk when the corrections cannot easily be made by the movant in the clerk's office. See § 12.27, *infra*.

§ 7.33 Motion to Substitute Parties

A concise but informative statement must be made in the motion as to the reasons for the substitution of parties. See § 12.28, *infra*.

§ 7.34 Voluntary Dismissal

An appellant may, prior to the time an opinion is filed, voluntarily dismiss an appeal either by stipulation or by filing and serving a notice

of dismissal with the clerk of the appellate courts. See § 12.29, *infra*. A dismissal of one party's appeal shall not affect an appeal or cross-appeal taken by another party. The dismissal may be with or without prejudice, depending on the stipulation or notice. Unless a dismissal is by agreement of the parties, the court may, upon motion of the appellee and reasonable notice, assess against the appellant those costs and expenses incurred by the appellee to the date of dismissal that would have been assessed against the appellant if the case had not been dismissed and there had been an affirmance of the judgment or order. Rule 5.04.

§ 7.35 Involuntary Dismissal

An appeal may be dismissed involuntarily on motion of a party (see § 12.30, *infra*) or upon the court's own motion by issuance of an order to show cause why an appeal should not be dismissed. In either case, the appellant or cross-appellant must be given 10 days notice and opportunity to respond why the appeal should not be dismissed. Rule 5.05. Appeals may be dismissed for substantial failure to comply with the rules of the court or for any other reason which by law requires dismissal. The most common reasons for such a dismissal are: failure to complete a required step in the appellate process such as paying a court reporter's timely demand for advance payment; failure to file a brief, or a motion for extension of time, by a final due date; untimely filing of the notice of appeal or cross-appeal (deprives the appellate court of jurisdiction); an attempt to appeal from an interlocutory or other non-appealable order; mootness; and acquiescence.

If dismissal is dependent on an issue of fact, the appellate court may remand the case to the district court with directions to make findings of fact. In any involuntary dismissal, the court may assess costs and expenses in the same manner as under Rule 5.04 and Rule 7.07. See Rule 5.05.

§ 7.36 Motion for Permission to File *Amicus* Brief

A brief of an *amicus curiae* may be filed only after an order of the appellate court granting an application which has been served upon all counsel of record. Rule 6.06. See § 12.31, *infra*. In considering an application, the court will consider the nature of the organization filing the application, the nature of the case, and whether an *amicus curiae* brief will be helpful to the court. A brief of an *amicus curiae* must be filed not

less than 30 days prior to oral argument. Any party may respond to the *amicus* brief within 20 days. Rule 6.06. An *amicus curiae* is not entitled to be heard on oral argument of the appeal. Rule 6.06.

PRACTICE NOTE: An application for permission to file an *amicus curiae* brief should describe the organization, why the organization is interested in the case, and why their input would be helpful. Such applications are not granted as a routine matter. The court will also be concerned about an *amicus curiae* brief delaying final resolution of the appeal. Therefore, the application should be filed as early as possible in the appellate process.

IX. HEARING PLACE AND DATE

§ 7.37 Suggestion of Place for Hearing or for Hearing *En Banc*

In the Court of Appeals, a party may suggest in writing a desired place for hearing. Rule 7.02(c)(3). See § 12.32, *infra*. The suggestion should be filed no later than the filing of appellee's brief. Since most hearings in the Court of Appeals are by panel, a party may also suggest the appropriateness of a hearing or rehearing *en banc*. A suggestion for a hearing *en banc* should be filed no later than the appellee's brief; a suggestion for rehearing *en banc* no later than the time prescribed for a motion for rehearing. Rule 7.02(b). These are not binding on the court and are to be titled as suggestions, not as motions.

§ 7.38 Notice of Hearing Date

Not less than 30 days before the date set for a hearing, the clerk of the appellate courts will notify the parties or their counsel in each case of the time and location of the hearing by mailing a copy of the hearing docket. Rules 7.01(d), 7.02(d).

PRACTICE NOTE: The appellate courts assume attorneys will be available for argument when scheduled. If a conflict cannot be resolved, call the Chief Judge's Office for Court of Appeals dockets or the clerk of the appellate courts for Supreme Court dockets. The courts

are more likely to agree to change a time than to remove a case from the docket.

