

MOTION PRACTICE IN MISSOURI'S APPELLATE COURTS¹

Each district of the Court of Appeals and the Supreme Court have discretion on how they handle motions in their districts. That discretion often leads to subtle distinctions in what is permissible and what is not in the respective courts. This handout is more for general information purposes. It is imperative you consult the Special Rules for the district where your appeal is pending and call the Court Clerk or Staff Counsel for additional guidance.

Phone numbers of Interest

The following phone numbers and names may be helpful:

- 1) Eastern District of Missouri: 314-539-4300 (Laura Roy, Circuit Clerk – Doug Bader, staff counsel),
- 2) Western District of Missouri: 816-889-3600 (Terry Lord, staff counsel)
- 3) Southern District: 417-895-6811 (Craig Street, staff counsel) 417-895-6811

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In preparing for this seminar I spoke with both Terry Lord and Craig Street. Most of their advice was similar, but there were a few differences.

General Rules of Interest

You can only fax motions for which only one copy is required.

These motions include motions for extensions of time.

- 1) Mr. Lord emphasized BE TRUTHFUL in your motions and filings with the Court. If you need a continuance, don't exaggerate trial settings in order to get a continuance.
- 2) While briefs are required to be in 13 point font – none of the district courts require motions to be filed in 13 point font, but at least one clerk thought you should err on the side of caution.
- 3) Sign your motions. This has become an issue in the Southern District.
- 4) Don't get personal with the Court. Keep your motion professional. This is a problem noted by the Western District.

5) There are page limits for motions – check with the Clerk of Court for the particular page limits and make sure you comply.

OOPS – MY NOTICE OF APPEAL WAS NOT FILED TIMELY

Rule 81.07 requires good cause for filing the Notice of Appeal late – but you can get only 6 months to correct the defect. Motions to file the Notice of Appeal out of time often lack enough information to meet that “good cause” hurdle. You should consider attaching an affidavit from your client as to why the client didn’t hire you in time or some type of verified information to back up your motion.

PROCEDURAL RULES

Rule 84.01 governs motions for civil appeals and Rule 30.10 governs motions in criminal appeals.

WHO RULES ON MOTIONS?

In both the Western District and the Southern District, the motions are ruled on by the Presiding Judge unless the case has already been assigned to a panel. The assigned panel rules on those motions. In the Western district the motion is placed on a conference agenda and ruled on the 4th Thursday of the motion. Motions for Rehearing / Transfer are ruled on the Tuesday

conference. The Southern District rules on motions any day of the week and also issues opinions any day of the week.

MY LEGAL FILE ISN'T DONE - WHAT DO I DO?

You need to file a motion to file your legal file out of time. Rule 81.20 allows the appellate courts to enlarge or shorten the time for filing a record on appeal. In the Southern District your motion must be VERIFIED and you must state good cause for the Court to grant your motion and if your extension is based on the lack of transcript then you need to include a copy of the written transcript order and an affidavit from the court reporter explaining the delay and the estimated completion date.

I CAN'T FINISH MY BRIEF IN TIME – WHAT DO I DO?

Rule 84.08 permits the filing of a motion for an extension of time. In the Western District, the second motion for continuance requires you to waive the notice of dismissal of appeal by certified mail. The Southern District does not require such a waiver.

However, the Court can't emphasize enough – be **truthful** about why you need a continuance.

I AM STILL WAITING FOR THE TRANSCRIPT ... WHAT DO I DO?

The Western District requires an affidavit that complies with Form 3 in the special rules. The Southern District does not have a sample form, but you are also required to file an affidavit in order to get a continuance for filing your legal file.

MY BRIEF IS TOO LONG – WHAT DO I DO?

The best advice is cut down your brief. The Courts have to read a lot of papers every day and brevity is valued above all else. If you know that your brief is going to be too long, you must file your motion to file your over length briefs ahead of time. You shouldn't file the motion the day the brief is due.

WRIT MOTIONS

In the Western District, local rule XII permits fax filing of motions in writ cases. In the Southern District, fax motions are permitted under Special Rule 12. Note, this is different than answers or suggestions in support. Those can't be fax filed.

HOW MANY COPIES OF MY DOCUMENTS DO I NEED?

For the Western District, Special Rule XII sets forth the necessary copies. For the Southern District, Special Rule 2 sets forth the number of copies.

THE COURT SET ORAL ARGUMENT ON A DATE I AM UNABLE TO BE THERE - WHAT CAN I DO?

In the Western District., they want this motion filed right away. While there is a general hierarchy of priorities, a special setting for a trial with out of town witnesses who have plane tickets may be a good enough excuse. A vacation is also an acceptable reason for continuing oral argument. Again, BE TRUTHFUL. Remember, the Court can check your excuses if it is inclined to do so.

