CHAPTER 7
Appellate Procedure

I. NOTICE OF APPEAL

§ 7.1 Generally

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

§ 7.2 Chapter 60 Appeals

A notice of appeal must specify the parties taking the appeal, designate the judgment or part 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; *In re Marriage of Galvin*, 32 Kan. App. 2d 410, 411, 83 P.3d 805 (2004).

> **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).

A notice of appeal must be filed within 30 days from "entry of the judgment." K.S.A. 60-2103(a). Note, however, that a notice of appeal from an order appointing or refusing to appoint a receiver must be filed within 14 days of the entry of the order. K.S.A. 60-1305.

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

A notice of appeal filed after oral pronouncement of final judgment but before the filing of a journal entry is a premature notice of appeal that becomes effective upon the filing of the journal entry. A premature notice of appeal must identify the judgment appealed from with sufficient certainty to inform the parties of the rulings to be reviewed. Rule 2.03(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, *rev. denied* 253 Kan. 858 (1993).

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

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 should 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, the appellate courts have 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 involves judicial action that seemingly extended the time to file a notice of appeal or posttrial motion.

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 absent infringement on a party's constitutional right, 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 mailed, faxed, or e-mailed to the parties. 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, *rev. denied* 245 Kan. 782 (1989). A trial court does, however, retain broad discretion under K.S.A. 60-260(b) and 60-260(b)(6) to relieve a party from final judgment for any reason justifying relief from the operation of the judgment if such power is exercised prior to the time for docketing the appeal. *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 11-12, 687 P.2d 603 (1984).

§ 7.3 Chapter 61 Appeals

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

A notice of appeal in Chapter 61 cases must be filed within 30 days after entry of a district judge's order, ruling, decision or judgment, and the procedure specified in K.S.A. 60-2103(a) and (b) applies. However, if a defendant desires to appeal an action for forcible detainer granting restitution of the premises, a notice of appeal must be filed within 7 days after entry of judgment. K.S.A. 61-3902. Timely posttrial motions extend the time to appeal. *Nolan v. Auto Transporters*, 226 Kan. 176, Syl. ¶ 1, 597 P.2d 614 (1979); *Squires v. City of Salina*, 9 Kan. App. 2d 199, Syl. ¶ 1, 675 P.2d 926 (1984).

All appeals from orders, rulings, decisions, or judgments of district magistrate judges in limited actions must be filed in district court within 14 days after entry of the order. K.S.A. 60-2103a(a). Posttrial motions do not extend the time to appeal from a district magistrate's orders. See K.S.A. 60-2103a(b). Compare K.S.A. 60-2103(a).

Appeal from any judgment under the Small Claims Procedure Act may be taken by filing a notice of appeal with the clerk of the district court

within 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).

§ 7.4 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, 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. K.S.A. 38-2273(b). Notice of appeal from district court must be filed within 30 days. K.S.A. 38-2273(c); K.S.A. 60-2103(a).

> **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), *rev. denied* 289 Kan. 1278 (2010). 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). Orders denying termination of parental rights are appealable. *In re T.D.W.*, 18 Kan. App. 2d 286, 289, 850 P.2d 947 (1993). 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 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.

> **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).

§ 7.5 Probate Appeals

Notice of appeal must be filed within 30 days from the entry of the judgment in any case involving a decedent's estate or other proceeding under K.S.A. Chapter 59. K.S.A. 59-2401(b); K.S.A. 59-2401a(b); K.S.A. 60-2103(a). A timely posttrial motion extends the time to appeal. *In re Estate of Burns*, 227 Kan. 573, 575, 608 P.2d 942 (1980).

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

§ 7.6 Mortgage Foreclosure Appeals

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

- 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).

§ 7.7 Criminal Appeals

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. *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, Syl. ¶ 1, 869 P.2d 598 (1994); *Anderson v. Scheffler*, 242 Kan. 857, Syl. ¶ 3, 752 P.2d 667 (1988). However, when "there is but one court to which an appeal may be taken, the failure to correctly name that court in the notice of appeal is a mere irregularity to be disregarded unless the appellee has been misled or otherwise prejudiced." *City of Ottawa v. McMechan*, 17 Kan. App. 2d 31, Syl. ¶ 2, 829 P.2d 927 (1992).

