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 §§ 12.1, 12.2, *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 Criminal Appeals

When a crime is committed on or after July 1, 1993, the defendant has 14 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. 21-6820(a). Because there is no time limit provided by K.S.A. 21-6820, the State has 30 days to appeal a departure sentence. See *State v. Freeman*, 236 Kan. 274, 277, 689 P.2d 885 (1984).

An exception to the time limits has been recognized when an indigent defendant (1) was not informed of the right to appeal, (2) was 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) (clarifying parameters of *Ortiz* exceptions); and *Albright v. State*, 292 Kan. 193, Syl. ¶ 5, 251 P.3d 52 (2011) (recognizing exception for out-of-time appeal of denial of 60-1507 motion where delay was due to ineffective assistance of counsel).

A notice of appeal must specify the parties taking the appeal, designate the judgment or part of the judgment 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. *State v. Bogguess*, 293 Kan. 743, 756, 268 P.3d 481 (2012); *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).

> **PRACTICE NOTE:** It is advisable to file an appeal generally from all adverse rulings. Also, remember that the time to appeal begins running at the oral pronouncement of sentence, not the date of the journal entry.

A criminal defendant may appeal to the district court any judgment of a municipal court that finds the defendant guilty of a violation of a municipal ordinance or any finding of contempt. K.S.A. 22-3609(a). The notice of appeal to district court is filed with either the municipal court or district court clerk and must be filed within 14 days of the imposition of sentence. K.S.A. 22-3609(b).

A criminal defendant also has the right to appeal a judgment of a district magistrate judge. If the district magistrate judge is not licensed to practice law in Kansas, the notice of appeal must be filed with the clerk of the district court within 14 days after the date the sentence is imposed. K.S.A. 22-3609a(2). A posttrial motion for new trial following 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. *State v. Mburu*, 51 Kan. App. 2d 266, 269-70, 346 P.3d 1086 (2015). 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 who is not licensed to practice law in Kansas, 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 (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 14 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 may file a motion to reconsider.

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. See *City of Wichita v. Brown*, 253 Kan. 626, 627-28, 861 P.2d 789 (1993). If the defendant is found guilty, the appeal time begins to run when sentence is imposed. *State v. Freeman*, 236 Kan. at 276-78. Appeals to a district judge may be taken by the State as a matter of right from these same orders issued by a district magistrate judge who is not licensed to practice law in Kansas. K.S.A. 22-3602(d).

§ 7.3 Civil Appeals - Chapter 60

A notice of appeal must specify the parties taking the appeal, designate the judgment or part of the judgment 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; *Walker v. Regehr*, 41 Kan. App. 2d 352, 354, 202 P.3d 712 (2009).

> **PRACTICE NOTE:** This is one area where too much 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).

With one exception, a notice of appeal must be filed within 30 days from "entry of the judgment." K.S.A. 60-2103(a). The exception is found in K.S.A. 60-1305. An order appointing or

refusing to appoint a receiver must be filed within 14 days of the entry of judgment.

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. *Valdez v. Emmis Communications*, 290 Kan. 472, 482, 229 P.3d 389 (2010). 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(a).

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 (1993).

Both case law and statute allow for certain premature notices of appeal. Case law allows that if a party filed a notice of appeal prior to the entry of a judgment covering all parties and all claims, that notice of appeal becomes effective once final judgment is entered. "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).

There is also a statutory procedure for a premature appeal in this scenario. Under K.S.A. 60-254(b), a court may direct the entry of final judgment as to one or more but fewer than all of the

claims or parties. This can only occur after the court makes an express determination that no just reason exists for delay and an express direction for the entry of judgment. Ideally, the district court will use the statutory language. The language may be used in the initial journal entry or the journal entry can be amended at a later date. See *Ullery v. Othick*, 304 Kan. 405, 414, 372 P.3d 1135 (2016). If judgment is entered under K.S.A. 60-254(b) the decision is final, and the parties will waive the appeal if a notice of appeal is not timely filed. *Dennis v. Southeastern Kansas Gas Co.*, 227 Kan. 872, 877, 610 P.2d 627 (1980). For a more detailed discussion of the entry of judgment under K.S.A. 60-254(b), see § 5.21.

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, including orders disposing of posttrial motions, or a final judgment occurring since the filing of the previous notice of appeal, another notice of appeal must be filed after entry of those orders or final judgment. Rule 2.03(b); *L.P.P. Mortgage, Ltd. v. Hayse*, 32 Kan. App. 2d 579, 587-88, 87 P.3d 976 (2004).

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); *Rowland v. Barb*, 40 Kan. App. 2d 493, 496-98, 193 P.3d 499 (2008). 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. *McDonald v. Hannigan*, 262 Kan. 156, Syl. ¶ 3, 936 P.2d 262 (1997); *Daniels v. Chaffee*, 230 Kan. 32, 38, 630 P.2d 1090 (1981).

In the past, appellate courts sometimes retained an untimely appeal because of the unique circumstances doctrine. See *Johnson v. American Cyanamid Co.*, 243 Kan. 291, Syl. ¶ 1, 758 P.2d 206 (1988), and *Schroeder v. Urban*, 242 Kan. 710, 750 P.2d 405 (1988). The unique circumstances doctrine allowed a jurisdictional time period, such as the time in which to file a notice of appeal, to be extended by judicial action.

However, in 2011 the Kansas Supreme Court overruled *Johnson and Schroeder*, holding that an appellate court has no authority to create equitable exceptions to jurisdictional requirements. *Board of Sedgwick County Comm'rs v. City of Park City*, 293 Kan. 107, Syl. ¶ 3, 260 P.3d 387 (2011). The court held that use of the unique circumstances doctrine is illegitimate to excuse an untimely appeal in the absence of infringement on a party's constitutional rights, such as the right to effective assistance of counsel in a criminal case. *Board of Sedgwick County Comm'rs*, 293 Kan. at 119-120.

Certain posttrial motions extend the time for filing a notice of appeal. If these posttrial motions are filed within 28 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 posttrial motion. K.S.A. 60-2103(a). The following timely posttrial 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 posttrial motions if the entry of judgment is served on other parties via first-class mail. K.S.A. 60-206(d).

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 (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 that power is exercised prior to docketing. *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 11-12, 687 P.2d 603 (1984).

§ 7.4 Civil Appeals - Chapter 61 Limited Actions

The rules governing appeals in Chapter 61 cases depend on whether the case was heard by a district magistrate judge or a district judge and whether the district magistrate judge is licensed to practice law in Kansas. It is also important to know whether the case was initially filed in small claims court.

In limited actions, if the district magistrate judge is not licensed to practice law in Kansas, the notice of appeal from the district magistrate judge's decision must be filed in district court within 14 days of the entry of the order. K.S.A. 61-3902(a), K.S.A. 60-2103a. After a ruling by the district court, a notice of appeal to the Court of Appeals must be filed within 30 days of the entry of the district court's order, ruling, decision, or judgment. See K.S.A. 60-2103a(b). An exception exists if a defendant is appealing an action for forcible detainer granting restitution of the premises; that notice of appeal must be filed within 7 days of the entry of judgment. K.S.A. 61-3902(a).

If the district magistrate judge is licensed to practice law in Kansas, the notice of appeal is filed with the Court of Appeals using the procedure established by K.S.A. 60-2103(a) and (b). See K.S.A. 61-3902(a).

In either case, a timely posttrial motion will extend the time to appeal from a district court's orders. K.S.A. 61-2912(j); *Squires v. City of Salina*, 9 Kan. App. 2d 199, Syl. ¶ 1, 675 P.2d 926 (1984).

