A STEP-BY-STEP WALK THROUGH THE APPELLATE PROCEDURE: FEDERAL VS. STATE

I. Filing the Notice of Appeal

a. Arkansas

The method of bringing a judgment or order up to the Supreme Court or Court of Appeals for review is set out in Rule 3 of the Arkansas Rules of Appellate Procedure, Civil and Criminal.

Arkansas has three different sets of rules applicable to appeals. We have the Arkansas Rules of Appellate Procedure-Civil [Ark. R. App. P.-Civ.]; the Arkansas Rules of Appellate Procedure-Criminal {Ark. R. App. P.-Crim.]; and the Rules of the Arkansas Supreme Court and Court of Appeals [Ark. Sup. Ct. R.[1]]. You will need at least two of them on any appeal.

The first step is often identified as filing a notice of appeal. The problem is that before you can ever file a notice of appeal you have to take a few extra steps first.

Determine whether you have a final order. Sometimes that's not as easy as it looks[2], and based on the number of appeals dismissed for want of a final order, sometimes we appeal a non-final order even though it *is* as easy as it looks.

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[1] Preferred abbreviations are set out in the House Style Guide at the Arkansas Supreme Court's website. http://courts.state.ar.us/reporter_decisions/house_style_guide/index.cfm

[2] I am grateful to Newbern and Watkins for this insight. "Ascertaining whether there are multiple claims is also straightforward in many situations; for example, the rule expressly provides that counter claims, cross-claims, and third-party claims "count" for purposes of multiplicity. However, the rule may also apply when a single plaintiff has asserted multiple claims against a single defendant. In such a case, it may be difficult to determine whether there are in fact multiple claims, or only a single claim supported by multiple grounds. Newbern & Watkins, 2 Arkansas Practice Series: Civil Practice and Procedure, § 40:3 [Multiple Claims or Parties] (4th Ed. 2006). I am thankful for this observation because I myself blew an easy one in 2006. *Myers v. McAdams*, 236 S.W.3d 504, 366 Ark. 435 (2006). We sued for wrongful death and survival damages. The trial court dismissed the wrongful death count on the statute of limitations, but did not rule on the survivorship claim. The appeal was dismissed without prejudice. I simply did not notice that the language of the judge's decision did not address the survivorship claim. The Appellee did, however, as did the Court.

A final judgment ends the case, puts the court's directive into execution, and ends the litigation. There are a lot of cases on final judgments. The Court will bring up the finality of the judgment *sua sponte*. *Coleman v. Regions Bank*, 364 Ark. 85, 216 S.W.3d 579 (2005); *Cockrum v. Fox*, 359 Ark. 508, 199 S.W.3d 69 (2004). Finality is jurisdictional. *McKinney v. Bishop*, 369 Ark. 191, --- S.W.3d ---- (2007).

The appellate courts do not want to consider fragmentary appeals. Newbern & Watkins, 2 Arkansas Practice Series: Civil Practice and Procedure, § 40:2 [Finality] (4th Ed. 2006).

The appellate courts will consider fragmentary appeals in rare situations. One is where the trial judge certifies the appeal under Ark. R. Civ. P., Rule 54(b). Read the rule carefully, though, and read the cases under it. It is not enough for the Trial Court to just recite the magic words. The judge must execute a certificate and give specific factual findings to support the conclusion that there is no just reason for delay. Watkins, *The Mysteries of Rule 54(b)*, 1996 Ark. L. Notes 117.

Practice Pointer: Watch out for orders subsequent to the one you thought might be final. When the Supreme Court or the Court of Appeals is faced with an appeal of a non-final judgment, the practice at the court is to dismiss the appeal without prejudice. There have been several cases, however, in which an Order which is not final is the subject of a notice of appeal and then thereafter some additional order is entered which arguably does create a final order. The only safe way to go is to file a new, or supplemental, notice of appeal.

Practice Pointer for Lawyers who Want to be Evil: If your opponent appeals an order that you do not believe is final, submit a final order sometime before the record is filed (and the trial court loses jurisdiction, *see Myers v. Yingling*, 369 Ark. 87, --- S.W.3d ----, 2007 WL 615119 (Ark. Mar 01, 2007)). Hope that opposing counsel has not read the practice pointer above or is otherwise unaware of it. When the Supreme Court or Court of Appeals dismisses the appeal, you will then be in a position to argue that your subsequent judgment was the real final judgment and that no notice of appeal was filed to that final judgment.

One of the easiest clues that you do not have a final order is if there are extra parties who have not been dealt with. If there is a party, even any "John Doe" whose claims or defenses have not been adjudicated you most likely do not have

a final order. A little bit more difficult to identify, but still a telltale sign to look for, is whether there are any issues outstanding or claims that have not been adjudicated properly.

Before you can file your notice of appeal you have to make arrangements with the court reporter for the preparation of the transcript. You have to recite that you have made those arrangements in your notice of appeal. Obviously, before you make that affirmation in a pleading you have to actually do what you said you would do.

> Failure of the appellant or cross-appellant to take any further steps to secure review of the judgment or decree appealed from shall not affect the validity of the appeal or cross-appeal, but shall be ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or cross-appeal. If, however, the record on appeal has not been filed pursuant to Rule 5 of these rules, the circuit court in which the notice of appeal was filed may dismiss the appeal or cross-appeal upon petition of all parties to the appeal or cross-appeal accompanied by a joint stipulation that the appeal or cross-appeal is to be dismissed.
>
> Rule 3(b).

In my experience most court reporters are busy. It is often a challenge to get them to prepare the record within the 90 days allotted to them. If they are unable to do so, it is necessary to get an extension (see § II.A. below). But the first step necessary before you can ever request that extension is to have already ordered the transcript from the court reporter and made the financial arrangements necessary to assure the preparation of the transcript before you ever file your notice of appeal.

Under the rules, "[a]n appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment. An appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from." Still, many people feel more comfortable

actually reciting that they appeal not only from the final order but any immediate orders. It can't hurt.

There are a few exceptions to the finality rule.

The notice of appeal is effective when filed with the clerk of the circuit court that entered the judgment. The operative date is when the document is file marked by the clerk.

There still remains a lot to be done after the notice of appeal is filed.

There are provisions in the rule for joint or consolidated appeals. In my experience, you are probably better off filing your own notice of appeal. Remember that the Clerk will count days from the filing of the first notice of appeal, so it is important to bear in mind that if another party files a notice of appeal that will govern when the record must be filed.