X. ORAL ARGUMENTS

§ 7.39 Supreme Court

Parties must be represented at the docket call at the beginning of each morning or afternoon session. Failure to be represented at the docket call constitutes a waiver of oral argument. Rule 7.01(d). Oral arguments on the general calendar are limited to 15 minutes each for the appellant and for the appellee. Either the appellant or the appellee may request 20, 25, or 30 minutes by printing “oral argument” on the lower right portion of the front of the brief cover, followed by the desired amount of time. See § 12.35, *infra*. If oral argument is scheduled, the court will designate on the oral argument calendar the amount of time granted. The appellant and the appellee will be granted the same amount of time. Rule 7.01(e). Argument in summary calendar cases is limited to 15 minutes per side, if granted, unless sufficient reason is given to grant additional time. Rule 7.01(c)(4).

Several parties on one side, who are united in interest, should determine in advance how they will divide the time allotment. Parties on one side of a case who are not united in interest may motion for separate arguments at the docket call; however, in practice, it is preferable to have the parties agree in advance. The appellant may request rebuttal time at the start of his or her argument. Rule 7.01(e).

PRACTICE NOTE: If the parties cannot agree on a division of time, it is advisable to call the clerk of the appellate courts in advance to so advise. It is likewise suggested that in arguments before the Supreme Court, attorneys notify the chief deputy clerk in advance if easels, chalkboards, or like equipment will be needed during argument.

Any party who does not have a brief on file will not be permitted an oral argument. Rule 7.02(e). Out-of-state attorneys may be permitted to make oral argument if a motion for admission *pro hac vice* has been granted by the Supreme Court in advance of the argument date. See Rule 1.10.

§ 7.40 Court of Appeals

Oral arguments in the Court of Appeals are usually limited to 15 minutes per side. Either the appellant or the appellee may request 20, 25, or 30 minutes by printing “oral argument” on the lower right portion of the front of the brief cover, followed by the desired amount of time. See § 12.35, *infra*. If oral argument is scheduled, the court will designate on the oral argument calendar the amount of time granted if more than 15 minutes. The appellant and the appellee will be granted the same amount of time. Rule 7.02(e). Argument in summary calendar cases is limited to 15 minutes per side, if granted, unless sufficient reason is given to grant additional time. Rule 7.02(f)(4).

Parties who are on the same side who are united in interest may divide the time by mutual consent. Parties on the same side but not united in interest should motion for separate arguments in advance of the hearing date. Rule 7.02(e).

PRACTICE NOTE: If the parties cannot agree on division of time, such questions should be settled by motion prior to the hearing date. Unlike the Supreme Court, the Court of Appeals does not generally have easels or other visual aids available. The attorney should bring any necessary equipment to the Court of Appeals argument.

Any party who does not have a brief on file will not be permitted an oral argument. Rule 7.02(e). Out-of-state attorneys may be permitted to make oral argument if a motion for admission *pro hac vice* has been granted by the Court of Appeals in advance of the argument date. See Rule 1.10.

XI. APPELLATE COURT DECISIONS AND POST-DECISION PROCEDURE

§ 7.41 Decisions of the Appellate Courts

Decisions of the appellate courts will be announced by the filing of the opinions with the clerk of the appellate courts at any time the decisions are ready. Under normal circumstances the Supreme Court and

the Court of Appeals release opinions every Friday. On the date of filing, the clerk will send one copy of the decision to the attorney of record of each party. In appealed cases the clerk will also send a copy to the judge of the district court from which the appeal arose. A certified copy of the opinion will be sent to the clerk of the district court when the mandate issues. Rule 7.03.

PRACTICE NOTE: Supreme Court and Court of Appeals opinions are mailed to the parties and released to the media at 9:30 a.m. on the day of filing. It is advisable in a high profile case to call the Appellate Clerk's Office and inquire whether the opinion has been filed or check the list of opinions filed on the Kansas Judicial Branch website <<http://www.kscourts.org/kscases/>>.

Opinions of the appellate courts are memorandum or formal opinions in accordance with K.S.A. 60-2106. Rule 7.04 sets out the standards for an opinion to be published in the official reports. Any interested person who believes that an unpublished opinion of either court meets those standards and should be published can file a motion for publication with the Supreme Court. The motion shall state the grounds for such belief and be accompanied by a copy of the opinion. All parties to the appeal must be served. Rule 7.04(c).