> **PRACTICE NOTE:** To find out whether a district magistrate judge is licensed to practice law in Kansas, check the online attorney directory at the Supreme Court's website: www.kscourts.org

Appeal from any judgment under the Small Claims Procedure Act, whether made by a district magistrate judge or the district court, may be taken by filing a notice of appeal with the clerk of the district court within 14 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).

§ 7.5 Juvenile Appeals

Any party or interested party (terms defined in K.S.A. 38-2202[v] and [m] 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. K.S.A. 38-2273(a). If the order was entered by a district magistrate judge who is not licensed to practice law in Kansas, the appeal is to district court and the notice of appeal must be filed with the clerk of the district court within 14 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. 38-2273(b). The notice of appeal from district court must be filed within 30 days. K.S.A. 38-2273(c); K.S.A. 60-2103(a).

> **PRACTICE NOTE:** An order must be appealed at the time when it first ripens for appeal purposes, or the right to appeal that order is waived, even if a subsequent order may be appealed. *In re L.B.*, 42 Kan. App. 2d 837, 838, 217 P.3d 1004 (2009). The appellate courts lack jurisdiction to review the denial of interested party status by a district court. *In re S.C.*, 32 Kan. App. 2d 514, 518, 85 P.3d 224 (2004). There is no statutory right to appeal from the denial of a motion to terminate parental rights. *In re T.S.*, 308 Kan. 306, 312, 419 P.3d 1159 (2018). Appellate courts do not have jurisdiction to consider a district court's order changing placement of a child after termination of parental rights. *In re D.M.M.*, 38 Kan. App. 2d 394, 399-400, 166 P.3d 431 (2007).

Under the Revised Kansas Juvenile Justice Code, 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, or both 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. An appeal may be taken

by the prosecution as provided in K.S.A. 38-2381(a) and (b). These appeals must be taken within 14 days of the order being appealed. Appeals from a district magistrate judge who is not licensed to practice law in Kansas are to the district court, while appeals from the district court or a district magistrate judge who is licensed to practice law in Kansas are to the Court of Appeals. K.S.A. 38-2382.

> **PRACTICE NOTE:** K.S.A. 38-2380(a)(1) precludes an appeal of an order waiving juvenile status when the juvenile has consented to the waiver. *State v. Ellmaker*, 289 Kan. 1132, 1149, 221 P.3d 1105 (2009).

§ 7.6 Probate Appeals

An appeal from a district magistrate judge who is licensed to practice law in Kansas to a district judge must be filed within 30 days from the entry of judgment in any case involving a decedent's estate. K.S.A. 59-2401(a). A similar appeal from a district judge to the appellate courts is governed by Chapter 60, so it must also be filed within 30 days. K.S.A. 59-2401(b); K.S.A. 60-2103(a).

Appeals in other kinds of Chapter 59 proceedings, however, may have a different time limit. For example, an appeal from a district magistrate who is not licensed to practice law in Kansas to a district court must be filed within 14 days of the entry of judgment under the Kansas Adoption and Relinquishment Act (K.S.A. 59-2111 *et seq.*); the Care and Treatment Act for Mentally Ill Persons (K.S.A. 59-2945 *et seq.*); the Care and Treatment Act for Persons With an Alcohol or Substance Abuse Problem (K.S.A. 59-29b45 *et seq.*); and the Act for Obtaining a Guardian or Conservator, or Both (K.S.A. 59-3050 *et seq.*). K.S.A. 59-2401a(a). See also § 5.22, *supra*.

A timely posttrial motion extends the time to appeal from a Chapter 59 judgment. *In re Guardianship of Sokol*, 40 Kan. App. 2d 57, 62-64, 189 P.3d 526 (2008).

The court from which the appeal is taken may require a party, other than the state of Kansas or its subdivisions or any Kansas city or county, 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*.

> **PRACTICE NOTE:** K.S.A. 59-2401(a) lists the kinds of orders that may be appealed from a district magistrate judge to the district court. For a discussion on appellate jurisdiction and the concept of finality, see *In re Estate of Butler*, 301 Kan. 385, 343 P.3d 85 (2015).

§ 7.7 Mortgage Foreclosure Appeals

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

- Order of foreclosure. *Stauth v. Brown*, 241 Kan. 1, 5-6, 734 P.2d 1063 (1987) (order of foreclosure is final for appeal purposes if it "determines the rights of the parties, the amounts to be paid, and the priority of claims"); *L.P.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.P.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).

§ 7.8 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 § 12.3, *infra*. The absence of a notice of cross-appeal is a jurisdictional bar to review. *Lumry v. State*, 305 Kan. 545, 553-54, 385 P.3d 479 (2016).

Raising new issues in a docketing statement answer or brief is not sufficient to preserve them for appellate review. *143rd Street Investors v. Board of Johnson County Comm'rs*, 292 Kan. 690, 704, 259 P.3d 644 (2011). The rules on docketing and motions to docket out of time also apply to docketing a cross-appeal. See Rule 2.04(a)(2) and Rule 2.041.

A notice of cross-appeal must be filed within 21 days after the notice of appeal has been served and filed. K.S.A. 60-2103(h). Where a notice of appeal was filed prematurely, the time for filing the notice of cross-appeal runs from the entry of final judgment, not the filing of the premature notice of appeal. *In re Marriage of Shannon*, 20 Kan. App. 2d 460, 462, 889 P.2d 152 (1995). As with a notice of appeal, a notice of cross-appeal should specify the parties taking the appeal, designate the judgment or part of the judgment 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 paper documents 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, telephone number, fax number, and e-mail address 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). For attorneys licensed to practice law in Kansas, no paper copies of electronic filings are required. Rule 1.05(c). Electronic filings are limited to 10 MB per transmission. Rule 1.05(g).

> **PRACTICE NOTE:** All documents must 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(d). But see *Jones v. Continental Can Co.*, 260 Kan. 547, 920 P.2d 939 (1996) (Workers Compensation Act provides its own time limit for appeals of decisions of the Workers Compensation Board without reference to Chapter 60).

Effective July 1, 2010, all deadlines stated in days are computed the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. If the period ends on a day that the clerk's office is inaccessible, such as for weather or other reasons, then the deadline falls on the next accessible day that is not a Saturday, Sunday or legal holiday. "Legal holiday" includes holidays designated by the president or congress of the United States or the legislature of this state, or observed as holidays by order of the Kansas Supreme Court. K.S.A. 60-206(a)(6).

K.S.A. 60-206(d) was amended effective July 1, 2017. After that date, documents that are served via first-class mail are allowed an additional three days for mailing. This rule also applies to notices of entry of judgment. *Danes v. St. David's Episcopal Church*, 242 Kan. 822, 825-26, 752 P.2d 653 (1986). Documents that are served via e-mail, fax filing, or notice of electronic service do not receive mail days.

Note that the triggering event is *service*, not *filing*. A document that is electronically *filed* but *served* via first-class mail is entitled to receive mail days. Attorneys should closely watch whether an action requires service, paying special attention to things like petitions for review and motions for rehearing or modification. Rules 7.05 and 7.06.

PRACTICE NOTE: The 30-day time limit to file a petition for review is jurisdictional and cannot be extended. Rule 8.03(b)(1).

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 Criminal Appeals

A defendant who has been convicted of a crime may be released by the district court, under 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. 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 under K.S.A. 22-2804(2) or K.S.A. 21-6820(b) (departure sentences). The application must include the following information:

- District court's disposition of the application
- Nature of the offense and the sentence imposed;
- Amount of any appearance bond 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 stating the reason 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 § 12.16, *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.

§ 7.12 Civil Appeals - Chapter 60

The general rule is that a judgment may not be executed and proceedings may not be taken to enforce a judgment until 14 days after the entry of judgment. K.S.A. 60-262(a). To extend the temporary 14-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 14-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 14 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).