When a crime is committed on or after July 1, 1993, the defendant has 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).

An exception to the time limits has been recognized when an indigent defendant (1) was not informed of his or her rights 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 criminal defendant has the right to appeal to district court any conviction in municipal court for violations of municipal ordinances. Notice of appeal must be filed with the clerk of the district court within 14 days after the date the sentence is imposed. K.S.A. 22-3609(2).

A criminal defendant also has the right to appeal a judgment of a district magistrate judge. Notice of appeal must be filed with the clerk of the district court within 14 days after the date the sentence is imposed. K.S.A. 22-3609a. 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. The State may take an interlocutory appeal to the Court of Appeals from an order "quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission." K.S.A. 22-3601(a) and K.S.A. 22-3603. In a case before a district magistrate judge, the State may appeal any of the above orders to a district judge. K.S.A. 22-3602(d).

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

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

In an interlocutory appeal by the State, the notice of appeal must be filed within 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 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 cases before a district magistrate judge from these same orders. K.S.A. 22-3602(d).

§ 7.8 Cross-Appeals

If an appellee desires to have an appellate court review adverse rulings and decisions made by the lower court, the appellee must file a notice of cross-appeal to preserve that right. K.S.A. 60-2103(h). See § 12.7, *infra*. See, *e.g.*, *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 290-91, 718 P.2d 1318 (1986) (Supreme Court lacked jurisdiction to remand case for retrial of issues between plaintiff and defendant physician where Supreme Court held drug manufacturer, which jury had found to be 100% negligent, to be free of negligence as a matter of law and plaintiff filed no cross-appeal of jury's finding that defendant physician was 0% at fault); and *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 307 P.3d 1255 (2013) (failure to cross-petition for review precluded Supreme Court's consideration of First Amendment claim).

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 papers in the Kansas appellate courts. All petitions, briefs, motions, applications, and other papers brought to the court's attention must be typed on standard size (8 1/2" by 11") sheets with at least a one-inch margin on all sides. Rule 1.05(a). All such papers must include the name, address, 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).

> **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). K.S.A. 60-206 was amended in 2010 as part of a general restyling of the Kansas Code of Civil Procedure. Before the amendments, a time period of more than 10 days was computed differently than a time period of 10 days or less. Intervening Saturdays, Sundays and legal holidays were included for longer time periods but excluded for shorter time periods.

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).

To avoid shortening statutory deadlines, the legislature extended most 10-day time periods to 14 days. The legislature also extended many time periods of three or five days to seven days. The Kansas Supreme Court similarly amended the time periods contained in the Kansas Supreme Court Rules effective July 1, 2010.

Most judgments and orders now are served by first class mail, although they can also be served by fax or by electronic means if authorized by court rule. K.S.A. 60-205(b). Rule 1.05(c) allows the parties to make a written agreement to effect service by electronic means. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper by mail, fax or e-mail, 3 mailing days are added to the period of time. K.S.A. 60-206(d). This rule also applies to judgments. *Danes v. St. David's Episcopal Church*, 242 Kan. 822, 825-27, 752 P.2d 653 (1988). These mailing days are calendar days.

Note that the 3-day mailing rule applies only when the measuring event is *service*. For example, the mail rule does not apply to petitions for review because Rule 8.03(a)(1) requires the petition to be served and filed within 30 days after the *date of the decision* of the Court of Appeals, not within 30 days after the date of service of the decision. Therefore, even if the opinion is mailed, the 30 days will be counted from the date of decision. Motions for rehearing or modification in the Supreme Court and Court of Appeals likewise count time from the date the decision is filed. Rules 7.05 and 7.06.

> **PRACTICE NOTE:** The 30-day time limit to file a petition for review is jurisdictional. Rule 8.03(a)(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 Chapter 60 Appeals

The general rule is that a judgment may not be executed and proceedings may not be taken to enforce a judgment until 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 or, for judgments exceeding $1 million, at $1 million plus 25% of any amount in excess of $1 million. However, the court may set bond in a lower amount if required by other law or for good cause shown. 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).

