

THE INSIDER'S GUIDE TO THE NEBRASKA APPELLATE COURTS

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I. TOP TIPS FOR OUT-OF-STATE PRACTITIONERS

The Nebraska Appellate Courts enjoy a rich tradition of high quality. The State's use of the "Missouri Plan" of judicial selection significantly de-politicizes the route to the appellate bench. As the only state with a non-political Unicameral Legislature, Nebraska's legal systems are designed to focus on merits, not preferences. You will be welcome in the appellate courts if strict obedience to these admonitions is practiced: 1) read and follow the rules; 2) be factually and intellectually accurate in your practice; and 3) get to the issue with precision, dissect it, and state the resolution. Each Nebraska appellate court will pay attention to your accuracy, command of the facts, research completeness, and precision.

Spend some time on the brief's jurisdictional statement. Describe, succinctly, the essential facts and statutory basis for jurisdiction in the trial court. Do the same thing with the appellate court's jurisdiction. For example, identify the date of the trial court's final judgment, the date the notice of appeal was actually filed and the docketing fee was paid, and the statutory grounds for invoking the appellate court's jurisdiction. Recite enough facts to confirm the order appealed is final or otherwise reviewable. If this issue is in doubt, lay this doubt out in the jurisdictional statement, then fillet the issue to your taste. Do not use footnotes! The courts can, but the advocates cannot, use footnotes in Nebraska's appellate tribunals.

There is one Appellate Clerk's office. The same office and personnel provide service as Clerk of the Supreme Court and Clerk of the Court of Appeals. The office is well equipped with tape measures, magnifying glasses and handbooks, so make sure your brief contains all required sections or expect to have it bounced back. Appendices count against your page limitation. Do not try to cheat the spacing requirements with what you think is novel. The Clerk's office has already seen your idea twenty times, and the twenty previous briefs were bounced just like yours will be.

You may request that a case bypass the Court of Appeals and be heard at the Supreme Court. A petition to bypass is required, Neb. Ct. R. § 2-102(B), and at least one of the statutory factors justifying bypass must be prominent and present in your case. Neb. Rev. Stat. § 24-1106.

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The Supreme Court may move a case to its docket *sua sponte*. Be calm if this occurs. Do not presume this means the case is getting special attention. It may mean the workload is being balanced with the Court of Appeals. Neb. Ct. R. § 2-102(C).

If you want the Supreme Court to review a decision of the Court of Appeals, you must file “a petition for further review and memorandum brief in support... within 30 days after the release of the opinion of the Court of Appeals or entry of the order sought to be reviewed” and pay a docketing fee. Neb. Rev. Stat. § 33-103.01.

Nebraska’s appellate courts do not have rules permitting the lawyers to file joint transcripts. Collaboration on the bill of exceptions (i.e. the trial record) is accommodated by the Rules. However, the Court expects counsel to make an effort to agree on the contents of the transcript, and the bill of exceptions, to assure they reach the appellate courts coherently and efficiently.

As of early 2010, Nebraska’s appellate courts do not have rules requiring, or permitting, electronic submission of briefs.

II. APPELLATE RESOURCES

A. **Court Websites and Dockets.** The official website of the Nebraska Judicial Branch is <http://supremecourt.ne.gov/>. The website includes links to individual pages for the Nebraska Supreme Court and the Nebraska Court of Appeals. The individual page for each court includes links to previously released court opinions, the court calendar (which includes dates the court is sitting and hearing oral arguments), the court call (which includes a listing of the cases scheduled for oral argument and a brief summary of the cases), and an archive of previous oral arguments held before the court (which includes both audio and video archives). In addition, the Nebraska Judicial Branch official website includes a link to “View Oral Arguments Online,” which allows anyone to view a video/audio feed of the Nebraska Supreme Court or Nebraska Court of Appeals conducting oral arguments during scheduled times.

The official court rules for practice in the Nebraska Supreme Court and the Nebraska Court of Appeals are available on the Nebraska Judicial Branch’s official website. The direct link to the appellate rules is <http://www.supremecourt.ne.gov/rules/index.shtml>. The official rules can also be accessed from links available on the separate pages devoted to the Nebraska Supreme Court and the Nebraska Court of Appeals. Although the rules routinely reference the Nebraska Supreme Court, the same rules generally govern practice in both the Nebraska Supreme Court and the Nebraska Court of Appeals. Neb. Ct. R. § 2-102(A).

The Nebraska Judicial Branch official website includes a link to “Appellate Court Offices.” That link directs users to a page that includes contact information for the Clerk of the Supreme Court and Court of Appeals. The Clerk’s office serves both appellate courts and maintains the case flow and court rules for the appellate courts.

Finally, the Nebraska Judicial Branch official website also includes a link to the “Self Help Center.” The Self Help Center includes online instructions for filing an appeal in the Nebraska appellate courts, as well as contact information for local “self-help desks” which are open limited hours, staffed by local volunteer lawyers, and can provide assistance with forms and brief legal advice.

B. Practice Guides. The Nebraska Bar Association publishes continuing education materials in Nebraska, including an “Appellate Practice Handbook.” The NBA official website is <http://www.nebar.com/>. On that site, under the heading for “CLE” a user can find a link to “Publications,” at which the NBA maintains an “online store,” from which a copy of the Appellate Practice Handbook and/or the Appellate Practice Handbook CD can be ordered. Additional practice guidance and tips can be found at Daniel L. Real, *Appellate Practice In Nebraska: A Thorough, Though Not Exhaustive, Primer In How To Do It And How To Be More Effective*, 39 CREIGHTON L. REV. 29 (2005).