A supersedeas bond is generally required to be set at the full amount of the judgment, subject to a reduction if the appellant can prove an undue hardship or a denial of the right to appeal. K.S.A. 60-2103(d). The court must not require a bond or other security when granting a stay on an appeal by the State, its officers or agencies.K.S.A. 60-262(e).

§ 7.13 Civil Appeals - Chapter 61 Limited Actions

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.

§ 7.14 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).

§ 7.15 Probate Appeals

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 under 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 its subdivisions or any Kansas city or county, 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*.

IV. DOCKETING THE APPEAL

§ 7.16 Generally

The appellant must docket the appeal with the clerk of the appellate courts within 60 days after filing the notice of appeal in the district court. The address is:

Clerk of the Appellate Courts

Kansas Judicial Center, Room 108

301 SW Tenth Avenue

Topeka, KS 66612-1507

An appeal is docketed when the following have been filed with the clerk of the appellate courts:

- the docketing statement (Rule 2.041);
- a file-stamped certified copy of the notice of appeal;
- a file-stamped certified copy of the journal entry, judgment form, or other appealable order or decision;
- a copy of any request for transcript or certificate of completion of transcript (or a statement that no transcript is requested);

- a file-stamped certified copy of any posttrial motion and any ruling on the motion;
- a file-stamped certified copy of any certification under K.S.A. 60-254(b); and
- the $145 docket fee and any applicable surcharge. Rule 2.04(a)(1) and (d).

PRACTICE NOTE: When electronically docketing an appeal, the required documents must be uploaded as separate PDFs in the order listed by Rule 2.04(a)(1) or (a)(2) and must be sent in a single submission. Rule 2.04(a)(3).

If the appeal previously was taken to the district court from a decision of a municipal judge, district magistrate judge, or pro tem judge, file-stamped certified copies of that judge's order and the notice of appeal to district court must also be included. Rule 2.04(b). If the appeal is from an administrative tribunal, file-stamped certified copies of the agency decision, any motion for rehearing and the ruling on the motion, and the petition for judicial review must also be included. See Rule 2.04(c).

A cross-appeal must be docketed with the clerk of the appellate courts within 60 days after filing the notice of cross-appeal in the district court. A cross-appellant must file with the clerk of the appellate courts:

- the docketing statement;
- a file-stamped certified copy of the notice of cross-appeal; and
- a copy of any request for transcript or certificate of completion of transcript (or a statement that no transcript is requested). Rule 2.04(a)(2).

Fewer documents are required from a cross-appellant because documents already filed by the appellant are readily available to court staff. All other requirements relating to docketing and motions to docket out of time are the same for both appeals and cross-appeals.

Docketing statements are required in all appeals except appeals under Rule 10.01 (expedited appeal for waiver of parental consent requirement). Docketing statements and answers must be on the applicable Judicial Council forms. Rule 2.041(e). Forms appear at §§ 12.4-12.6, *infra*, and on the Judicial Council website at www.kansasjudicialcouncil.org.

Since 2009, the Supreme Court has imposed a Judicial Branch Surcharge to appellate docket fees The current surcharge is $10. See Supreme Court Order 2019 SC 39. The total cost to docket an appeal is $155.

The docket fee or excuse for nonpayment must accompany the documents. The docket fee is nonrefundable and is the only cost assessed by 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 will 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. See § 12.10, *infra*.
- 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
- Under 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 must include the docket fee. See Rule 2.04(d).

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 sent 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. This notice is sent to the attorney who signed the docketing statement plus any attorney or individual who received service of the docketing statement.

PRACTICE NOTE: The clerk of the appellate courts does not monitor docketing statements to determine whether parties have been properly included as litigants. If an attorney receives notice of docketing, that attorney is officially a party of record with the appellate courts. If that docketing statement has been served in error, it is counsel's responsibility to file a motion to be dismissed from the appeal.

The clerk's office will prepare an appellate case file that is accessible to the attorneys of record. Files are generally also accessible 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 stating good cause for the failure if beyond the 60-day period. See § 12.8, *infra*.

Failure to docket within 60 days may result in the appeal being dismissed by the district court. Failure to docket the appeal in compliance with Rule 2.04 is presumed to be an abandonment of the appeal, and the district court may enter an order dismissing the appeal. The order is 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. See § 12.9, *infra*. The application must comply with Rules 5.01 and 2.04. Rule 5.051.

> **PRACTICE NOTE:** A rush to the district court on the 61st 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 (1993).

§ 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 7 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 must be filed within 14 days after the appeal is docketed. In all appellate proceedings, the anonymity of the minor must 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 14 days after filing.

If the petition is granted, the Supreme Court will review the matter on the record and file its opinion within 14 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 must 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 must 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 §§ 12.18 and 12.19, *infra*.

A motion *pro hac vice* must be filed not later than 15 days before the brief due date or oral argument date. Rule 1.10(d)(1).

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 under 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. The Kansas attorney of record must be actively engaged in the case, sign all pleadings, documents and briefs, and attend any prehearing conference or oral argument that is scheduled. Rule 1.10(a) and (b).

> **PRACTICE NOTE:** Out-of-state counsel will receive notices as a courtesy, but that does not relieve the Kansas attorney of record of obligations under Rule 1.10(b). Attorneys admitted to practice *pro hac vice* are not allowed to use the Kansas electronic filing system.

§ 7.19 Withdrawal

Rule 1.09 governs when and how an attorney who has appeared of record in an appellate proceeding may withdraw. If the withdrawal of the attorney will leave the client without counsel, the attorney may withdraw only after filing a motion with the clerk of the appellate courts under Rule 5.01. The motion must state the reason for withdrawal, unless doing so would violate a standard of professional conduct; demonstrate that the attorney warned the client that the client is personally responsible for complying with court orders and time limits and notified the client of any pending hearing, conference or deadline; and state the client's

current mailing address and telephone number, if known. he motion must be served on the client and all parties, and a justice or judge of the appellate court must issue an order approving the withdrawal. Rule 1.09(b).

If the client will continue to be represented by other counsel of record or by substituted counsel, then the attorney may withdraw without a court order by filing a notice of withdrawal that identifies the other counsel of record or includes an entry of appearance of substituted counsel. The notice must be served on the client and all parties. Rule 1.09(c) and (d).

If an appointed attorney wishes to withdraw, the attorney must file a motion with the clerk of the appellate courts under Rule 5.01. The attorney must state the reason for the withdrawal, if the attorney may ethically do so, and serve the motion on the client and all parties. If a justice or judge of the appellate court approves the withdrawal, the case must then be remanded to the district court for appointment of new appellate counsel unless substitute counsel has already entered an appearance. The district court has 30 days to appoint new counsel. Rule 1.09(e).

> **PRACTICE NOTE:** Motions to withdraw are among the most frequently rejected motions filed in the appellate courts. No matter what type of motion to withdraw or notice of withdrawal is being filed, serve a copy on the client and all parties.

VI. RECORD ON APPEAL

§ 7.20 Record of Proceedings Before the Trial Court

The entire record consists of all the original papers and exhibits filed in district court, the court reporter's notes and transcripts, any other authorized records of the proceedings, and the appearance docket. Rule 3.01(a). The record on appeal, however, only includes that portion of the entire record required by the rules or requested by a party. The appellate court may, of

course, order any or all additional parts of the entire record to be filed. Rule 3.01(b) 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 trial exhibits are not included in the record on appeal unless specifically requested.
>
> An appendix to a brief is not a substitute for the record on appeal, and any appendix that is not part of the record on appeal will not be considered. See *Romkes v. University of Kansas*, 49 Kan. App. 2d 871, 886, 317 P.3d 124 (2014).