> A notice of appeal or cross-appeal shall specify the party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal. The notice shall also contain a statement that the appellant has ordered the transcript, or specific portions thereof, if oral testimony or proceedings are designated, and has made any financial arrangements required by the court reporter pursuant to Ark. Code. Ann. § 16-13-510(c). The notice shall also state whether the appeal is to the Court of Appeals or to the Supreme Court; and if to the Supreme Court, the appellant shall designate the applicable subdivision of Supreme Court Rule 1-2 (a) which gives the Supreme Court jurisdiction. This declaration shall be for the purpose of placing the case with one court or the other for preliminary administration. It shall not preclude the appellant from filing his or her Brief pursuant to Supreme Court Rules 4-3 and 4-4 in the alternative court if that is later determined by the appellant to be appropriate.

"A cross-appeal may be taken by filing a notice of cross-appeal with the clerk of the circuit court that entered the judgment, decree or order being appealed."

Service of the notice of appeal or cross-appeal can be a trap. It is not like an ordinary pleading that merely needs to be mailed. The rule requires that a copy of the notice of appeal or cross-appeal be served by certified mail. Failure to do this does not affect the validity of the appeal.

There is a provision for designating less than the entire record on appeal. If you're going to designate less than the entire record on appeal you have to serve a statement of your points with the notice of appeal. Otherwise, you get to put off figuring out your points until you've had a chance to review the record. Second, there's very little incentive for your opponent not to go ahead and designate the rest of the record. Rule 6(b). When the appellant designates a limited record the appellee has 10 days to designate additional parts of the record to be included. Once the appellee has done so, it is the appellant's duty to see to it that those additional parts are included in the record. ARAP—Civil, 10(b). Because of this provision, it seldom does any good to designate a partial record.

The next question is when you have to file the notice of appeal. Ordinarily, you need to filed a notice of appeal within 30 days of the entry of judgment. Ark. R. App. P, Rule 4. A notice of cross-appeal should be filed within 10 days of the notice of appeal, but a cross appellant will always have at least 30 days from the entry of judgment.

It used to be that a notice of appeal filed before the entry of judgment was a nullity. This caused a tremendous amount of confusion and injustice, particularly in districts where the judge had to preside in numerous counties. The judge would often sign the judgment but it might be days before the judgment was ever file marked by the appropriate court. Under the old rules, a notice of appeal filed before the judgment was file marked was considered a nullity. The rule now provides for that eventuality. "A notice of appeal filed after the circuit court announces a decision but before the entry of the judgment, decree, or order shall be treated as filed on the day after the judgment, decree, or order is entered." Rule 4(a).

It is important to bear in mind when the notice of appeal is deemed to be filed because the time for filing the record is triggered by that date. Rule 5(a). It runs from the filing of the first notice of appeal.

Ark.R.App.P. Civil, Rule 4 (b) Extension of Time for Filing Notice of Appeal.
(1) Upon timely filing in the circuit court of a motion for judgment notwithstanding the verdict under Rule 50(b) of the Arkansas Rules of Civil Procedure, a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), a motion for a new trial under Rule 59(a), or any other motion to vacate, alter, or amend the judgment made no later than 10 days after entry of judgment, the time for filing a notice of appeal shall be extended for all parties. The notice of appeal shall be filed within thirty (30) days from entry of the order disposing of the last motion outstanding. However, if the circuit court neither grants nor denies the motion within thirty (30) days of its filing, the motion shall be deemed denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty (30) days from that date.

Post trial motions create some of the greatest confusion. The confusion has been somewhat ameliorated by changes in the rules. Still, "over the years, aspects of Arkansas appellate procedure have been likened to Justice Cardozo's famous "Serbonian Bog." Newbern & Watkins, 2 Arkansas Practice Series: Civil Practice and Procedure, § 40:1[Appeals: Introduction] (4th Ed. 2006)[3]. Always file post-trial motions with an eye toward the impact it may have on your appeal.

First, make sure your motion is filed timely. An untimely posttrial motion does not extend the time for filing a Notice of Appeal. Second, make sure that your motion is actually one of the motions described in Rule 4(b). The Court will look to the actual nature of the motion to decide what kind of motion it is. *Jackson v. Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992). There is no reason to have to argue about that. Look at the rules referenced in Rule 4(b). Conform your motion to the requirements of those rules, and everyone will know what type of motion it is. Third, an amended or supplemental post-trial motion does not extend the 30 days for the Court to act. It will run from the date of the first post-trial motion.

[3] Citing *Poole v. Poole*, 298 Ark. 550, 551, 768 S.W.3d 544, 545 (1989) (Hickman, J., concurring); Holmes, *Pitfalls of Appellate Practice: Avoiding the Serbonian Bog*, 35 Ark. Lawyer 10 (Summer 2000); Schulze, *What's Wrong with Appellate Law in Arkansas*, 31 Ark. Lawyer 10, 11 (Fall 1996).

b. Federal.

The Federal Rules of Civil Procedure were designed to be a complete set of rules governing federal appeals. In federal court, an appeal is taken by filing a notice of appeal with the District Court with sufficient copies for the Clerk to send notice of the notices of appeal to all parties. Fed.R.App.P. 3.

> (c) Contents of the Notice of Appeal.
> (1) The notice of appeal must:
> (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";
> (B) designate the judgment, order, or part thereof being appealed; and
> (C) name the court to which the appeal is taken.

The Eighth Circuit's Internal Operating Procedures give the following advice about filing a notice of appeal:

> Before filing a notice of appeal, counsel should consider the following questions.
>
> > (1) Is there subject matter jurisdiction in the case?
> > (2) Has the district court fully resolved all issues in the case? If not, is the order appropriate for the interlocutory appeal process under 28 U.S.C. § 1292(b), or has the district court entered an order under Fed. R. Civ. P. 54(b)?
> > (3) Is there a pending motion listed in FRAP 4(a)(4) that would render the filing of a notice of appeal premature?
> > (4) Is the appeal timely?
> > (5) Have the points of error been properly preserved?
> > (6) Does the proposed appeal have real merit, or is it frivolous?
> > (7) Is counsel appealing from an appropriate "final order"? See 28 U.S.C. § 1291; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Eighth Circuit Internal Operating Procedures III A. (p.10-11) (Revised June 1, 2007).[4]

[4] http://www.ca8.uscourts.gov/newrules/coa/IOP.pdf

Entry of judgment is a prerequisite to appeal as of right. Entry of judgment in the federal system occurs when the clerk makes the appropriate entry on the docket. The entry of judgment also has to follow Rule 58 of the Federal Rules of Civil Procedure. One of the ways that federal practice differs from state practice is that it is easier in federal practice to accidentally or even intentionally waive certain technical requirements. Proper entry of a final judgment is jurisdictional in Arkansas, but in the Federal system entry of a final judgment can be waived. *Missouri v. Prudential Health Care Plan, Inc.*, 295 F.3d 949 (8th Cir. 2001).