All memorandum opinions (unless otherwise required to be published) are marked "Not Designated for Publication." Unpublished opinions are not favored for citation but they "may be cited if they have persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court and they would assist the court in its disposition." Rule 7.04(f). See also *State v. Bryan*, 12 Kan. App. 2d 206, 210, 738 P.2d 463, *rev. denied* 241 Kan. 839 (1987) (disregarding citation to unpublished opinion that did not comply with requirements of Rule); *Casco v. Armour Swift-Eckerich*, 34 Kan. App. 2d 670, 680, 128 P.3d 401 (2005), *aff'd* 283 Kan. 508, 154 P.3d 494 (2007) (discussing and applying Rule 7.04[f]).

PRACTICE NOTE: When citing an unpublished opinion from another jurisdiction, include that jurisdiction's rule which allows citation.

The appellate courts may summarily dispose of a case that appears to be controlled by a prior appellate decision simply by citing Rule 7.041

and the controlling decision. The court can do this on its own motion or upon motion of a party. The parties have 10 days in which to show cause why such an order of summary disposition should not be filed. An appellate court may also affirm by summary opinion if it determines after arguments or submission on the briefs that no reversible error of law appears and one of the five conditions under Rule 7.042 is applicable.

§ 7.42 Motion for Rehearing or Modification

The timely filing and service of a motion for rehearing or modification in an appellate court stays the issuance of a mandate until the appellate court rules on the issues raised by the motion. Rule 7.05(a); Rule 7.06(a). The motion for rehearing or modification should be concise and clearly identify the points of law or fact by which the movant feels the court has erred, overlooked, or misunderstood. See § 12.33, *infra*. The motion and any attached exhibits should not consist of reargument of the case.

§ 7.43 Supreme Court

A motion for rehearing or modification in a case decided by the Supreme Court may be served and filed within 20 days of the date of the decision. A copy of the court's opinion must be attached to the motion. If a rehearing is granted, such an order suspends the effect of the original decision until the matter is decided on rehearing. Rule 7.06(a); *In re Wagle*, 275 Kan. 543, 66 P.3d 884 (2003); *Board of Greenwood County Comm'rs v. Nadel*, 228 Kan. 469, 474, 618 P.2d 778 (1980).

§ 7.44 Court of Appeals

A party may file and serve a motion for rehearing or modification within 10 days of the decision. A copy of the Court of Appeals decision must be attached to the motion. If a rehearing is granted, the order suspends the effect of the original decision until the matter is decided on rehearing. A motion for rehearing or modification is not a prerequisite for review by the Supreme Court, nor does the motion extend the time for filing a petition for review to the Supreme Court. Rule 7.05(a).

PRACTICE NOTE: The time to file a motion for rehearing or modification is different for each court. In the Court of Appeals, such a motion may be filed within 10 days of the date of the decision while the time

period is 20 days in the Supreme Court. Also, many motions for rehearing or modification are filed without a copy of the appellate court's decision attached to the motion. Both Rules 7.05 and 7.06 require attachment of the decision to the motion.

§ 7.45 Appeal of Right from Court of Appeals

Only when a question involving the federal or state constitutions arises from a final decision of the Court of Appeals can a party petition for review as a matter of right to the Supreme Court. K.S.A. 60-2101(b); K.S.A. 22-3602(e); Rule 8.03(e)(1). Review is obtained in the Supreme Court by filing a petition with the appellate court clerk within 30 days of the Court of Appeals opinion. Rule 8.03(a).

PRACTICE NOTE: When petitioning to the Supreme Court as a matter of right from a final decision of the Court of Appeals, the petition should be identical in format to a petition for discretionary review under Rule 8.03(a). The cover title should read Petition for Review as a Matter of Right.

§ 7.46 Petition for Review

In all other cases a party seeking review of a Court of Appeals decision must petition the Supreme Court in accordance with K.S.A. 20-3018(b) and Rule 8.03. The granting of review is discretionary with the Supreme Court in these cases, requiring a vote of three justices to grant review. Rule 8.03(e)(2).

The petition for review must be filed within 30 days of the filing of the Court of Appeals opinion. The 30-day period is jurisdictional, and the 3-day mail rule does not apply. The filing of a motion for rehearing in the Court of Appeals under Rule 7.05 does not extend the time for filing a petition for review. The original and nine copies of the petition are filed with the clerk of the court, and a copy of the Court of Appeals opinion must be attached. Rule 8.03(a).