§ 7.12 Chapter 61 Appeals

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

§ 7.13 Juvenile Appeals

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

§ 7.14 Probate Appeals

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*.

§ 7.15 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. K.S.A. 22-2804(2). If the district court denies the application or the court does not grant the relief sought, the defendant may file an application for release after conviction with the appellate court having jurisdiction over the appeal. K.S.A. 22-2804(2).

Rule 5.06 governs applications for release after conviction filed with the appellate courts 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 § 12.9, *infra*.

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

IV. DOCKETING THE APPEAL

§ 7.16 Generally

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

Clerk of the Appellate Courts

Kansas Judicial Center, Room 374

301 SW Tenth Avenue

Topeka, KS 66612-1507

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

- an original and one copy of the docketing statement (Rule 2.041);
- a file-stamped certified copy of the notice of appeal;
- a file-stamped certified copy of the 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 $125 docket fee and any applicable surcharge. Rule 2.04(a)(1) and (d).

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

- an original and one copy of 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 §§ 12.10-12.13, *infra*, and on the Judicial Council website at www.kansasjudicialcouncil.com.

Since 2009, the Supreme Court has imposed a Judicial Branch Surcharge of $10 to appellate docket fees, bringing the total docket fee to $135. See Supreme Court Order 2013 SC 60.

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

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

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

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

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

Failure to docket within 21 days may result in the appeal being dismissed by the district court. Failure to docket the appeal in compliance with Rule 2.04 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. The application must comply with Rules 5.01 and 2.04. Rule 5.051.

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

§ 7.17 Parental Notice Waiver Requirements — Rule 10.01

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

The appeal process is expedited, and counsel for the minor must file the appellant's brief within 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 §§ 12.15 and 12.16, *infra*.

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

§ 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. The 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.

§ 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 § 12.19, *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. 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).

> **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 either why the appeal should not be dismissed for failure to make payment or 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. Rule 3.02 sets out in detail a list of items that must be included in the record for civil and criminal cases. Documents are filed chronologically when possible, and transcripts are added when filed by the court reporter, always as separate volumes. The clerk of the district

court also prepares a table of contents showing the volume and page number of each document contained in the record on appeal. A copy of the table of contents is included in the record and also furnished to each party. If additions are made to the record after the initial compilation, an amended table of contents is furnished.

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

§ 7.26 Request for Additions to the Record on Appeal

Any document in the entire record, even if not specifically listed for inclusion under Rule 3.02, may be included in the record on appeal by written request of a party, stating with particularity what is to be added. Rule 3.02(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 his or her claims 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 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)(2).

- 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 § 12.20, *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)(3).
- 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

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. Documents of unusual bulk and physical exhibits other than documents will not be transmitted unless requested by a party, who is then responsible for the transportation and cost of transportation of such items. Rule 3.07.

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

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

VII. CONSOLIDATION OF APPEALS

§ 7.28 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 § 12.21, *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 § 7.39, *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

§ 7.29 Generally

Any application to an appellate court should be made in writing 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, 144 P.3d 697 (2006). Oral arguments are held on motions only when ordered by an appellate court. Rule 5.01(e).

> **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 documents as the forms demonstrate the proper format for motions and, more importantly, the information an appellate court or the clerk likely will need to rule on various motions.

The original motion must be filed with the clerk of the appellate courts and must be accompanied by the correct number of copies. If the motion is filed in the Supreme Court, eight copies should be included with the original; only three copies and the original are required if the motion is filed in the Court of Appeals. Rule 5.01(b).

> **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.
>
> The clerk of the supreme court is also the clerk of the court of appeals and should be referred to as "the clerk of the appellate courts." Rule 1.01(e).

Any party may respond to a motion. Responses to motions should be filed with the same number of copies as the original motion and must be timely filed. Rule 5.01(c). Responses to motions for involuntary dismissal or motions for summary disposition must be filed within 14 days after the party is served with the motion; responses to all other motions must be made within 7 days after service. Rule 5.01(c); 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. If the motion is mailed to the other party, 3 mailing (calendar) days are added to the end of the business days. K.S.A. 60-206(d). See § 7.9, *supra*. If no provision is made for a reply, the court will accept a further filing, but the party must act quickly before the court rules on the motion.