Fed.R.App.P., Rule 4(a) [civil]Effect of a Motion on a Notice of Appeal.
(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
(i) for judgment under Rule 50(b);
(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
(iv) to alter or amend the judgment under Rule 59;
(v) for a new trial under Rule 59; or
(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

Rule 4 (b) [criminal] (3) Effect of a Motion on a Notice of Appeal.
(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:
(i) for judgment of acquittal under Rule 29;
(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or
(iii) for arrest of judgment under Rule 34.
(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:
(i) the entry of the order disposing of the last such remaining motion; or
(ii) the entry of the judgment of conviction.
(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)

Timeliness of an appeal is jurisdictional, however. Timeliness is governed by statute and rule. 28 U.S.C. § 1292(b) and FRAP 4 and 5(a). You ordinarily have 30 days to file a notice of appeal from the final judgment. If the United States is a party however, you have an additional 30 days for a

total of 60 days to filed a notice of appeal. A petition for permission to file an interlocutory appeal should be filed within 10 days of the challenged order.

Even here, however, the Federal system is more forgiving than the Arkansas system. As noted in the 8th Circuit Appellate Practice Manual (3d Ed. 2005)[5], the rule that failure to file a timely notice of appeal is jurisdictional is softened somewhat by the discretion federal courts have to overlook inadequacy of form. The federal courts accept any paper that shows an intention to appeal and identifies the appellant is a sufficient notice of appeal. Also, remember the District Court's authority to enlarge the filing periods for excusable neglect or other good cause. *Id.* at 5-3. Even though the Court of Appeals has no authority to extend the time to initiate appeal, sometimes the District Court can do so. 28 U.S.C. § 2107(c); FRAP 4(a)(5), (6).

Another practicality that has made things much easier in federal court is the adoption of electronic filing.

The federal system also has rules providing additional time for appeal when a post-trial motion is filed. The system works differently, though, and it is important to keep in mind that some of the principles that apply in Arkansas are different in the federal system.

The types of motion that will extend the time for filing a notice of appeal are different in Arkansas and federal court. For instance, a motion for fees will delay the case in federal court.

Filing a post-trial motion in the federal system should be seen as ending the finality of the judgment. Like in Arkansas, in order for the post-trial motion to have that

[5] If you're going to do much Federal appellate work in this Circuit, this book is a very good investment. To order this helpful manual contact Minnesota CLE, (651)227-8266 or (800)759-8840 or www.minncle.org.

effect, it has to be timely. The federal courts will also look to the substance of the motion, not the title. *Buchanan v. Stanships, Inc*., 485 U.S. 265 (1988). Substantively, it must be one of the motions listed in the rule.

There is not a "deemed denied" provision in the federal rule. The Court needs to actually enter an order resolving the motion.

If a party files an early notice of appeal, it is deemed to be filed when the order disposing of the post-trial motion is entered. If you want to challenge the post-trial ruling as well, you should file an amended notice of appeal. Rule 4(a)(4)(B)(i) and (ii).

A major difference between Arkansas and Federal practice is the power of the Federal District Court to extend time for filing a notice of appeal, or even reopen the time for filing such a notice for excusable neglect or good cause. FRAP Rule 4(a)(5) and (6). You should not depend on this from the beginning, of course, but if you ever find yourself in a situation in which a notice of appeal has not been filed in a timely manner, it is worth looking at this rule and see if there is any way to fix the problem.

II. Perfecting the Record on Appeal

a. Arkansas

There should be no doubt about it, getting the record timely lodged is a huge chore that should not be taken lightly. You have 90 days from the **first** notice of appeal to deliver the record to the Clerk of the Arkansas Supreme Court and Court of Appeals.

It is the lawyer's duty to see to it that the record is lodged in a timely manner. Even though you do not pay the court reporter's salary or control the court reporter's schedule, you are responsible for seeing to it that the court reporter prepares the record in a timely manner. The court reporter has to have the record prepared in time for the

circuit clerk to prepare the record and deliver it to you for filing within 90 days. You have to lodge it within 90 days.

The record is prepared by the Circuit Clerk. The court reporter must provide the transcript to the Circuit Clerk in time for the Clerk to prepare the record. The clerk will index the record, attach the pleadings and the transcript, number the record, and put it in the form required under the Arkansas Rules of the Supreme Court and Court of Appeals, Rule 3-1. ARAP-Civil, Rule 6

There is a provision for extending that time under certain circumstances. If the court reporter cannot get the transcript prepared within the 90 days, you may file a motion before the trial court for an extension of time.

The litigant, and not the court reporter, must file the motion. *Spurlock v. Riddell*, 2008 WL 659828, (March 13, 2008). The motion must contain the following allegations which must also appear as findings of fact in the trial court's order granting the extension:

> (A) The appellant has filed a motion explaining the reasons for the requested extension and served the motion on all counsel of record;
>
> (B) The time to file the record on appeal has not yet expired;
>
> (C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing;
>
> (D) The appellant, in compliance with Rule 6(b), has timely ordered the stenographically reported material from the court reporter and made any financial arrangements required for its preparation; and
>
> (E) An extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal.

It is not enough to merely make these allegations. The motion has to be served in time for the opposing counsel to respond. The facts alleged in the motion have to be true,

and proved.[6] This will ordinarily require, at a minimum, an affidavit from the court reporter.

There is a limit of seven months to this extension. That seven months runs from the date of the entry of the judgment or order, not the notice of appeal. It can conceivably run from the date on which a post-trial motion is "deemed denied" making calculation of that day extremely important. In my experience, it is amazing how many court reporters are absolutely unable to prepare a transcript until a week or two before the seven-month maximum extension runs.

There are situations in which a court reporter will not be able to finish the record even within the seven months. If that is the case your solution is to file a partial record with the appellate court along with motion for certiorari to complete the record. The rule reads:

> (3) If the appellant has obtained the maximum seven-month extension available from the circuit court, or demonstrates (by affidavit or otherwise) an inability to obtain entry of an order of extension, then before expiration of the period prescribed by subdivision (a) of this rule or a prior extension order, the appellant may file with the clerk of the Supreme Court a petition for writ of certiorari pursuant to Rule 3-5 of the Rules of the Supreme Court and Court of Appeals.