§ 7.21 Transcript of Proceedings

If the appellant considers a transcript of any hearing necessary to the appeal, a request must 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 must be for a complete transcript of any such hearing (except for jury voir dire, opening statements and closing arguments, which will 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(d). Rule 3.03(a).

> **PRACTICE NOTE:** The request for transcript must be clearly designated "for appeal purposes." Rule 3.03(a).

Within 14 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(c).

> **PRACTICE NOTE:** Additional transcripts may be requested outside these time frames; however, if a briefing schedule has been set, it will not be stayed automatically during transcript preparation. A party would need to file a motion to stay briefing.

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 § 12.22, *infra*. The request must be filed in the district court and served on the court reporter and all parties. A copy of the request and any agreed upon stipulations must be filed with the appellate court clerk when the appeal is docketed under Rule 2.04, as must any subsequent transcript requests that are made after docketing occurs. Rule 3.03(d).

> **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 14 days of receipt of a request for transcript, a court reporter may demand prepayment of the estimated cost of the transcript. (No advance payment may be required of the state or its agencies or subdivisions.) Failure to make the advance payment within 14 days of service of the demand is grounds for dismissal of the appeal. If, however, no demand is made within the 14-day period, the right to advance payment is waived. Rule 3.03(f). A court reporter may request permission to file a demand for payment out of time.

> **PRACTICE NOTE:** If advance payment is not made within 14 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 court should not deem the transcript request withdrawn.

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) must 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(e).

> **PRACTICE NOTE:** Service of the last certificate of completion starts the running of appellant's time to file a brief. Rule 6.01(b). There is no notice from the appellate clerk's office. The appellant counts time from service of the certificate of completion. To compare the appellate clerk's calculation, go to kscourts.org "Appellate Case Inquiry System."

§ 7.23 Unavailability of Transcripts or Exhibits

If a transcript is unavailable, a party to an appeal may prepare a statement of the evidence or proceedings by the best available means, including personal recollection. The statement must be served on the adverse parties, who have 14 days to serve objections or proposed amendments to the statement.

The statement with objections or amendments must then be submitted to the district court judge for settlement and approval.

The statement as approved must be included in the record on appeal by the district court clerk. Rule 3.04(a).

Rule 3.04(b) sets out a similar process to create a substitute for an unavailable exhibit.

§ 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 must be accompanied by copies of the judgment appealed from, the notice of appeal, and a concise statement of the issues raised.

This statement must be submitted to the district court judge for approval within 21 days after filing of the notice of appeal. If the statement is approved, it is then filed with the clerk of the district court. The approved statement and inclusions constitute the record on appeal. Rule 3.05.

> **PRACTICE NOTE:** To comply with Rule 6.02(a) and Rule 6.03(a), 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 14 days after notice from the appellate clerk that the appeal has been docketed. It is vitally important that attorneys wait for this record to be compiled and not use their own copies of district court documents.

> **PRACTICE NOTE:** Citations to the record on appeal must take the reader to the exact spot in the record that is being cited. If a discrepancy

is noticed between what an attorney sees and what has already been cited in another brief, the attorney should immediately contact the Clerk of the District Court for assistance.

Rule 3.02(c) sets out in detail a list of items that must be included in the record for civil and criminal cases. These documents will automatically be included in the record on appeal by the Clerk of the District Court. 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(a) and 6.03(a). If the table of contents is not furnished or if it is incomplete, contact the district court clerk.

Practitioners can expedite the creation of a complete record on appeal by requesting additions and ordering transcripts as soon as possible. They need not wait for the clerk to prepare the table of contents before requesting additions.

§ 7.26 Request for Additions to the Record on Appeal

The appellate courts do not review every pleading and transcript from the lower court. But any document in the "entire record", as that term is defined by Rule 3.01(a), 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, **specifying with particularity** what is to be added. Rule 3.02(d).

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 all claims made on appeal. See *Hill v. Farm Bur. Mut. Ins. Co.*, 263 Kan. 703, Syl. ¶ 3, 952 P.2d 1286 (1998). 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 should be promptly requested and 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 must serve the request on the clerk of the district court and, if the requested addition is an exhibit that is in a court reporter's custody, on the reporter, who must promptly deliver the exhibit to the clerk of the district court. Service should also be made on opposing counsel and the clerk of the appellate courts. The clerk of the district court must add the requested documents to the record on appeal. No court order is required. Rule 3.02(d)(3).
- 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 must file a motion with the proper appellate court. See § 12.25, *infra*. Additions to the record on appeal may be made only upon an order of the clerk of the appellate courts or a justice or judge of an appellate court. If the requested addition is an exhibit that is in a court reporter's custody, the order granting the motion must be served on the reporter, who must promptly deliver the exhibit to the clerk of the district court. Rule 3.02(d)(4).
- 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)(2).

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

If the record on appeal is in paper form, an attorney is responsible for returning the record on appeal to the clerk of the district court once that attorney's brief is filed. Rule 3.06(a). Once the last brief is filed, or 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 7 days from notification in which to transmit the record to the appellate clerk. Rule 3.07(a). A district court may transmit to the clerk of the appellate courts exhibits that are documents, photographs, or electronically stored information. A party wishing to include any other exhibit must prepare a photograph, not to exceed 8 ½ inches by 11 ½ inches, that fairly and accurately depicts the exhibit. This photograph must be served on opposing parties. Any objection must be made no later than 14 days after service of the photograph. The photograph and any objection must be submitted to the district court for approval. After approval, the clerk of the district court must include the photograph in the record on appeal. Rule 3.07(b). Any documents, photographs, or electronically stored information that is of unusual bulk or weight may only be sent after counsel has made advance arrangements with the clerk of the district court.

> **PRACTICE NOTE:** Many appellate records are transmitted electronically to the clerk of the appellate courts. If there is an exhibit that cannot be sent electronically, counsel must ensure that the table of contents reflects the existence of a paper exhibit. Without that notice, the court will have no idea that the exhibit exists.

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 must copy those portions requested and then transmit the originals. Rule 3.08.

§ 7.28 Pro Se Litigants

A pro se litigant may review the record on appeal at the district court clerk's office during the time that has been allotted for briefing. If the pro se litigant is unable to travel to the district court clerk's office, the litigant should use the table to contents to establish volume and page numbers for citations. If the record on appeal is electronic, the litigant should contact the clerk of the district court to see if it is possible to access the record on appeal online.

VII. CONSOLIDATION OF APPEALS

§ 7.29 Generally

Under 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 § 12.26, *infra*. An appellate court may order consolidation upon a party's motion under Rule 5.01, or on its own motion after notice to the parties 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.

Rule 2.05(a) recognizes that cases may be consolidated in the district court. If the cases are consolidated in the district court prior to docketing the appeal, then only one docket fee is required in order to docket the appeal.

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(f). See §§ 7.40, 7.43, *infra*.

Rule 2.06(e) also provides an alternative to consolidation. The appellate court may stay all proceedings in an appeal until common issues in a separately pending appeal are determined.

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

VIII. MOTIONS

§ 7.30 Generally

Any application to an appellate court must be made in a written motion and cannot be contained within a brief. Rule 5.01(a). See also *Muzingo v. Vaught*, 18 Kan. App. 2d 823, 829, 859 P.2d 977 (1993). Each motion may contain only one subject and must state with particularity the grounds for the motion and the relief or order sought. Rule 5.01(a). Although the Rules permit a motion to be made orally at a hearing, the practice is discouraged as it does not give the opposing party time to respond. Cf. *In re Sylvester*, 282 Kan. 391, 395, 144 P.3d 697 (2006). Oral arguments are held on motions only when ordered by an appellate court. Rule 5.01(c).