After a party's time to respond has passed or a response has been filed, the appellate court or clerk may rule on the motion and the clerk issues the court's order. 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 5.01(d).

§ 7.30 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). Each such motion must be filed before the original deadline to act has expired and state: the present date, the number of extensions previously requested, the amount of additional time needed, and the reason for the request. Rule 5.02(a). See § 12.23, *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. The motion must state the reasons for the delay, and the court can grant the motion if the reasons constitute excusable neglect. Rule 5.02(c); K.S.A. 60-206(b)(1)(B).

> **PRACTICE NOTE:** At times, each appellate court will limit the number of motions for extension of time on which the clerk may act. That number has never been higher than three.

Generally, when a party is granted additional time to file a brief, the length of the extension is the length of time the rules originally allowed a party to file a brief. For example, an appellee is allowed 30 days after service of an appellant's brief to file a brief. Any extension, absent exceptional circumstances, is for 30 days. Similarly, an appellant is allowed 15 days to file a reply brief so any extension is 15 days. If the court grants an extension and the time granted is more or less than a party requested, the party probably miscalculated the due date.

§ 7.31 Motions Relating to Corrections in Briefs

If a party discovers its brief contains typographical errors, printing errors, or similar non-substantive errors, the party may file a motion to correct its brief. Such a motion must be made before the appeal is set for hearing or placed on summary calendar. If the motion is granted, the movant must make the corrections by the date specified in the order.

If the errors are easily corrected, the party may request to correct the errors in the clerk's office without withdrawing the brief. See § 12.26, *infra*.

If, however, the error is difficult to correct, such as improperly collated pages, the party may request to withdraw its brief and submit corrected copies. See § 12.27, *infra*.

§ 7.32 Motion to Substitute Parties

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

§ 7.33 Motion for Permission to File *Amicus* 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 §§ 7.33, *supra*, and 12.31, *infra*.

> **PRACTICE NOTE:** An application for permission to file an *amicus curiae* brief should describe the individual or entity seeking to file the brief, their interest in the appeal, and the reason their input would be helpful. Such applications are not granted as a routine matter. 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 at least 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 within 21 days after the brief is filed. Rule 6.06(c). An *amicus curiae* is not entitled to oral argument. Rule 6.06(d).

§ 7.34 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 §§ 7.28, *supra*, and 12.21, *infra*.

§ 7.35 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. Such a motion must be filed with the clerk not less than 30 days after the service of the notice of appeal and must be accompanied by 8 copies. The motion should state the nature of the appeal; should demonstrate the appeal is within the Supreme Court's jurisdiction; and should 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); § 12.22, *infra*.

IX. VOLUNTARY AND INVOLUNTARY DISMISSALS

§ 7.36 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 should 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 § 12.29, *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 the appellee's costs and expenses against the appellant to the extent the costs and expenses could have been assessed if the appeal had not been dismissed and the judgment or order had been affirmed. Rule 5.04(b).

§ 7.37 Involuntary Dismissal

An appellate court has discretion to dismiss an appeal due to a substantial failure to comply with the 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 reasons for an involuntary dismissal are a party's failure to complete a required step in the appellate process, such as failure to pay a court reporter's timely demand for advance payment; failure to file a brief or a motion for extension of time; untimely filing of the notice of appeal; attempt to appeal from a non-appealable order; mootness; and acquiescence. See § 12.30, *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, 212 P.3d 1029 (2009).

The court may dismiss an appeal not 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 the appellee's costs and expenses against the appellant to the extent the costs and expenses could have been assessed if the appeal had not been dismissed and the judgment or order had been affirmed. Rule 5.05(c).