In criminal cases, if the attorney fails to lodge the record in time, there is a provision for a Motion for Rule on the Clerk. Ark. Sup. Ct. R. 2-2. This requires the attorney to accept fault for failing to file the record on time. This also results in a referral to the Committee on Professional Conduct.

[6] I was consulted once by a *pro se* litigant who had found a perfect form for a motion to extend time to prepare the record. Unfortunately, the statement in his notice of appeal that he had made financial arrangements with the court reporter was inaccurate.

In civil cases, this remedy is unavailable for a record truly filed late. *Davis v. C & M Tractor Co.*, 2 Ark. App. 150; 617 S.W.2d 382 (1981) "But in civil cases we have refused to exercise our inherent powers in accepting late appeals 'except in a most extraordinary situation.'" *Bernard v. Howell*, 254 Ark. 828, 496 S.W. 2d 362 *(1973), citing West v. Smith*, 224 Ark. 651, 278 S.W. 2d 126 *(1955) quoted in Davis, supra.*

If there is a dispute with the Clerk's office on whether a record is timely filed, however, a motion for rule on the clerk is the appropriate motion to file.

b. Federal

This is an area in which, although the theory is the same, things proceed much differently. When you file your notice of appeal, the Clerk of the United States District Court will take over to some extent. You file the notice of appeal, with sufficient copies, and you should file Appellant's Form A. If you don't file Form A, the Clerk's office will send you the form. You send the filled-out form A, and a blank form B, to the appellee. You will also be sent a transcript purchase order form, to be filed within 10 days of filing the Notice of Appeal. FRAP 10.

The duties of the appellant are essentially the same as in Arkansas courts, but there is no requirement that the transcript be ordered before the Notice of Appeal is filed. The appellant has the duty to order the transcript and make sure that financial arrangements are made.

The federal rule also has a provision for designating less than all the testimony. This requires a statement of the issues. The appellee can cross-designate. The difference is that the Federal rule is not quite as clear as the Arkansas rule as to who pays for the

appellee's portion of the transcript. Under the federal rule, if the appellant does not volunteer to pay for the additional transcript the appellee can either pay for it or file a motion with the Court for an order requiring the appellant to pay for it. FRAP Rule 10(b)(3)(C).

The record in Federal Court is (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk. FRAP Rule 10(a)

III. Motions: Procedure and Pitfalls

a. Arkansas

Motions are governed by Ark. Sup.Ct. R., Art. 2. The general rule is Rule 2-1. The biggest "pitfall in the rule is the time to respond. You have ten *calendar* days. That means you are not entitled to the extra days for Saturday, Sunday, and any holiday that you usually enjoy under the Arkansas Rules of Civil Procedure.

> **(a) Writing Required.** All motions must be in writing.
> **(b) Number of Copies.** In cases pending before the Supreme Court, eight (8) clearly legible copies must be filed on 8 1/2 " x 11" paper. In cases pending before the Court of Appeals, fourteen (14) clearly legible copies must be filed on 8 1/2 " x 11" paper.
> **(c) Service.** Evidence of service of motions upon opposing counsel must be furnished at time of filing.
> **(d) Response.** A response may be filed within 10 calendar days of the filing of a motion. Evidence of service is required.
> **(e) Memorandum of Authorities.** With any motion, application for temporary relief, or other action of the Court that is sought before the regular submission of the case, the moving party shall file and serve upon opposing counsel or an unrepresented party a short citation of statutes, rules of court, and other authorities upon which the movant relies. Any party responding to any such motion or application shall likewise file a memorandum of authorities.

Following Rule 2-1 there are specific rules for the Motion for Rule on the Clerk, the Petition for Rehearing, and the Petition for Review. It is somewhat surprising that the Petition for Rehearing and Petition for Review show up so early in the rule.

b. Federal

Motions can play a large role in federal appeals. Motions cover a lot of ground. "An application for an order or other relief is made by motion unless these rules prescribe another form. Fed. R. App. P., Rule 27. "A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." *Id.* The Eighth Circuit divides motions by who can grant them. Some motions can be granted by the Clerk. Others can be granted by a single judge. The rest have to be ruled upon by a three judge panel.

RULE 27B. ORDERS.
(a) Orders the Clerk May Grant. The clerk has discretion to enter orders on behalf of the court in procedural matters including, but not limited to:
(1) applications to file briefs exceeding the page limits set forth in these rules and the Federal Rules of Appellate Procedure;
(2) extensions of time for filing briefs and records;
(3) extensions of time for designating the record under 8th Cir. R. 30A(b);
(4) authorization to proceed on a deferred appendix under 8th Cir. R. 30A(b)(2);
(5) corrections in briefs, pleadings, or the record;
(6) supplementation of the record;
(7) incorporation of records from former appeals;
(8) consolidation of appeals;
(9) substitution of parties;
(10) motions to appear as amicus curiae;
(11) requests by amicus curiae counsel to participate in oral argument by sharing time with other counsel;
(12) advancement or continuance of cases;
(13) appointment of counsel on appeal in cases prosecuted under the Criminal Justice Act;
(14) withdrawal of appearance in civil cases;
(15) extensions of time to file petitions for rehearing not to exceed 14 days;
(16) transmission of records to the Supreme Court for use in connection with petitions for writs of certiorari;
(17) entry of consent decrees in National Labor Relations Board cases and other governmental agency review cases; and
(18) taxation of costs under 28 U.S.C. § 1920.
If any party opposes the action requested in any of the above matters or seeks reconsideration of an order entered under this section, the clerk must submit the matter for a ruling by a judge of this court.
(b) Orders One Judge May Grant. Subject to FRAP 27(c), one judge of the court may determine any motion and exercise any power including:
(1) granting leave to appeal in forma pauper-is and ordering preparation of a transcript at government expense;
(2) granting appointment of counsel for an indigent defendant proceeding under 28 U.S.C. § 1915;
(3) denying a motion to dismiss under 8th Cir. R. 47A; and
(4) ordering a temporary stay of any proceeding pending the court's determination of a stay application.
(c) All Other Matters. A panel of three judges will act in all other matters.

The Federal rules treat motions differently whether they are substantive, procedural, or both substantive and procedural.

Again, the biggest pitfall is the response time. You have only eight days to respond to a Motion in the United States Court of Appeals. Fed. R. App. P, Rule 27(a)(3).

The Eighth Circuit permits motions of up to ten pages to be filed by facsimile. Rules of the Court of Appeals for the Eighth Circuit, Rule 25A. The fax number for filing is (314) 244-2780. It is often a good idea to call the

Clerk's office about a fax filing. The personnel at the Court are very helpful. Ordinarily, someone in the clerk's office will be assigned to work with you and answer at least some questions you may have about procedural matters on your appeal. These people can be very helpful and informative. I recommend contacting the clerk's office before filing any motion, just to see if they can offer you any helpful advice.