PRACTICE NOTE: The ninth copy is circulated among judges of the Court of Appeals.

The following factors, used by the court, should be considered when filing a petition for review: the public importance of the question presented; the existence of a conflict between the Court of Appeals decision and prior appellate decisions; the need for exercising Supreme Court supervisory authority; and the final or interlocutory character of the opinion to be reviewed. K.S.A. 20-3018(b).

The petition for review shall contain the following items in order: a clear prayer for review; date of the Court of Appeals decision; a statement of the issues decided by the Court of Appeals; a short statement of the facts; a short argument including authority stating why review is warranted; and a copy of the Court of Appeals decision. Rule 8.03(a)(5). The petition should contain a clear statement of the issues on which review is sought. Rule 8.03(a)(5)(c).

A cross-petition must be filed within 10 days from the date the petition for review is filed. Responses to a petition or cross-petition must be filed within 10 days of the date the petition or cross-petition is filed. The adverse party is not required to respond. The petition for review, cross-petition, and responses must not exceed 15 pages in length (excluding the appendix), must have a white cover, and must conform to applicable format provisions of Rule 6.07. See Rule 8.03(a)(4), (b)(1), and (c)(2).

If review is granted, the issues will be considered on the basis of the record and briefs filed in the Court of Appeals. The Supreme Court may limit the issues to be considered or may, in civil cases, consider other issues presented to the Court of Appeals and preserved for review. Rule 8.03(g)(1). See also Rule 8.03(h)(3). Within 30 days after the order granting review, any party may file a supplemental brief. Any opposing party then has 30 days in which to file a brief in response. Supplemental briefs are limited to one half the page limits set out in Rule 6.07 and follow the same color scheme used for original briefs. Oral argument follows the same order as in the Court of Appeals. Rule 8.03(g).

PRACTICE NOTE: Within 10 days of the date of the order granting review, the parties must file an additional ten copies of the brief(s) originally filed in the Court of Appeals. This assures sufficient copies for the Supreme Court. Supplemental briefs contain material in addition to that already before the Court of Appeals. Sixteen

copies of a supplemental brief must be filed with the clerk of the appellate courts and two copies served on opposing counsel. See Rules 6.09(a) and 8.03(g)(3).

Timely filing of a petition for review will stay the issuance of the mandate by the Court of Appeals. Rule 8.03(i). If review is denied, the Court of Appeals mandate shall issue forthwith. The denial of a petition for review is not subject to a motion for reconsideration. Rule 8.03(f). If review is granted the mandate shall not issue, and the Court of Appeals opinion has no force or effect. Rule 8.03(i). After a decision of the Supreme Court on review, the parties may petition for rehearing in accordance with Rule 7.06.

PRACTICE NOTE: Care should be taken when citing a Court of Appeals opinion for persuasive authority before the mandate has issued. Note in the citation that the case is not final and may be subject to rehearing or to petition for review. See Rule 8.03(i).

XII. COSTS AND ATTORNEY FEES

§ 7.47 Costs

In any case there shall be separately assessed when applicable all fees for service of process, witness fees, reporter's fees, allowance for fees and expenses of a master or commissioner appointed by the appellate court, and any other proper fees and expenses. All such fees and expenses shall be approved by an appellate court unless specifically fixed by statute. When any such fees and expenses are to be anticipated in a case, the appellate court may require the parties to the proceeding to make deposits in advance to secure the fees and expenses. Rule 7.07(a).

In disposing of any case before it, an appellate court may apportion and assess any part of the original docket fee, the expenses for transcripts, and any additional fees and expenses allowed in the case against any one or more of the parties in such a manner as justice may require. When a decision of the district court is reversed, the mandate will direct that the appellant recover the original docket fee and expenses for transcripts, if any. Rule 7.07(a).

If an appellate court finds that an appeal has been taken frivolously, or only for purposes of harassment or delay, it may assess against an appellant or appellant's counsel, or both, the cost of reproduction of the appellee's brief. The mandate shall then include a statement of any such assessment, and execution may issue as with any other judgment, or in an original case the clerk of the appellate courts may cause an execution to issue. Rule 7.07(c).