X. APPEALS PLACED ON SUMMARY CALENDAR

§ 7.38 Summary Calendar Screening and Procedure

After docketing, each appeal is screened. If it is determined 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)(2); Rule 7.02(c)(2). 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 which must be served on all parties and filed with the clerk not 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

§ 7.39 Requesting Additional Oral Argument Time

Appeals scheduled for oral argument are traditionally allotted 15 minutes 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 § 12.36, *infra*. If the appeal is granted additional oral argument time, it will be indicated on the docket sheet.

§ 7.40 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).

§ 7.41 Notice of Hearing Date

At least 30 days before the hearing date, the clerk of the appellate courts will notify the parties or their counsel of the time and location of the hearing by mailing a copy of the hearing docket. Rule 7.01(d); Rule 7.02(e). The amount of time set aside for argument will be indicated on the docket sheet.

> **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 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.

§ 7.42 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, however, 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 among themselves by mutual agreement. If the parties cannot agree on 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 which tracks the oral argument time remaining. The timer is located on the podium and is visible to the speaking party. However, 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.

Parties who fail to 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

§ 7.43 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 mails one copy of the decision to the attorney of record of each party or to the party if the party has appeared in the appellate court but has no counsel of record. In appeals from the district court, the clerk also mails a copy of the opinion to the judge of the district court from which the appeal arose. A certified copy of the opinion is sent to the clerk of the district court when the mandate issues. Rule 7.03(a).

> **PRACTICE NOTE:** Supreme Court and Court of Appeals opinions are mailed to the parties and released to the media at 9:30 a.m. on the day of filing. Parties may also contact the appellate clerk's office and inquire whether an opinion has been filed or check the list of opinions filed 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 can file a motion for publication with the Supreme Court. The motion shall state the grounds for such belief and be accompanied by a copy of the opinion. All parties to the appeal must be served. Rule 7.04(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 which allows citation.

By citing Rule 7.041 and the controlling decision, the 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 the appeal, the clerk notifies the parties of the proposed disposition and the parties then have 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.

§ 7.44 Motion for Rehearing or Modification

A motion for rehearing or modification of a Court of Appeals case 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 the points of law or fact by which the movant feels the court has erred, overlooked, or misunderstood. See § 12.33, *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 a mandate until the appellate court rules on the issues raised by 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 by the Supreme Court. See K.S.A. 20-3018(b); Rule 7.05(b). See also Rule 8.03(a)(2) (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).

§ 7.45 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 constitutions 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(e)(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 opinion. The 30-day period is jurisdictional. Rule 8.03(a).

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

§ 7.46 Petition for Review

Any party aggrieved by a Court of Appeals decision may petition the Supreme Court for review in accordance with 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(e)(2).

§ 7.47 Timing of Petition for Review

The petition for review must be filed within 30 days of the filing of the Court of Appeals opinion. This 30-day period is jurisdictional, and the 3-day mail rule does not apply. K.S.A. 20-3018(b); Rule 8.03(a)(1); *Kargus v. State*, 284 Kan. 908, 925, 169 P.3d 307 (2007). The petitioner must file the original and nine copies of the petition with the clerk of the appellate courts, and attach a copy of the Court of Appeals opinion to the petition. Rule 8.03(a)(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.

§ 7.48 Content of Petition for Review

The petition for review must contain the following items in order: a clear prayer for review; date of the Court of Appeals decision; a clear statement of the issues decided by the Court of Appeals of which review is sought; 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(a)(4). The appendix also must include copies of other documents from the appellate record that are relevant to the issues presented for review. See Rule 8.03(a)(4)(F).

> **PRACTICE NOTE:** The purpose of the petition, 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(e)(3). That purpose is not served if the filings merely repeat arguments made to the Court of Appeals.

§ 7.49 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).

> **PRACTICE NOTE:** The petition and cross-petition must include clear statements of the issues on which review is sought. Generally, the court will not consider issues not presented or fairly included in the petition, cross-petition, or response. See Rules 8.03(a)(4)(C) (content of petition), 8.03(b)(2) (content of cross-petition), and 8.03(c)(3) (content of response); see also Rule 8.03(g)(1) (discussing issues subject to review). See also *State v. Sanchez-Loredo*, 294 Kan. 50, 53-54, 272 P.3d 34 (2012) (discussing petitioner's failure to challenge some adverse rulings made by Court of Appeals); *State v. Roberts*, 293 Kan. 29, 33, 259 P.3d 691 (2011) (noting the State must file cross-petition to preserve issues decided in defendant's favor).