Ordinarily, there is no oral argument on motions, but in unusual circumstances there may be. The Eighth Circuit has even held telephone conference call hearings on emergency motions. Obviously, requests for oral arguments on motions should be requested very sparingly.

IV. Procedural Rules for Opening and Responsive Briefs

a. Arkansas

i. Appellant's Brief

The rules for briefs are set out at Ark. Sup. Ct. R., Article IV (Rules 4-1 through 4-3). The Clerk's office uses a checklist when examining the briefs for compliance with the rules. Also, there is a sample brief on the Court's webpage that is an excellent guide. It was written by Judge Price Marshall when he was a practicing lawyer.

One very unusual feature of appellate briefs in Arkansas is the pagination requirement. The abstract, statement of the case, argument, and addendum must all be numbered sequentially. That means you have separate pagination for each. The abstract starts with page **Ab 1**, the statement of the case starts with **SoC 1**, the argument starts with **Arg 1**, and the addendum starts with **Add 1**.

The brief, including footnotes, should be double-spaced. Footnotes should be used sparingly. Quoted material may be single-spaced and indented.

The argument is limited to twenty-five pages. The appellant's reply brief is limited to fifteen. Motions for additional pages must set forth the reasons for the request and must state that a good faith effort to comply with the Rule has been made. Such motions are routinely denied.

The brief must have a table of contents, an informational statement and jurisdictional statement, the points on appeal, a table of authorities, an abstract, a statement of the case, an argument, and an addendum. Evidence of service on the opposing counsel and the trial court must be provided.

REQUIREMENTS:
17 COPIES OF THE BRIEF
12 PICTH OR LARGER FONT SIZE
TEXT IS DOUBLE-SPACED
1 INCH MARGINS ON THE TOP, BOTTOM, & RIGHT MARGI
EACH MAJOR SECTION BEGINS WITH PAGE 1
CONTENTS:
TABLE OF CONTENTS
A. PAGE NUMBER REFERENCES TO EACH MAJOR SECTIO
B. PG REF TO THE ABS WHERE EACH WIT BEGIN TSMY
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POINTS ON APPEAL
TABLE OF AUTHORITIES
ABSTRACT
A. FIRST PERSON NARRATIVE
B. PAGE REFERENCES TO RECORD
STATEMENT OF THE CASE
A. FIVE PAGES OR LESS
B. PAGE REFERENCES TO THE ABSTRACT & ADDENDUM
ARGUMENT
A. TWENTY-FIVE PAGES OR LESS
B. PAGE REFERENCES TO THE ABSTRACT & ADDENDUM
C. SIGNATURE AND CERTIFICATE OF SERVICE
ADDENDUM
A. INDEX WITH PAGE REFERENCES TO THE RECORD
B. JUDGMENT/ORD/DECREE APPEALED FROM INCLUDED
C. NOTICE OF APPEAL INCLUDED
CIVIL CASE

The abstract and the addendum are the most unusual feature of appellate briefs in Arkansas. The abstract is, quite frankly, archaic. It made sense in the days before photocopiers, but now it is a tedious and probably unhelpful process. The appellant is required to convert the testimony into first person narrative. That can be extremely

confusing considering the nature of testimony in courtrooms in the real world. Deposition testimony likewise must be abstracted. The best guide for how to abstract is old—not unlike the very philosophy of abstracting itself. Justice George Rose Smith's article on abstracting is about as good as it gets. George Rose Smith, *Arkansas Appellate Reports: Abstracting the Record*, 31 Ark. L. Rev. 359, 365 (1977).

One of the reasons that proper abstracting and preparation of the addendum are essential is that the Arkansas appellate courts will not go back and look at the record. The Supreme Court has often said, it is impractical to require all seven members of this court to examine one transcript in order to decide an issue. *Zini v. Perciful*, 289 Ark. 343, 711 S.W.2d 477 (1986). *Kingsbury v. Robertson*, 325 Ark. 12, 923 S.W.2d 273 (1996).

To quote a somewhat less respected expert on abstracting:

> Abstracts are too damn long because we have to abstract everything that has marginal relevance to the issues or the validity of the appeal. The plain language of the rules suggests otherwise. The appellant's abstract or abridgement of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision. In fact, the only italicized word in these rules is "only."
>
> But, in practice, the Court often refuses to consider an issue because something wasn't abstracted. To play it safe, the lawyer must abstract everything that might be marginally relevant. It creates more billable hours for attorneys, but more work for the Court and it slows down the wheels of justice.

Gerry Schulze, What's Wrong with Appellate Law in Arkansas, 31 Fall Ark. Law. 10, 12 (1996) [footnotes omitted].

You may notice the reference to abstracts of pleadings in the quote above. Fortunately, that is no longer required. Pleadings are to be placed in the addendum now.

ii. Appellee's Brief

Like the appellant's brief, the appellee's brief must meet certain requirements. The Clerk has a checklist for that, too.

The appellee does not have to abstract unless the abstract provided by the appellant is somehow inadequate or inaccurate. The appellee does not have to do a statement of the case if the appellant's statement is sufficient to the appellee. The appellee's addendum shall only include items not included in the appellant's addendum.

APPELLEE BRIEFS
TABLE OF CONTENTS
POINTS ON APPEAL
TABLE OF AUTHORITIES
SUPPLEMENTAL ABSTRACT (IF ANY)
STATEMENT OF THE CASE - FIVE PAGES (IF ANY)
ARGUMENT - 25 PAGES
SUPPLEMENTAL ADDENDUM INDEX (IF ANY)
SUPPLEMENTAL ADDENDUM (IF ANY)

iii. Appellee/Cross Appellant Brief

One interesting wrinkle that I learned just a year or so ago is the following rule: "If the cross-appellant is also the appellee, the two separate arguments may be contained in one brief, but each argument is limited to 25 pages." Ark. Sup .Ct. R., Rule 4-4 (b). The significant word there is "each." I did not recognize the significance of the word "each" in that context until it was called to my attention by the Clerk's office. I was looking at filing my first ever (okay, first in a very long time) motion for extra pages. There was a highly contentious case with mixed results and both parties were unhappy with what the trial judge had done. Apparently my opponent was slightly more unhappy, as he reached the courthouse with his notice of appeal first. I was facing not only a detailed appeal, I also had a complicated cross appeal I wanted to pursue.

