



BRIEFLY

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Trial lawyers on appeal

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Appeals can be daunting. But understanding the nuances of appellate procedure is important to effectively advocate at trial for a client who wishes to appeal from an unfavorable judgment or order, or defend against an appeal from a favorable judgment or order. While involving appellate lawyers may be a good idea (and even if you don't, you will be held to the standard of an appellate lawyer, see Eric J. Magnuson, *The Ethical Duty of Competence on Appeal*, Minn. Lawyer (Jan. 25, 2016)), trial lawyers need to know what is involved in an appeal so that they can shape the record during trial. Here is a reminder of five important appellate requirements for trial lawyers to keep in mind.

Preserve your argument in the District Court

One of the most frequently overlooked requirements for appeals is preserving issues for appeal in the District Court proceeding. A party cannot raise an issue for the first time on appeal. While a court will consider issues that were not raised by an objection if those issues involve fundamental or constitutional rights, the failure to timely object is tantamount to waiver of the claimed error. Trial lawyers must understand that a timely objection is necessary to create a record for appeal and to give the trial court an opportunity to correct any error. See Eric J. Magnuson, *Objections Can Make—or Break—Appellate Odds*, Minn. Lawyer (July 12, 2018). And if an objection to your evidence is sustained, remember to make an offer of proof.

Appeal from an appealable order or judgment

An attorney seeking to appeal from an unfavorable order or judgment must first determine whether that order or judgment is appealable. Sometimes rulings may be appealed before the end of the case, and sometimes they must be. Generally, an appeal may be taken from a final or partial judgment to the Court of Appeals. See Eric J. Magnuson, *How to Judge a Judgment*, Minn. Lawyer (July 21, 2014). There are also a number of appealable orders, which include, for example, orders regarding injunctions, orders denying new trials, orders vacating or sustaining attachments, final orders affecting a substantial right made in an administrative proceeding, orders regarding modification of child support, custody, or visitation, and “such other orders or decisions as may be appealable by statute or under the decisions of the Minnesota appellate courts.” Minn. R. Civ. App. P. 103.03. To avoid appealing a nonappealable order, familiarize yourself with Minnesota Rule of Civil Appellate Procedure 103.03 before filing the appeal.

Even if the unfavorable order or judgment is appealable, you should consider whether an appeal is worthwhile. This will require weighing the benefits and the costs and risks of an appeal. This may involve a review of the applicable standard of review (is the standard of review *de novo*, clear error, abuse of discretion?), scope of review (is the issue presented properly before the court?), and the Minnesota Court of Appeals' disposition statistics (while historical data is scarce, approximately twenty percent of appeals are successful in changing the outcome before the District Court).

There are also costs to appeal. Costs may include fees, costs, delay, and potentially bad precedent. While appel-

lants may have an uphill battle in any appeal proceeding, in many cases, the prospects of success or the significance of the issues justify the costs of appeal. On the other hand, sometimes the best you can get is a new trial, and the results the second time around could be worse. Ultimately, the decision of whether to appeal an order or judgment is one that rests with your client after careful consideration and evaluation of the benefits and risks.

Timely serve and perfect your appeal

The notice of appeal is what you need to file to initiate your appeal. You generally have sixty days to file and serve your appeal. See Minn. R. Civ. App. P. 104.01. But you should always double check the rules and determine if a statute sets a shorter timeline for appeal. See Eric J. Magnuson, *Appeal Triggers Can Be Traps: Not All Are the Same*, Minn. Lawyer (Apr. 14, 2016). In many instances, time is not just of the essence, but it is absolute. In fact, the Minnesota Court of Appeals regards timely filing and serving the notice as jurisdictional requirements. Late appeals are routinely dismissed and the consequences of failing to timely serve can be significant. To avoid these consequences, determine the specific time limits for your appeal as soon as possible to avoid having your appeal dismissed. And don't wait until the last day to file. Mistakes can and do happen even if you are careful. If you file early, you may be able to fix a mistake.

To perfect your appeal, you must file a notice of appeal and accompanying documents identified in Minnesota Rule of Civil Appellate Procedure 103.01. If you are the non-appealing party, you must determine if you need to file a Notice of Related Appeal (a cross appeal). Related appeals must be filed within fourteen days after service of the first notice of appeal, or resolution of post-trial motions, whichever is later.

These are the first steps to initiating an appeal in the Minnesota Court of Appeals. Failure to fulfill these basic requirements may result in dismissal of the appeal. But you also have to file processing documents, like transcript orders, or face possible dismissal or other sanctions for not following the rules.