> **PRACTICE NOTE:** Chapter 12 of this handbook contains forms for most of the commonly filed motions. Litigants are encouraged to consult these forms before crafting their motions because the forms demonstrate the proper format for motions and, more importantly, the information an appellate court or the clerk of the appellate courts likely will need to rule on various motions.

A Kansas-licensed attorney in good standing must electronically file with the clerk of the appellate courts any motion submitted to the appellate courts. Rule 1.14(a)(1). A pro se litigant who is not a Kansas-licensed attorney in good standing cannot electronically file a motion. Instead, a pro se litigant must file the original motion and one copy of the motion with the clerk of the appellate courts. Rule 1.14(c).

> **PRACTICE NOTE:** Additional copies of a motion are not required if the motion is filed by fax with the clerk of the appellate courts. The fax-filed motion must not exceed 10 pages in length. Rule 1.08(b), (e). An attorney subject to the mandatory electronic filing requirement under Rule 1.14 cannot utilize fax filing. Rule 1.08(a).

A party must serve a motion on all parties. Rule 1.11(a); K.S.A. 60-205. Any party may respond to a motion. Rule 5.01(b). Responses to motions must be electronically filed by Kansas-licensed attorneys in good standing. Rule 1.14(a)(1). Pro se litigants must file the original response and one copy of any response. Rule 1.14(c). Responses to motions for involuntary dismissal or motions for summary disposition must be filed no later than 14 days after the party is served with the motion; responses to all other motions must be filed no later than 7 days after service of the motion. Rule 5.01(b); Rule 5.05(a); Rule 7.041.

> **PRACTICE NOTE:** The 7 and 14 days for response are calendar days and are counted from the date of service indicated on the certificate of service. K.S.A. 60-206(a). If service is made under K.S.A. 60-205(b)(2)(C) (mail) or K.S.A. 60-205(b)(2)(D) (leaving with the clerk), three mail (calendar) days are added to the response time. K.S.A. 60-206(d). See § 7.9, *supra*. This mail rule applies only if service is made via mail or by leaving it with the clerk if the person has no known address; if service is made electronically or via fax, the three mail days are not added to the response time. If no provision is made for a reply, a party must file a motion with the appropriate appellate court seeking permission to file a reply.

After a party responds or the time to respond has passed, the appellate court or clerk of the appellate courts may rule on the motion. The clerk has authority to rule on unopposed motions: for an extension of time, to correct a brief, to substitute a party, or to withdraw a brief to make corrections. Rule 5.03(a). Additionally, either the clerk or the appellate court can grant a party's motion for extension of time not exceeding 20 days without waiting for the opposing party to respond. Rule 5.02(d).

> **PRACTICE NOTE:** If all opposing parties do not object to a motion and wish to waive response time, the parties should file a joint motion. Even if the movant states in the motion that the opposing parties do not object to the motion, the appellate court or clerk will wait until the response time has run unless the parties file a joint motion.

§ 7.31 Motion for Additional Time

A party required or permitted to perform an action by a deadline, such as filing a brief or responding to a motion, may request additional time. Rule 5.02(a). A motion for extension of time must be filed before the original deadline to act has expired and state: the present due date, the number of extensions previously requested, the amount of additional time needed, and the reason for the request. Rule 5.02(a). See § 12.28, *infra*.

While the clerk may rule on an unopposed motion for additional time, only an appellate court may grant an untimely motion for extension of time. An untimely motion must state reasons constituting excusable neglect for filing the motion after the time to act expired. Rule 5.02(c); K.S.A. 60-206(b)(1)(B).

> **PRACTICE NOTE:** Each appellate court limits the number of motions for extension of time on which the clerk may act. That number has never been higher than three.

Generally, the appellate courts or clerk grant an extension the length of time the rules originally allowed for filing a document. For example, an appellee's brief is due no later than 30 days after service of an appellant's brief. Any extension of this due date, absent exceptional circumstances, will be for 30 days.

§ 7.32 Motions Relating to Corrections in Briefs

If a party discovers its brief contains errors, the party may file a motion to substitute a corrected brief. See § 12.32, *infra*. The motion must be filed before the appeal is set for hearing or placed on summary calendar. If the motion is granted, the

movant must file a corrected brief by the date specified in the order.

§ 7.33 Motion to Substitute Parties

A motion to substitute parties must give the reasons why substitution is proper. See § 12.34, *infra*.

§ 7.34 Motion for Permission to File *Amicus Curiae* Brief

An individual or entity may seek to file a brief as an *amicus curiae* by filing a motion with the clerk of the appellate courts and serving it on all parties. Rule 6.06(a). See § 12.39, *infra*.

> **PRACTICE NOTE:** An application for permission to file an *amicus curiae* brief should describe the individual or entity seeking to file the brief, the interest in the appeal, and the reason input would be helpful. Additionally, because an *amicus curiae* should not delay the appeal's resolution, the request should be filed as early in the appeal process as possible.

If an appellate court grants the motion, the brief must be filed no later than 30 days before oral argument and served on all parties. Rule 6.06(b). Parties are permitted to respond to an *amicus curiae* but must do so no later than 21 days after the brief is filed. Rule 6.06(c). An *amicus curiae* is not entitled to oral argument. Rule 6.06(d).

§ 7.35 Motion to Consolidate Appeals

A party may file a motion to consolidate multiple appeals when one or more common issues are so nearly identical that a decision in one appeal is dispositive of another appeal or when the interests of justice are served. Rule 2.06(a). See §§ 7.29, *supra*, and 12.26, *infra*.

§ 7.36 Motion to Transfer an Appeal to the Supreme Court

A party may file a motion requesting transfer to the Supreme Court of an appeal pending in the Court of Appeals. The motion must be filed no less than 30 days after service of the notice of appeal. The motion must: state the nature of the appeal; demonstrate the appeal is within the Supreme Court's jurisdiction; and identify a ground for transfer. Grounds for transfer include: the Court of Appeals lacks jurisdiction; the appeal has significant public interest; the legal question presented is of major public significance; or expeditious administration of justice requires transfer due to the status of the Court of Appeals and Supreme Court dockets. See Rule 8.02. See also K.S.A. 20-3016(a); § 12.27, *infra*.

IX. VOLUNTARY AND INVOLUNTARY DISMISSALS

§ 7.37 Voluntary Dismissal

Before an opinion is filed in an appeal, the parties may agree to dismiss the appeal by stipulation. If the parties so agree, the appellant must file a notice of the stipulation of dismissal with the clerk of the appellate courts. Or, an appellant can unilaterally dismiss its appeal by filing a notice of voluntary dismissal with the clerk of the appellate courts and serving the notice on all parties. Rule 5.04(a). A dismissal may be either with or without prejudice and should be specified in the filing. See § 12.37, *infra*. If an appeal involves multiple appellants, a dismissal of one party's appeal does not affect any other party's appeal. Rule 5.04(a).

If an appellant unilaterally dismisses the appeal, after motion and reasonable notice, the court may assess against the appellant the appellee's costs and expenses if they could have been assessed had the appeal not been dismissed and the judgment or order affirmed. Rule 5.04(b).

§ 7.38 Involuntary Dismissal

An appellate court may dismiss an appeal due to a substantial failure to comply with the Supreme Court Rules or any other reason requiring dismissal by law. Rule 5.05(a); see *Vorhees v. Baltazar*, 283 Kan. 389, 393, 153 P.3d 1227 (2007). The most common reason for an involuntary dismissal is a party's failure to complete a required step in the appellate process, such as failing to file a brief or a motion for extension of time; failing to file a timely notice of appeal; appealing from a non-appealable order; appealing moot issues; or acquiescing to dismissal. See § 12.38, *infra*. A criminal appeal may be dismissed under the "fugitive disentitlement doctrine" if a defendant has absconded from the jurisdiction of the court. See *State v. Raiburn*, 289 Kan. 319, 331-33, 212 P.3d 1029 (2009).