I had learned long ago that when I have a difficult question I call the Clerk's office and talk to the Clerk himself, Les Steen. Mr. Steen pointed out this rule to me and told me its significance. I did not have to have extra pages. I could easily fit my appellee's argument into one twenty-five page brief, and my cross-appellant's argument into another. If I had thought it through, this would have been obvious. The appellant would get twenty-five pages for his opening brief, and twenty-five pages for his cross-appellee's argument. The prize for winning the race to the courthouse with your notice of appeal cannot be a twenty-five page advantage on your opponent.

I gleefully shared this development with several of my friends who do a lot of appellate work. I think every one of them had already heard it.

b. Federal

i. Appellant's Brief

The Appellant files a brief and an appendix. The federal appeal seems to go much faster than the Arkansas appeal at first. In Arkansas you have to lodge the record with the Clerk of the Arkansas Supreme Court and Court of Appeals and then and only then does your time for preparing the brief start running. In Federal Court, however, the time starts running from the time the record gets to the Court of Appeals and they issue a scheduling order. That means you may have to start writing your brief before you even have a copy of the transcript.

The Eighth Circuit has its own rules. They track the Federal Rules of Appellate Procedure. That means that the numbering on the Eighth Circuit Rule matches the numbering of the applicable Rule of Appellate Procedure. There are some areas in which the Eighth Circuit rule actually changes the Federal Rule of Appellate Procedure, so you

always should check both. In general, the brief should contain a number of specific, required elements. See generally, Fed. R. App. P., Rule 28(a); 8th Cir. R. 28A.

United States Court of Appeals
For the Eighth Circuit
Briefing Checklist
BEFORE FILING A BRIEF IN THIS COURT, please ensure compliance with all provisions of FRAP 28, 29, 31, & 32, as well as Eighth Circuit Local Rule 28A. **Particularly, check for:**
1. Timeliness: See FRAP 31(a) and briefing schedule.
2. Page Limitations: Main briefs: 30 pages **or** 14,000 words using proportional spacing and 14-pt. type **or** 1,300 lines using monospaced face and 10½ characters per inch. See FRAP 32(a)(7). Reply briefs: One half the length of main briefs using page limit or type/volume limitations. See FRAP 32(a)(7). Amicus briefs: One-half the maximum length of the principal brief. See FRAP 29(d).
3. Color of cover: See FRAP 32(a)(2). Appellant/petitioner–blue; appellee/respondent–red; reply–gray; intervenor/amicus–green.
4. Cross-appeals: See 8th Cir. R. 28A(e). Appellant's principal brief (blue cover) and Appellee/Cross-Appellant's principal brief (red cover) is governed the length provisions of FRAP 32(a)(7)(A) and (B). The reply/cross-appellee brief (grey cover) may not exceed 25 pages or 10,000 words or 1000 lines. The reply cross-appellant brief (white cover) may not exceed 15 pages or 7,000 words or 750 lines. See FRAP 32(a)(7)(A) & (B).
5. Number of Copies: Ten copies in attorney-handled cases; five copies in pro se appeals. See 8th Cir. R. 28A(a). BRIEFS AND APPENDICES SHOULD BE SENT TO THE ST. LOUIS CLERK'S OFFICE.
6. Footnotes: Same size as text of brief; may be single spaced. FRAP 32(a)(4).
7. Unpublished opinions: Cite pursuant to provisions of 8th Cir. R. 28A(I) and include a copy of the opinion in the addendum.
REQUIREMENTS AND ORDER OF APPELLANT'S BRIEF. See FRAP 28(a); 8th Cir. R. 28A(f).
1. Summary of the case and request of oral argument or waiver. See 8th Cir. R. 28A(f)(1).
2. Corporate Disclosure Statement. See FRAP 26.1.
3. Table of Contents. See FRAP 28(a)(2).
4. Table of Authorities. See FRAP 28(a)(3).
5. Jurisdictional Statement. See FRAP 28(a)(4)
6. Statement of the issues: no more than four most apposite cases. See FRAP 28(a)(5); 8th Cir. R. 28A(f)(2).
7. Statement of the case. See FRAP 28(a)(6).
8. Statement of the facts. See FRAP 28(a)(7).
9. Summary of the argument. See FRAP 28(a)(8).
10. Argument and applicable standard of review. See FRAP 28(a)(9).
11. Conclusion. See FRAP 28(a)(10).
12. Certificate of Compliance. See FRAP 32(a)(7).
13. District court opinion/administrative agency decision on review. See 8th Cir. R. 28A(b)(1)
14. Addendum. 15-page limit. See 8th Cir. R. 28A(b)(2).
SEE FRAP 28(B) FOR EXCLUSIONS ALLOWED IN APPELLEE'S BRIEF.
The clerk's office screens all briefs for strict compliance with the rules. We will reject untimely or overlength briefs. Your cooperation in meeting the specified requirements is appreciated.

_____
Michael E. Gans, Clerk

The Appendix consists of: (A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order, or decision in question; and (D) other parts of the record to which the parties wish to direct the court's attention. Fed. R. App. P., Rule 30. This is where the information necessary to the Court's understanding of the case is provided. The major

difference between State and Federal practice in this regard is the following provision, "Parts of the record may be relied on by the court or the parties even though not included in the appendix." Fed. R. App. P., Rule 30(a)(2).

The parties can get together to designate and prepare a joint appendix, or can file separate appendixes. 8th Cir. Rule 30A.

ii. Appellee's Brief

"Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9)and (11), except that dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review."

Fed. R. App. P., Rule 28(b).

iii. Appellee/Cross Appellant Brief

The 8th Circuit has summarized this well. It is different from the Arkansas rule:

> When the appellee also files a notice of appeal, the appellee becomes the cross appellant. (The cross appellant may be properly called merely "the appellee" at all times). Rule 28(h). This appellee may file a fourth brief– an appellee's reply brief. Rule 28(c). The sequence and timing are set out in 8TH CIR. R. 28A(e):
> • Appellant files the initial brief;
> • Within 30 days, appellee files a brief that both responds to the appellant's brief and raises the cross-appeal;
> • Within 30 days, appellant files a reply brief that responds to the cross appeal and that may reply to the appellee's brief; and
> • Within 14 days, appellee may file a reply brief to the appellant's second brief, but only on the cross appeal issues.

> The due dates for these briefs are generally set forth in the docketing notice sent out by the court.

8th Circuit Appellate Practice Manual, §10.2.7 (3d Ed. 2005).

iv. Multiple Parties

Rule 28 (i) provides:

> **Briefs in a Case Involving Multiple Appellants or Appellees**. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

V. Advantages and Disadvantages of an Amicus Brief

In an appropriate case, you may want friends. The Latin phrase "*amicus curiae*" means "Friend of the Court," but nobody has been fooled by that meaning since probably the days that people actually spoke Latin in court. The *amicus curiae* is your friend, not the Court's.