Timely serve and file your appellate brief and addendum

The next step is to file an appellate brief. The time for filing an appellate brief varies depending on the type of appeal, but generally the brief is due within thirty days after delivery of the transcript, or after filing the notice of appeal if there is no transcript. See Minn. R. Civ. App. P. 131.01. The respondent then has thirty days to file and serve a brief. An appellant may file and serve a reply brief within ten days of receiving the respondent's brief.

The brief is the single most important document you will file in your appeal, so you should carefully prepare a clear and well reasoned brief that addresses each of the technical requirements. The technical requirements vary depending on the type of appellate brief, which can range from formal (Minn. R. Civ. App. P. 128.02) to informal and letter (Minn. R. Civ. App. P. 128.01). The form requirements for appeal briefs are governed by Rule 132.01, and the contents of appeal briefs are governed by Rule 128.02. Generally, you need to include a cover page, a table of contents and authorities, a statement of legal issues, a statement of facts, an argument section, and a conclusion. An addendum is required pursuant to Rule 130.02, and should include the most important or helpful orders and exhibits from the District Court record (the court has access to the entire court file).

Your brief should be cogent and persuasive. Keep your brief short and concise. Select your issues carefully and focus your brief on the best arguments. Use legal authority effectively and meaningfully. Confront and explain bad facts. Develop a persuasive tone. Avoid “legalese.” See Eric J. Magnuson & Lisa Beane, *Eschew Obfuscation – Writing is for Communication*, Minn. Lawyer (Mar. 16,

2015). Write a powerful conclusion. State concisely your requested relief and why you are entitled to it. Proofread, proofread, proofread!

Prepare an effective oral argument

Generally, the Minnesota appellate courts will grant oral argument in every case where the parties are represented by counsel if requested by the appellant. See Minn. R. Civ. App. P. 134.01. The Court of Appeals will notify counsel of the time and place of oral argument approximately one month before the hearing date. See Minn. R. Civ. App. P. 134.01. The time allowed for oral argument is fifteen minutes for appellant, fifteen minutes for respondent, and five minutes for appellant's rebuttal. Spec. R. Prac. Minn. Ct. App. 2. Because you will have only a short time to present your client's case, and you will almost certainly be immediately interrupted with questions from the panel, you will need to use your time during the oral argument efficiently and effectively.

The best way to deliver an effective oral argument is to prepare and practice, then prepare some more and practice some more. Your preparation must include reviewing the record and relevant legal authority, even if you tried the case and wrote the brief. Find any relevant opinions issued since filing your brief, and any cases or articles that your panel of judges may have written on issues before the panel, draft an outline of your key arguments, and develop a succinct summary of your argument in one or two sentences.

Once you have adequately reviewed the record and the law, the court's protocol and dynamics, and drafted your argument outline, you should moot your oral argument. Moot sessions are important because they help you prepare for anticipated questions. See Eric J. Magnuson, *To Moot or Not to Moot: What was the Question?*, Minn. Lawyer (Aug. 11, 2016). Don't be concerned if you're interrupted with questions from the bench. Questions are opportunities and an “active” bench is a good sign that your panel is engaged and interested in the issues presented in your appeal. If you are the appellant, keep your rebuttal short and confined to responding to the respondent's most persuasive arguments.

The Minnesota Court of Appeals generally issues decisions within ninety days after oral argument or final submission of briefs by the parties, whichever is later. Minn. R. Civ. App. P. 136.01; Minn. Stat. § 480A.08(3). Hopefully, after following each of these steps, you will win your appeal. If you do, you may be entitled to costs from the opposing party. See Minn. R. Civ. App. P. 139.03. If you don't win, you may be able to petition for further review by the Minnesota Supreme Court, although relatively few petitions are granted. See Minn. R. Civ. App. P. 117.

It is important for trial lawyers to understand the basics of appellate practice in order to effectively prepare for, perfect, and maximize their chances on appeal. While this article focuses on the most important appellate procedures for trial lawyers, it is not a comprehensive recitation. For more detailed guidance, see 3 Eric J. Magnuson, David F. Herr & Sam Hanson, *Minnesota Practice: Appellate Rules Annotated (2019 ed.)*, Diane B. Bratvold & Paula Duggan Vraa, *The Appellate Process*, in 5A *Minnesota Practice* (4th ed. 2007), and American Academy of Appellate Lawyers, *Bibliography of Appellate Practice*, <https://www.appellateacademy.org/publications/bibliography.pdf>.

At the end of the day, a good trial lawyer can be a good appellate lawyer. But the appellate work starts long before the appeal is filed. Make sure that it is your client's case that is being judged on appeal, not your work as a trial lawyer.

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