On its own motion, or on the motion of an aggrieved party filed not later than 10 days after an assessment of the costs pursuant to Rule 7.07, the appellate court may assess against a party or the party's counsel, or both, all or any part of the cost of the trial transcript. To do so, the court must find the transcript was prepared as the result of an unreasonable refusal to stipulate pursuant to a written request and in accordance with Rule 3.03 to the preparation of less than a complete transcript of the proceedings in the district court. Rule 7.07(d).

§ 7.48 Attorney Fees

Appellate courts may award attorney fees for services on appeal in any case in which the trial court had authority to award attorney fees. Any motion for attorney fees on appeal shall be made pursuant to Rule 5.01. An affidavit must be attached to the motion and must specify: the nature and extent of the services rendered; the time expended on the appeal; and the factors considered in determining the reasonableness of the fee. See Model Rules of Professional Conduct 1.5 Fees; Rule 7.07(b). See also § 12.34, *infra*.

PRACTICE NOTE: Many motions for attorney fees do not include the affidavit required by Rule 7.07(b). This affidavit must be attached. Without it, the appellate court has no information by which to evaluate the motion and grant an award. See *Fisher v. Kansas Crime Victims Comp. Bd.*, 280 Kan. 601, 617, 124 P.3d 74 (2005) (failure to file motion in compliance with Rules 5.01 and 7.07 prevents appellate court from awarding attorney fees); *Stramel v. Bishop*, 28 Kan. App. 2d 262, 267-68, 15 P.3d 368 (2000), *rev. denied* 271 Kan. 1042 (2001).

A motion for attorney fees shall be filed with the clerk of the appellate courts no later than 15 days after oral argument. If oral argument is

waived, the motion shall be filed no later than 15 days after either the day of argument waiver or the date of the letter assigning the case to a non-argument calendar, whichever is later. Rule 7.07(b).

If the appellate court finds that an appeal has been taken frivolously, or only for purposes of harassment or delay, it may assess against an appellant or appellant's counsel, or both, a reasonable attorney fee for appellee's counsel. The mandate shall then include a statement of any such assessment, and execution may issue thereon as for any other judgment, or in an original case the clerk of the appellate courts may cause an execution to issue. Rule 7.07(c).

XIII. MANDATE

§ 7.49 Generally

The mandate is the final, formal order of the appellate court to the district court, disposing of the judgment of the district court and assessing costs. It is the judgment of the appellate court but is enforced through the district court. The mandate is issued from the clerk of the appellate courts to the clerk of the district court for filing and is accompanied by a certified copy of the opinion. See K.S.A. 60-2106(c); Rule 7.03. Copies of the mandate are not sent to counsel.

§ 7.50 Supreme Court

Mandates from the Supreme Court are issued after 20 days have elapsed from the filing of the opinion. This allows the parties to file a motion for rehearing or modification under Rule 7.06. If a motion is filed and denied, the mandate issues on the date of denial. If granted, the mandate is issued in conjunction with the decision on the rehearing.

§ 7.51 Court of Appeals

Mandates from the Court of Appeals are held for 30 days to allow for the filing of a motion for rehearing (10-day time limit under Rule 7.05) or a petition for review (30-day time limit under Rule 8.03). If a rehearing is granted, the mandate is held 30 days after the new opinion is filed to allow for a petition for review.

Filing a timely petition for review stays the issuance of a mandate. Rule 8.03(i). If review is denied, the mandate issues on the date of denial. Rule 8.03(f). If the petition for review is granted, the mandate is stayed until the Supreme Court files its opinion and the time for a motion for rehearing by that court has passed.

§ 7.52 Stays After Decision

Where a party seeks review in the United States Supreme Court, either by appeal or by certiorari, it may be necessary to stay the decision of the appellate court to preserve the status quo or prevent mootness. A motion to stay the issuance of the mandate should be sought in the court that issued the decision and will be issuing the mandate. Where a petition for review of the Court of Appeals has been denied by the Kansas Supreme Court, the motion for stay should be addressed to the Court of Appeals.

Application for a stay to the state court is ordinarily required before an application for a stay will be considered by the United States Supreme Court. See United States Supreme Court Rule 23.

If the stay is granted before the mandate is issued, the clerk of the appellate courts will hold the mandate. If the mandate has already been filed with the district court, the appellate court will enter an order recalling the mandate from the district court.