The court may dismiss an appeal on its own motion no earlier than 14 days after it issues a show cause order to the appellant. Or a party may file a motion for involuntary dismissal with at least 14 days' notice to the appellant. Rule 5.05(a).

If the appeal is dismissed, after motion and reasonable notice, the court may assess against the appellant the appellee's costs and expenses if they could have been assessed had the appeal not been dismissed and the judgment or order had been affirmed. Rule 5.05(c).

X. APPEALS PLACED ON SUMMARY CALENDAR

§ 7.39 Summary Calendar Screening and Procedure

After docketing, each appeal is screened. If the appeal does not present a new question of law and oral argument would be neither helpful nor essential to a decision, the appeal will be placed on summary calendar and the clerk will notify the parties. Rule 7.01(c); Rule 7.02(c). At least 30 days before the date of the docket, the clerk will mail each party a docket containing a list of the summary calendar appeals. Rule 7.01(d); Rule 7.02(e).

If, after receiving a summary calendar notice, a party believes oral argument would be helpful to the court, the party may file a motion for oral argument. The motion must be served on all parties and filed with the clerk no later than 14 days after the clerk mails notice of calendaring. The motion must state the reason oral argument would be helpful to the court. Rule 7.01(c)(4); Rule 7.02(c)(4). If the appellate court grants oral argument, ordinarily 15 minutes is allotted to each side unless there is reason to grant 20, 25, or 30 minutes. Rule 7.01(c)(4); Rule 7.02(c)(4).

XI. APPEALS SCHEDULED FOR ORAL ARGUMENT

§ 7.40 Requesting Additional Oral Argument Time

If an appeal is scheduled for oral argument, the appellant and appellee are traditionally allotted 15 minutes of argument per side. If a party believes additional time is warranted, it may request 20, 25, or 30 minutes by printing "oral argument" on the lower right portion of the front cover of the party's initial brief, followed by the desired amount of time. Rule 7.01(e)(2); Rule 7.02(f)(2). See sample brief in Appendix B. If the parties are granted additional oral argument time, it will be indicated on the docket sheet.

§ 7.41 Suggesting a Hearing Location Before the Court of Appeals

Because panels of the Court of Appeals hold oral arguments throughout the state, a party may file a suggestion requesting that its appeal be heard in a particular location. The suggestion should be filed no later than the deadline for filing the appellee's brief. Rule 7.02(d)(3).

§ 7.42 Notice of Hearing Date

At least 30 days before the hearing date, the clerk of the appellate courts must submit to all parties a docket sheet showing the time and location of the hearing. Rule 7.01(d); Rule 7.02(e). The docket sheet will be e-filed and will indicate the amount of time set for argument.

> **PRACTICE NOTE:** The appellate courts assume attorneys will be available on the date and time an argument is scheduled. If a conflict cannot be resolved, contact 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 date or time than to remove an appeal from the docket. The best practice is to notify the clerk of the appellate courts in advance of known conflicts with scheduled hearing dates in either the Court of Appeals or the Supreme Court and avoid having a case set on a date when the attorney is not available.

§ 7.43 Procedure at Oral Argument

In the Supreme Court, the clerk of the appellate courts or the clerk's designee calls the daily docket in open court at the beginning of each day's session. Failure of a party's counsel to be present at the call of the day's docket constitutes a waiver of oral argument. Rule 7.01(d).

> **PRACTICE NOTE:** Although the docket is not called at the beginning of each day's session before panels of the Court of Appeals, counsel are expected to be present at the start of the docket.

The amount of oral argument time allotted to each side is indicated on the oral argument calendar. Rule 7.01(e)(1); Rule 7.02(f)(1). If there are multiple parties on either side that are not united in interest and are separately represented, the court on motion will allot time for separate arguments. Parties that are united in interest should divide the allotted time by mutual agreement. If the parties cannot agree on the division of time, such questions should be settled by motion prior to the hearing date. Rule 7.01(e)(5); Rule 7.02(f)(5).

> **PRACTICE NOTE:** When the Supreme Court sits in its courtroom in Topeka, the clerk operates a timer that tracks the oral argument time remaining. The timer is located on the podium and is visible to the speaking party. Parties must keep track of their own time when appearing before a panel of the Court of Appeals.

The appellant may reserve for rebuttal a portion of the time granted by making an oral request at the time of the hearing. Rule 7.01(e)(3); Rule 7.02(f)(3).

> **PRACTICE NOTE:** If an appellant wants to reserve rebuttal time, it should be requested at the start of appellant's oral argument, or it may be considered waived. A cross-appellant is not ordinarily permitted to reserve rebuttal time.

A party that does not file a brief will not be permitted oral argument. Rule 7.01(e)(1); Rule 7.02(f)(1). Out-of-state attorneys may be permitted to argue if the court grants a motion for admission *pro hac vice* prior to the argument date. See Rule 1.10.

During the hearing, the court on its own may extend the time for oral argument. Rule 7.01(e)(4); Rule 7.02(f)(4).

XII. APPELLATE COURT DECISIONS AND POST-DECISION PROCEDURE

§ 7.44 Decisions of the Appellate Courts

Decisions of the appellate courts are announced by the filing of the opinions with the clerk of the appellate courts. Decisions can be announced any time they are ready; however, decisions generally are filed each Friday. On the date of filing, the clerk will notify Kansas-licensed attorneys of opinions via the electronic filing system. The clerk will send one copy of the decision to any party that has appeared in the appellate court but has no counsel of record. In appeals from the district court, the clerk will

send a copy of the opinion to the judge of the district court from which the appeal arose. A certified copy of the opinion is mailed to the clerk of the district court when the mandate issues. Rule 7.03(a).

> **PRACTICE NOTE:** Parties are notified of Supreme Court and Court of Appeals opinions at 9:30 a.m. on the day of filing. Parties may also contact the appellate clerk's office to inquire whether an opinion has been filed. Published appellate opinions are released to the public via posting at 10:30 on the day of filing on the Kansas Judicial Branch website http://kscourts.org/Cases-and-Opinions/opinions/.

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

All memorandum opinions (unless otherwise required to be published) are marked "Not Designated for Publication." Unpublished opinions are not favored for citation and may be cited only if the opinion has persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court and would assist the court in disposition of the issue. See Rule 7.04(g)(2)(B). See also *State v. Urban*, 291 Kan. 214, 223, 239 P.3d 837 (2010) (discussing Rule 7.04); *Casco v. Armour Swift-Eckrich*, 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).

PRACTICE NOTE: When citing an unpublished opinion, a party must attach the opinion to any document, pleading, or brief that cites the opinion. Rule 7.04(g)(2)(C). When citing an unpublished opinion from another jurisdiction, a party should include that jurisdiction's rule allowing citation.

§ 7.45 Summary Disposition

By citing Rule 7.041 and the controlling decision, an appellate court may summarily dispose of an appeal that appears to be controlled by a prior appellate decision. The court may do this on its own motion or upon the motion of a party. When the court decides on its own to issue an order summarily disposing of an appeal, the court must give the parties 14 days to show cause why the order should not be filed. Rule 7.041(a). If a party moves for summary disposition under Rule 7.041(b), the motion must be served on all parties, and the nonmoving parties may file a response no later than 14 days after being served. Rule 7.041(b).

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 six conditions under Rule 7.042(b) applies.