§ 7.50 Cross-Petitions and Responses

A cross-petition must be filed within 14 days from the date the petition for review is filed. Rule 8.03(b). As with the petition, the 3-day mail rule does not apply to this deadline. Responses to a petition or cross-petition must be filed within 14 days of the date the petition or cross-petition is filed. The adverse party is not required to respond. Rule 8.03(c).

> **PRACTICE NOTE:** The failure to file a response to a petition for review is not an admission that the petition should be granted. Rule 8.03(c)(4). The party that prevailed in the Court of Appeals should consider filing a cross-petition for review on issues that were not decided in favor of that party.

§ 7.51 Page Limits and Covers

The petition for review, cross-petition, and responses must not exceed 15 pages in length (excluding the appendix), must have a white cover, and must conform to applicable format provisions of Rule 6.07. See Rule 8.03(a)(3), (b)(2), and (c)(2).

§ 7.52 Procedures Following Granting of Review

If review is granted, the Supreme Court may limit the issues to be considered or may, in civil appeals, consider other issues presented to the Court of Appeals and preserved for review. Rule 8.03(g)(1) and (h)(4). Unless the court orders otherwise, the issues subject to review will be considered on the basis of the record and briefs filed in the Court of Appeals and, within 14 days of the date of the order granting review, the parties must file an additional ten copies of the brief(s) originally filed in the Court of Appeals. Rule 8.03(g)(2).

Within 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 and follow the same color scheme used for original briefs. Supplemental briefs should not repeat material contained in the Court of Appeals briefs. Sixteen copies of a supplemental brief must be filed with the clerk of the appellate courts and two copies served on opposing counsel. See Rules 6.09(a) and 8.03(g)(3).

§ 7.53 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(g)(4).

§ 7.54 Effect on Mandate

Timely filing of a petition for review will stay the issuance of the mandate by the Court of Appeals. Rule 8.03(i). 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(i).

> **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(i).

§ 7.55 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(h). 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.

§ 7.56 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(f) and (i). 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(f).

XIII. COSTS AND ATTORNEY FEES

§ 7.57 Costs

In any appeal in which they are applicable, all fees for service of process, witness fees, reporter's fees, allowance for fees and expenses of a master or commissioner appointed by the appellate court, and any other proper fees and expenses 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, the expenses for transcripts, and any additional fees and expenses allowed in the appeal against any one or more of the parties in such a manner 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).

§ 7.58 Attorney Fees

Appellate courts may award attorney fees for services on appeal in any case in which the trial court had authority to award attorney fees. See Rule 7.07(b)(1). See also *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 Rule 5.01. An affidavit specifying 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 must be attached to the motion. See Kansas Rule of Professional Conduct 1.5 Fees; Rule 7.07(b)(2). See also § 12.34, *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).

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).

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

On its own motion, or on the motion of an aggrieved party filed not later than 14 days after an assessment of the costs under Rule 7.07, the appellate court may assess against a party or the party's counsel, or both, all or any part of the cost of the trial transcript. To do so, the court must

find the transcript was prepared as the result of an unreasonable refusal to stipulate, pursuant to a written request and in accordance with Rule 3.03, to the preparation of less than a complete transcript of the proceedings in the district court. Rule 7.07(d).

XIV. MANDATE

§ 7.59 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.

§ 7.60 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 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.

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

§ 7.62 Stays After Decision

When a party seeks review in the United States Supreme Court, it may be necessary to stay the decision of the state appellate court to preserve the status quo or prevent mootness. A motion to stay the issuance of the mandate should be sought in the court that issued the decision and will be issuing the mandate. When a petition for review of a Court of Appeals decision has been denied by the Kansas Supreme Court, the motion for stay should be addressed to 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). If the stay is granted before the mandate is issued, the clerk of the appellate courts will hold the mandate. If the mandate has already been filed with the district court, the appellate court can enter an order recalling the mandate from the district court in order to rule on the motion for stay.