That does not mean that the amicus should abandon all pretense of being the Court's friend. To the contrary, the proper role of the amicus is to bring the implications of the Court's decision to the attention of the Court.

As lawyers, we live with the fear every day that we will screw something up. We imagine that those lucky souls who have ascended from mere mortal status to the judiciary no longer are concerned with the risk that they might err. This does not seem to be accurate. It seems to me that judges are highly conscious of the impact that their decisions have, and they are well aware that one law that even the highest court cannot

invalidate is the law of unintended consequences. For this reason, in an appropriate case, an amicus can be helpful to the Court as well as to the litigants. In *Thomas v. Stewart*, 347 Ark. 33, 60 S.W.3d 415 (2001) the Court declined to revisit the doctrine of *caveat lessee*. The Court contrasted the case with *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970) in which the Court reconsidered the doctrine of *caveat emptor*. In declining to reconsider the doctrine, the Court noted:

> Thomas contends that because the court swept away an "old world caveat related to real property" in *Wawak*, we should take the opportunity to do so here with respect to *caveat lessee*. We decline to adopt this reasoning. Although Thomas asserts that we should simply adopt a more modern rule, as the court did in *Wawak*, we point out that this court, in that case, had the benefit of *amicus curiae* briefs from interested organizations; such briefs had been invited after the case was submitted in order to ensure that the court would have before it all possible persuasive arguments before overturning long-standing precedent. Without the benefit of such research and argument in this case, we simply do not believe we are in the best-informed position to make relatively sweeping changes to our common law.

Id. at ___, 60 S.W.3d at ___. (The Court also noted that they reversed summary judgment on another ground, making *Thomas* an inappropriate case for reconsidering the doctrine of *caveat lessee*.).

In the highly publicized *Lake View School District No. 25 of Phillips County v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002), for example, there was a long list of amici: "the Arkansas Education Association (in support of the trial court's order); the Arkansas State Chamber of Commerce, Inc. and the Associated Industries of Arkansas, Inc. (in support of the trial court's order); Arkansas Advocates for Children and Families (in support of the trial court's order); the Arkansas Public Policy Panel and the Rural School and Community Trust (in support of the trial court's order); and the Arkansas Policy Foundation (in support of the State's position)."

The role of an *amicus* is limited, as noted by the Arkansas Supreme Court:

> One coming before this court in the posture of amicus curiae is bound by the questions that are properly before us. *Mears v. Little Rock Sch. Dist*., 268 Ark. 30, 593 S.W.2d 42 (1980). We have consistently limited amicus briefs to the facts proven at trial and the points raised by the parties on appeal. *Ferguson v. Brick*, 279 Ark. 168, 649 S.W.2d 397 (1983). Amicus curiae cannot enlarge the issues beyond those raised by the pleadings of the parties in the lower court. *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995); *City of Little Rock v. AT&T Communications of the Southwest , Inc*., 316 Ark. 94, 870 S.W.2d 217 (1994); see also *Equilease Corp. v. United States Fidelity & Guaranty Co*., 262 Ark. 689, 565 S.W.2d 125 (1978) (refusing to consider new issues in amicus brief because amicus must take the case as he finds it and cannot introduce new issues at the appellate level).

Baptist Health v. Murphy, 358 Ark. 341, 189 S.W.3d 438 (2004)

VI. Preparing and Submitting Your Appeal

a. Arkansas

File seventeen copies of your brief and addendum with the Arkansas Supreme Court Clerk. You have to make sure it actually arrives on or before the day it is due. Putting it in the mail is not enough. Entrusting it to a courier who fails to deliver it on the appointed day is not enough. Serve opposing counsel and the trial court with a copy of the brief and addendum.

b. Federal

Take a good look at Michael Gans's letter on Page 21. One difference is that the Federal system does honor the mailbox/courier rule. In other words, if you place your copies of your brief in the hands of the United States Postal Service or a reputable courier

service, that will fulfill your responsibility to file the brief and appendix. Fed. R. App. P. Rule 25(a)(2)(B).

VII. Variations to Standard Procedure

a. Arkansas

Variations are rare and depend on the circumstances. Most variations of any substantial nature will require you to file a motion. If you do not have a good ground for your motion, it will most likely be denied.

Motions to expand the page limit for briefs are routinely denied.

b. Federal

The philosophy at the Eighth Circuit is that rules can be flexible. "Most procedures prescribed by the rules are not absolutely inflexible. In procedural matters the court's primary interest is efficient and expeditious case processing. To that end, the court is willing to accommodate reasonable alternatives to procedures set forth in the rules. See FRAP 2." Eighth Circuit Internal Operating Procedures, Sec. III.A. p. 10.[7]

VIII. Procedural Rules for Oral Argument

a. Arkansas

Send a letter with your brief asking for oral argument. The rule suggests that oral argument will be allowed unless: (1) the appeal is frivolous; (2) the dispositive issue or set of issues has been decided authoritatively; or (3) the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the

[7] http://www.ca8.uscourts.gov/newrules/coa/IOP.pdf

decision-making process. Ark. Sup. Ct. R. 5-1. In practice, however, oral arguments are routinely denied.

There's no way to know for sure, but experience tells me that you do not lose anything by not asking for oral argument at the Arkansas Supreme Court or Court of Appeals. Most appeals can be handled on the briefs. The purpose of oral argument is to give the Court the chance to ask questions and explore the implications of your arguments. If you have anything that you think needs to be said, you can always put it in your brief.

b. Federal

In your opening brief you have to start with a summary of the argument and a request for or waiver of oral argument. Fed. R. App. P., Rule 28A(f)(1). There is some degree of concern in the federal system that it is not advisable for an appellant to waive oral argument as it may be seen as a sign of lack of confidence.

Taking Your Appeal to the Next Level

c. Arkansas

i. Petitions for Rehearing

Rule 2-3. Petitions for rehearing.

(a) Filing and service. A petition for rehearing, a brief in support of the petition, and evidence of service of the petition, brief, and a certificate of merit stating that the petition is not filed for the purpose of delay, shall be filed within 18 calendar days from the date of decision.

(b) Response. The respondent may file a brief on the following Monday (in the Supreme Court) or Wednesday (in the Court of Appeals) or within seven calendar days from the filing of the petition for rehearing, whichever last occurs, or may, on or before that time, obtain an extension of one week upon written motion to the Court.