§ 7.46 Motion for Rehearing or Modification

A motion for rehearing or modification of a Court of Appeals decision may be served and filed no later than 14 days after the decision is filed. Rule 7.05(a). A motion for rehearing or modification of a Supreme Court case may be served and filed no later than 21 days after the decision is filed. Rule 7.06(a). The motion for rehearing or modification should be concise and clearly identify how the court erred or the points of law or fact that the movant feels the court overlooked or misunderstood. See § 12.41, *infra*. A copy of the appellate court's opinion must be attached to the motion. Rule 7.05(a); Rule 7.06(a).

The timely filing and service of a motion for rehearing or modification in an appellate court stays the issuance of the mandate until the appellate court rules on the motion. Rule 7.05(b); Rule 7.06(b). An order granting rehearing suspends the effect of the original decision until the matter is decided on rehearing. Rule 7.05(c); Rule 7.06(c). See *Martinez v. Milburn Enterprises, Inc.*, 290 Kan. 572, 614-15, 233 P.3d 205 (2010) (Johnson, J., concurring) (discussing effect of Rule 7.06 when rehearing is granted).

> **PRACTICE NOTE:** Filing a motion for rehearing or modification from a decision of the Court of Appeals is not a prerequisite for review of that decision by the Supreme Court and does not extend the time for filing a petition for review. See K.S.A. 20-3018(b); Rule 7.05(b). See also Rule 8.03(b)(2)(A) (noting that if a petition for review is filed, the Court of Appeals retains jurisdiction over the appeal and the Supreme Court will take no action on the petition for review until the Court of Appeals has made a final determination of all motions filed under Rule 7.05).

§ 7.47 Appeal as a Matter of Right from Court of Appeals

Any party may appeal as a matter of right to the Supreme Court from a final Court of Appeals decision when a question involving the federal or state constitution arises for the first time as a result of such decision. K.S.A. 60-2101(b); K.S.A. 22-3602(e); Rule 8.03(g)(1). The party appealing as a matter of right must file a petition for review, in accordance with Rule 8.03, within 30 days of the Court of Appeals decision. The 30-day period is jurisdictional and cannot be extended. Rule 8.03(b)(1).

> **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(g)(2), but the cover title should read Petition for Review as a Matter of Right.

§ 7.48 Petition for Review

Any party aggrieved by a Court of Appeals decision may petition the Supreme Court for review under K.S.A. 20-3018(b) and Rule 8.03. See K.S.A. 60-2101(b) (providing supreme court with jurisdiction to review court of appeals decisions). The granting of review is discretionary, and the vote of three justices is required to grant the petition. Rule 8.03(g)(2).

§ 7.49 Timing of Petition for Review

The petition for review must be filed no later than 30 days after the filing of the Court of Appeals decision. This 30-day period is jurisdictional and cannot be extended. K.S.A. 20-3018(b); Rule 8.03(b)(1); *Kargus v. State*, 284 Kan. 908, 925, 169 P.3d 307 (2007). The 3-day mail rule does not apply to the deadline for filing a petition for review. The petitioner must file the petition with the clerk of the appellate courts and attach a copy of the Court of Appeals decision to the petition. Rule 8.03(b)(1).

> **PRACTICE NOTE:** The filing of a motion for rehearing in the Court of Appeals under Rule 7.05 does not extend the 30-day jurisdictional time period for filing a petition for review.

§ 7.50 Content of Petition for Review

The petition for review, cross-petition, or conditional cross-petition must contain the following items in order: a prayer for review explaining why review is warranted; the date of the Court of Appeals decision; a statement of the issues the petitioner wishes to be decided by the Supreme Court; a short statement of relevant facts; a short argument, including authority, stating the reason review is warranted; and an appendix containing a copy of the Court of Appeals decision. Rule 8.03(b)(6). The appendix also should include copies of other documents from the appellate record that are relevant to the issues presented for review. See Rule 8.03(b)(6)(F).

The statement of the issues in a petition for review, cross-petition, or conditional cross-petition should not merely repeat the issues raised in the Court of Appeals brief; rather, the issues must be tailored to address why review is warranted. Rule 8.03(b)(6)(C). The court will not consider issues not raised before the Court of Appeals or issues not presented or fairly included in the petition for review, cross-petition, or conditional cross-petition. Rule 8.03(b)(6)(C)(i); *Russell v. May*, 306 Kan. 1058, 1066, 400 P.3d 647 (2017).

Rule 8.03(b)(6)(E) provides a nonexhaustive list of reasons the court may grant review. Petitioners should build arguments around these reasons. Failure to include an argument in a petition for review showing how the Court of Appeals erred or why review is warranted may result in the summary denial of a petition for review. Rule 8.03(b)(6)(E).

> **PRACTICE NOTE:** The purpose of the petition, cross-petition, conditional cross-petition, response, and reply is to identify the reason the Supreme Court should exercise its discretion to grant or deny review. Rule 8.03(a)(1). That purpose is not served if the filings merely repeat arguments made to the Court of Appeals.

A helpful checklist and sample petition for review can be found in Appendix B.

§ 7.51 Grant or Denial of Review

The Supreme Court considers several factors in determining whether to grant 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).

§ 7.52 Cross-Petitions and Responses

A cross-petition or conditional cross-petition must be filed no later than 30 days from the date the petition for review is filed. Rule 8.03(c)(1). The 3-day mail rule does not apply to this deadline. Responses to a petition or cross-petition must be filed no later than 30 days after the petition, cross-petition, or conditional cross-petition is filed. The adverse party is not required to respond. Rule 8.03(d).

> **PRACTICE NOTE:** The decision not to file a response to a petition for review is not an admission that the petition should be granted. Rule 8.03(d)(4). The purpose of a cross-petition is to seek review of holdings the Court of Appeals decided adversely to the cross-petitioner. Rule 8.03(c)(3). The purpose of a conditional cross-petition is to seek review of specific claims or issues only if the court grants the petition for review. Rule 8.03(c)(4). Rule 8.03(c)(3) and (4) detail when the cross-petitioner and conditional cross-petitioner must raise issues to preserve them for review. Failure to file a cross-petition or conditional cross-petition challenging a holding or ruling decided adversely by the Court of Appeals results in waiver of that challenge. *State v McBride*, 307 Kan. 60, 62-63, 405 P.3d 1196, 1199 (2017) (State waived review of Court of Appeals' finding of prosecutorial error by failing to file cross-petition); *State v. Gray*, 306 Kan. 1287, 1292-93, 403 P.3d 1220 (2017) (preservation issue decided by Court of Appeals waived by not filing a cross-petition); *State v. Keenan*, 304 Kan. 986, 992-93, 377 P.3d 439 (2016) (preservation issue waived).

§ 7.53 Page Limits

The petition for review, cross-petition, conditional cross-petition, and response must not exceed 15 pages in length (excluding the cover, table of contents, appendix, and certificate of service) and must conform to applicable format provisions of Rule 6.07. See Rule 8.03(b)(3), (c)(2), and (d)(2).

§ 7.54 Procedures Following Granting of Review

If review is granted, the Supreme Court may limit the issues to be considered. Rule 8.03(i). Unless the court orders otherwise, the case will be considered on the basis of the record before the Court of Appeals, the petition for review, and any cross-petition, conditional cross-petition, response, or reply. Within 14 days of the date of the order granting review, the parties must file with the clerk of the appellate courts a copy of the paper briefs, if any, originally filed with the Court of Appeals. Rule 8.03(i)(2).

No later than 30 days after the order granting review, any party may file a supplemental brief. Any opposing party then has 30 days to file a response brief. Supplemental briefs are limited to one-half the page limits set out in Rule 6.07. Rule 8.03(i)(3).

§ 7.55 Oral Argument

The party whose petition for review was granted argues first in the Supreme Court and may reserve time for rebuttal. Rule 8.03(i)(4). When the Supreme Court has granted both parties' petitions for review, the party who argues first and gets rebuttal time will be the same party who argued first before the Court of Appeals.