In the Southern District, they are not as lenient with vacations unless you have tickets, etc. If you are taking a vacation and staying home, they are less inclined to grant the continuance. Tell the Court that you have non-refundable tickets for this time. You might also consider attaching an affidavit and a copy of your itinerary, etc.

WE HAVE AN OPINION AND MY CLIENT ISN'T HAPPY

Rule 84.17 governs your filing of a motion for rehearing in the District Court. This motion MUST be filed within 15 days after the opinion is filed and there are NO provisions for filing this motion out of time (regardless of the merits of the reason). The opposing

party can not file suggestions in opposition unless the Court requests such suggestions.

Even though most motions for rehearing are denied, it is a required motion for further appellate review. You need to include the order denying your motion for rehearing in your application for transfer to the Supreme Court. Rule 83.04 sets forth the required contents for your application form. The Court is looking at cases of general interest and importance or cases calling for a re-examination of existing law.

Rule 83.05 provides your page limits and formatting limits. The Supreme Court is very stringent on these formatting and spacing requirements. Attorneys often forget to change their formatting on their block quotes and footnotes. The Supreme Court has rejected filings for single spaced footnotes!

MISCELLANEOUS MOTIONS

Parties can file motion to dismiss an appeal for the lack of a final and appealable order, when the appeal is moot (this is happening quite frequently with orders of protection expiring before the appeal is heard); and motion for sanctions for a frivolous appeal (rarely granted).

MY CLIENT IS NOT HAPPY WITH THE OPINION, WHAT CAN I DO?

You must first file a motion for rehearing and a motion for transfer in the Court of Appeals. In both the Western and Southern Districts these motions can be combined. Rule 83.02 governs filing a motion for transfer from the Court of Appeals. You must file this within 15 days of the order being issued by the Court of Appeals.

After you lose these motions, you can file an application for transfer to the Supreme Court under Rule 83.04. You must pay the docket fee of \$70.00 unless your client is IFP. This application for transfer must also be filed within 15 days (postmark doesn't count). Remember the Supreme Court is very particular about double spacing and 13 point fonts. Your quotations should also be double spaced, as well as headings. If you file on the 15th day and you don't comply with any of the rules, you can not get an extension of time to comply. Therefore, it is advisable to file it well ahead of time to ensure compliance with the rules and a chance to fix a mistake.

The Supreme Court also requires certain information on the cover sheet. Rule 83.04 requires you to state the issue of general interest or importance. The application for transfer cover page

must also express the grounds for transfer without too much detail. This must fit on one page. The Supreme Court also requires you to fill out Form 15.

As far as the remainder of the application, the application shall contain a statement of facts and a discussion of the law. Any exhibits that are attached count against your page limit so don't attach everything. Rule 83.05(d).

You must also file a copy of the application for transfer to the Court of Appeals and a copy of the order denying rehearing or transfer. Rule 83.05(e)(2)-(3). If the Court of Appeals issued an unpublished opinion, then you must also file a copy of the unpublished opinion AND a copy of each party's brief.

If your client is merely upset by a simple mistake of law or fact, a motion to modify the opinion may be filed pursuant to Rule 84.17(a)(2).

I WON (OR LOST) AND THE COURT WROTE A GREAT UNPUBLISHED OPINION. CAN I ASK THE COURT TO PUBLISH?

The answer used to be no. However, the rules now permit a motion to publish the opinion. You must explain why the opinion should have precedential value. Rule 84.17(a)(3).

I CAN GET ATTORNEY'S FEES UNDER MISSOURI LAW ON MY CASE, CAN THE COURT OF APPEALS ORDER ATTORNEY'S FEES?

Yes and No. In domestic cases, you need to file your motion with the Circuit Court BEFORE the mandate is issued. The motion does not need to be heard before the mandate is issued, but it must be filed.

On non-domestic cases where the fees are assessable by the Court of Appeals rather than the trial court the procedure differs amount the districts. In the Western District, local rule XXIX requires your motion to be filed before the case is submitted. The Western District encourages attaching affidavits and billing statements with your motion. The motion will be taken with the case. In the Southern District, Special Rule 14 requires your motion to be filed prior to the submission of the case.

Both courts often remand the case back to the trial court for a determination of reasonable attorney fees, although the Southern District is more likely to rule on the motion than the Western District. Remember, the Courts of Appeals are not designed to take evidence so if an evidentiary hearing is required, the Court will remand the case to the Circuit Court.

Also remember that the Circuit Court loses all jurisdiction to act on a case once the Notice of Appeal is filed. You must file a motion to remand to the Circuit Court for any straggling issue that remains.