(c) Additional time. Neither party will be granted further time than as indicated above, except upon written motion to the Court and a showing of illness of counsel or other unavoidable casualty.

(d) Number of copies to be filed. Eight copies of the petition must be filed for Supreme Court cases and fourteen copies of the petition must be filed for Court of Appeals cases, and a copy must be served upon opposing counsel.

(e) Page length. In all cases, both civil and criminal, the petition and supporting brief, if any, including the style of the case and the certificate of counsel, shall not exceed ten 8 ½" x 11" double-spaced, typewritten pages and shall comply with the provisions of Rule 4-1(a), except that if the petition and supporting argument are not more than three pages, they need not be bound as set forth in Rule 4-1(a).

(f) Ground(s) stated. The petition must specifically state the ground(s) relied upon.

(g) Entire case not to be reargued. The petition for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain. Counsel are expected to argue the case fully in the original briefs, and the brief on rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the Court.

(h) Previous reference in abstract or Addendum. In no case will a rehearing petition be granted when it is based upon any fact thought to have been overlooked by the Court, unless reference has been clearly made to it in the abstract of the transcript or the Addendum of the record prescribed by Rules 4-2 and 4-3.

(i) No oral argument. Oral argument will not be permitted on a petition for rehearing.

(j) Limited to one petition. A party may submit only one petition for rehearing.

(k) New counsel. Litigants will not be permitted to substitute new counsel for the purpose of filing a petition for rehearing. Additional counsel may, however, participate in a petition for rehearing, or in opposition to the petition, by joining with the original counsel in the petition and brief, or by obtaining permission of the Court by motion.

ii. Petitions for Review

Rule 2-4. Petitions for review.

(a) Contents of petition. A petition to the Supreme Court for review of a decision of the Court of Appeals must be in writing and must be filed within 18 calendar days from the date of the decision, regardless of whether a petition for rehearing is filed with the Court of Appeals. The petition may be typewritten and shall not exceed three 8 1/2" x 11", double-spaced pages in length. The petition must briefly and distinctly state the basis upon which the case should be reviewed and may include citations of authority or references to statutes or constitutional provisions. The petition can only be filed by a party to the appeal and is otherwise subject to Rule 1-2(e).

(b) Briefs and oral argument prohibited. Briefs will not be accepted and oral arguments will not be heard in support of petitions for review. However, the petitioner may attach a copy of the petition for rehearing to the petition for review.

(c) Grounds for review. A petition for review must allege one of the following: (i) the case was decided in the Court of Appeals by a tie vote, (ii) the Court of Appeals rendered a decision which is in conflict with a prior holding of a published opinion of either the Supreme Court or the Court of Appeals, or (iii) the Court of Appeals otherwise erred with respect to one of the grounds listed in Rule 1-2(b).

(d) Response. A response to a petition for review must be filed within 10 calendar days of the date the petition was filed. Responses are subject to the same limitations as petitions. The respondent may attach a copy of the response to the petition for rehearing to the response to the petition for review.

(e) Clerk's notification; request for oral argument. When the Supreme Court grants a petition for review, the Clerk shall promptly notify all counsel and parties appearing pro se. Within two weeks of the notification, fourteen additional copies of the briefs previously submitted to the Court of Appeals shall be filed with the Clerk. Any party may request oral argument by filing, contemporaneously with that party's filing of the additional copies of the briefs, a letter, separate from the brief, stating the request with a copy to all parties. The decision to grant the request for oral argument and other aspects of oral argument are governed by Rule 5-1.

(f) Supplemental and reply briefs. Any party may request permission to submit a supplemental brief by motion, filed with the Clerk and served upon all other parties, within two weeks after the granting of review. The moving party's brief shall be due 20 calendar days from the granting of the motion. Other parties may file responsive supplemental briefs within 10 calendar days of the date the moving party's supplemental brief is filed. A reply brief may be filed within five calendar days after the filing of a responsive supplemental brief. No supplemental brief, responsive supplemental brief, or reply brief submitted pursuant to this Rule shall exceed 10 pages in length. These briefs shall otherwise conform to the requirements of Rule 4-1.

These petitions are rarely granted. One of the most important things that you must remember is that both motions must be filed within 18 days of the decision.

The practice appears to be that the Supreme Court waits until the Court of Appeals has ruled on a petition for rehearing before submitting the petition for review. In recent months there has been about a three-month delay from the filing petitions for rehearing and review and the submission to the Supreme Court. Once the case is submitted, however, a ruling on a Petition for Review seems to come the next week.

This is probably as good a time as any to mention some of the amazing advantages of the fact that the Arkansas Supreme Court's website contains a link to the dockets of the case is pending at the Supreme Court and Court of Appeals. This is an extremely useful tool to see what has been filed or what action has been taken.

We moved offices a couple of years ago. We had several important matters pending at the Arkansas Supreme Court and Court of Appeals. Even though we notified opposing counsel that we had moved we knew that there was some risk that opposing counsel might inadvertently send briefs and pleadings to the wrong address. As it happened, one opposing counsel did fail to note our new address. I checked the docket sheet regularly. When we found out that there had been a filing in our case, I went out to the Supreme Court clerk's office and made a copy of the argument portion so that I could get to work on the case. This is an extremely useful tool.

http://courts.state.ar.us/dockets/docket_search.cfm.

d. Federal

i. Petition for Rehearing/En Banc

Rule 40 of the Federal Rules of Appellate Procedure controls petitions for review in general. It must be filed within 14 days of the decision. You must file five copies and you must do it right the first time because only one petition will be accepted.

Petitions for Rehearing are not favored at the Eighth Circuit. 8TH CIR IOP IV.D. "As a result of their limited purpose, petitions for rehearing by panel are infrequently granted. To be exact, from July 1, 2001, through June 30, 2002, 347 petitions were filed in the Eighth Circuit, and only two were granted." 8th Circuit Appellate Practice Manual § 14.1.1. petitions for review are so rarely granted that the rules do not even permit a response to be filed unless requested by the court. It is rare that a response to any motion or petition is not permitted, but this is one of those rare occasions. "Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request." Fed. R. App. P, Rule 40(a)(3).

Petitions for Review *en banc* are governed by Rule 35. These are also fairly rarely granted. Under the Eighth Circuit's rules, a petition for rehearing en banc will also be deemed a petition for rehearing.

ii. Certiorari to the United States Supreme Court

It is really beyond the scope of the normal appellate advocacy course to consider certiorari to the United States Supreme Court. This is the longest of long shots known to American jurisprudence. But it does happen. Yours may be the case. Or you may just win the lottery.