§ 7.56 Effect on Mandate

The timely filing of a petition for review stays the issuance of the mandate by the Court of Appeals. Rule 8.03(k). During the period for filing a petition for review and while the petition for review is pending, the Court of Appeals opinion has no force or effect and the mandate will not issue until disposition of the appeal

on review. If a petition for review is granted in part, a combined mandate will issue when appellate review is concluded, unless otherwise directed by the Supreme Court. Rule 8.03(k).

> **PRACTICE NOTE:** Care should be taken when citing a Court of Appeals opinion for persuasive authority before the mandate has issued. The citation to any such decision must note that the decision is not final and may be subject to review or rehearing. See Rule 8.03(k)(1).

§ 7.57 Other Dispositions

Even after review is granted, the Supreme Court may dispose of the appeal in a manner other than issuing a decision. See Rule 8.03(j). After a decision is issued in an appeal in which review has been granted, the parties may petition for rehearing in accordance with Rule 7.06.

§ 7.58 Denial of Review

If review is denied, the decision of the Court of Appeals is final as of the date the petition is denied, and the clerk of the appellate courts must issue the mandate under Rule 7.03(b). Rule 8.03(h) and (k). The denial of a petition for review imports no opinion on the merits of the appeal, and the denial is not subject to a motion for reconsideration. Rule 8.03(h).

§ 7.59 Summary Petition for Review

When controlling authority is dispositive of an entire appeal or no substantial question is presented by the appeal, a party may file a summary petition for review under Rule 8.03A in lieu of a petition for review under Rule 8.03. Rule 8.03A(a). A summary petition for review is due no later than 30 days after the date of the decision of the Court of Appeals. Rule 8.03A(b)(1). As with a petition for review filed under Rule 8.03, the 30-day deadline to file a summary petition for review is jurisdictional and cannot be extended. Rule 8.03A(b)(1). The summary petition for review must include citation to the controlling authority that

is dispositive of the issues raised or an explanation of why no substantial question is presented. Rule 8.03A(b)(4)(E).

If controlling case law is dispositive of only one issue in a multiple-issue petition for review, a petitioner may not file a summary petition for review under Rule 8.03A. Rule 8.03(b)(5).

A party opposing a summary petition for review may file a response. Rule 8.03A(c).

§ 7.60 Exhaustion

In all appeals from criminal convictions or post-conviction relief on or after July 1, 2018, a party is not required to petition for Supreme Court review from an adverse Court of Appeals decision to exhaust all available state remedies. Rather, when a claim has been presented to the Court of Appeals and relief has been denied, the party is deemed to have exhausted all available state remedies. Rule 8.03B(a).

Rule 8.03B(b) provides a savings clause for the dismissal or denial of a federal habeas corpus petition based on a finding that Rule 8.03B is ineffective. Rule 8.03B(b).

XIII. COSTS AND ATTORNEY FEES

§ 7.61 Costs

In any appeal in which they are applicable, all fees for service of process, witness fees, reporter's fees, fees and expenses of a master or commissioner appointed by the appellate court, and any other proper fees and expenses will be separately assessed. Rule 7.07(a)(1). When any such fees and expenses are anticipated in an appeal, the appellate court may require the parties to make advance deposits. Rule 7.07(a)(3).

Unless fixed by statute, an appellate court must approve the fees and expenses assessed. Rule 7.07(a)(2). Further, an appellate court may apportion and assess any part of the original docket fee, transcript expense, and any additional fees

and expenses allowed in the appeal against any party as justice may require. Rule 7.07(a)(4).

When a district court's decision is reversed, the mandate will direct that the appellant recover the original docket fee and any expenses for transcripts. Rule 7.07(a)(5).

§ 7.62 Attorney Fees

Appellate courts may award attorney fees for services on appeal in any case in which the district court had authority to award attorney fees. See Rule 7.07(b)(1). See also *In re Estate of Strader*, 301 Kan. 50, 61, 339 P.3d 769 (2014) (attorney fees cannot be awarded absent statutory authority or agreement); *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 167-68, 298 P.3d 1120 (2013) (holding that, if a prevailing party on appeal would be entitled to appellate attorney fees under a statute or contract, the party must file a motion for appellate attorney fees with the appellate court under Rule 7.07(b) in order to preserve the right to those fees). Any motion for attorney fees on appeal must be made under Rules 5.01 and 7.07(b). 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 under Kansas Rule of Professional Conduct 1.5. Rule 7.07(b)(2). See also § 12.42, *infra*.

> **PRACTICE NOTE:** Many motions for attorney fees do not include the affidavit required under Rule 7.07(b). 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). Failure to include the affidavit required by Rule 7.07(b) could lead to the summary denial of the motion.

A motion for attorney fees must be filed with the clerk of the appellate courts no later than 14 days after oral argument. If

oral argument is waived, the motion must be filed no later than 14 days after either the date of the waiver or the date of the *letter* assigning the appeal to a non- argument calendar, whichever is later. Rule 7.07(b)(2).

> **PRACTICE NOTE:** If a party intends to petition for review of a Court of Appeals decision by the Supreme Court, the party must file a timely motion under Rule 7.07(b) following oral argument in the Court of Appeals to preserve a right to fees incurred before the Court of Appeals. *In re Estate of Strader*, 301 Kan. 50, 62-63, 339 P.3d 769 (2014); *Thoroughbred Assocs. L.L.C. v. Kansas City Royalty Co.*, 297 Kan. 1193, 1215, 308 P.3d 1238 (2013).

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. A motion for attorney fees due to a frivolous appeal, harassment, or delay must comply with Rule 7.07(b). The mandate will include a statement of any such assessment, or in an original matter, the clerk of the appellate courts may issue an execution of assessment. Rule 7.07(c).

On its own motion, or on the motion of an aggrieved party filed no later than 14 days after an assessment of costs under Rule 7.07, the appellate court may assess against a party or the party's counsel, or both, all or 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 under Rule 3.03 to the preparation of less than a complete transcript of the proceedings in the district court. Rule 7.07(d).

XIV. MANDATE

§ 7.63 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 clerk of the appellate courts issues the mandate to the clerk of the district court for filing, 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.

§ 7.64 Supreme Court

Mandates from the Supreme Court are issued 7 days after the 21-day time period to file a motion for rehearing or modification passes; the entry of an order denying a motion for rehearing or modification; or any other event that finally disposes of an appeal. See Rule 7.03(b)(1)(A). If a motion for rehearing or modification is granted, the mandate is issued in conjunction with the decision on the rehearing.

§ 7.65 Court of Appeals

Mandates from the Court of Appeals are held for 30 days to allow for the filing of a motion for rehearing (14-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(k). If review is denied, the mandate issues on the date of denial. Rule 8.03(k). 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.

§ 7.66 Stays After Decision

In criminal appeals and appeals from post-conviction actions in criminal cases, the issuance of the appellate mandate is automatically stayed when a party files a notice with the appellate court that it intends to file a petition for writ of certiorari to the United States Supreme Court and the time for filing such a petition has not expired. K.S.A. 22-3605(b)(1). The notice must be filed in the appellate court that issued the decision. If the appellate mandate has already been issued when a party files its notice of intent to file a petition for writ of certiorari to the United States Supreme Court, the appellate court must withdraw its mandate and stay issuance. K.S.A. 22-3605(b)(2). In civil cases, a party should file a motion to stay the issuance of the mandate in the court that issued the decision if the party intends to seek review in the United States Supreme Court. When the Supreme Court denies a petition for review of a Court of Appeals decision, the notice of intent or motion for stay should be filed in the Court of Appeals.

Ordinarily, a party must seek a stay from the state court before the United States Supreme Court will entertain an application for a stay. See United States Supreme Court Rule 23(3).