C. Contacting the Clerk’s Office. The appellate clerk’s office manages appeals before both the Nebraska Supreme Court and the Nebraska Court of Appeals. The Clerk’s office is located in the Nebraska State Capitol building in Lincoln, Nebraska. All current contact information, including telephone and facsimile numbers, is available at the Clerk’s office’s official web page : <http://www.supremecourt.ne.gov/appellate-court/clerks-office.shtml>. The staff members of the Clerk’s office in Nebraska are extremely knowledgeable and extremely helpful.

D. Electronic Notices. The Nebraska appellate courts do not issue electronic notices of any kind at the present time. There are currently proposed appellate practice rules governing the use of email addresses for active members of the Nebraska State Bar Association, but the use of electronic notices is not likely in the very near future. The Nebraska State Bar Association does send out electronic notices to active members every week concerning the weekly releases of opinions by the Nebraska Supreme Court and Nebraska Court of Appeals.

E. Legislative History Resources. The primary resource for legislative information in Nebraska is the Nebraska Legislature’s official website: <http://uniweb.legislature.ne.gov>. On the Nebraska Legislature’s official website, one can search current, recent, or past legislative actions dating back to 1999, and access daily Legislative Journals for each regular session since 2003. Helpful information about utilizing the resources available on the Nebraska Legislature’s official

website can be found on the “Frequently Asked Questions” page of the website at http://uniweb.legislature.ne.gov/contact/history_request.php. For help with legislative documents not available on the website, one can contact the Legislative Historian through the contact information available at http://uniweb.legislature.ne.gov/contact/history_request.php. To get assistance from the Legislative Historian, one must have either the legislative bill number or a statutory reference, and there are fees associated with obtaining legislative history materials. Finally, additional materials may be available by contacting the Nebraska State Library through the contact information available at <http://www.supremecourt.ne.gov/state-library/index.shtml>.

III. ADMISSION TO PRACTICE AND REPRESENTATION OF COUNSEL

A. General. Lawyers admitted to practice in Nebraska need not seek special admission to appear in the state’s appellate courts. Neb. Ct. R. § 3-105(E).

B. Admission Pro Hac Vice. A lawyer admitted to the practice of law in the courts of another state, the District of Columbia, or a territory, may be admitted pro hac vice on motion. Neb. Ct. R. § 3-106. The applicant must take the oath required for admission by lawyers regularly practicing before the Nebraska Supreme Court. The oath requirement appears at Neb. Ct. R. § 3-105(E) and the oath is at Neb. Rev. Stat. § 7-104. Even if the lawyer was admitted pro hac vice in the trial court, a separate application for admission pro hac vice before the appellate courts is required. The applicant must associate with “an attorney who is a resident of Nebraska, duly and regularly admitted to practice” in Nebraska.

C. Appearance of Counsel on Appeal. Lawyers who appeared as counsel of record in the trial court are deemed the attorneys of record on appeal. Guardians ad litem who served in the lower court continue in this same capacity in the appellate court. Neb. Ct. R. § 2-101(F).

In criminal cases, the rules provide that withdrawal may occur “only after obtaining permission of” the appellate court. *Id.* In civil cases, withdrawal is governed by the *Rules of Professional Conduct*, which require consideration of Neb. Ct. R. § 3-501.16(b), and compliance with notice requirements. Withdrawing counsel must take steps “to the extent reasonably practicable to protect their client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property... and refunding any advance payment of fee or expense....” Neb. Ct. R. § 3-501.16(d).

IV. THE APPELLATE COURT SYSTEM

A. Structure. Nebraska has a traditional two-tiered appellate court structure. The Nebraska Court of Appeals serves as an intermediary court of appeals and acts primarily as an error-correcting court. The Nebraska Supreme Court is the court of last resort in Nebraska and handles direct appeals from the trial courts, further review of decisions of the Nebraska Court of Appeals, and some original actions. The Nebraska Supreme Court comprises seven members and hears all of its cases en banc. The Nebraska Court of Appeals comprises six members and hears cases by sitting in panels of three judges, the composition of such panels changing from month to month.

B. Jurisdiction. The Nebraska Supreme Court and the Nebraska Court of Appeals have concurrent appellate jurisdiction in almost every type of case, including appeals from civil matters, criminal matters, administrative matters, and special tribunals like the Nebraska Workers' Compensation Court. The Nebraska Supreme Court has exclusive jurisdiction to hear appeals involving capital cases and appeals including a challenge to the constitutionality of a state statute. Neb. Rev. Stat. § 24-1106(1). Single judges of the Nebraska Court of Appeals enjoy exclusive jurisdiction to hear appeals brought by the State in criminal matters challenging the trial court's ruling sustaining motions to suppress evidence. Neb. Rev. Stat. § 29-824(2). As a result of the largely concurrent jurisdiction of the two courts, most appeals are initially docketed by the Clerk's office in the Nebraska Court of Appeals; the Nebraska Supreme Court has the power to move cases between the dockets of the two courts as it sees fit. See Neb. Ct. R. § 2-102(C). In addition, parties may file a "Petition to Bypass" the Nebraska Court of Appeals and request the Nebraska Supreme Court hear the appeal. See Neb. Ct. R. § 2-102(B).

V. COMMENCING THE APPEAL

A. Notice of Appeal. An appeal is docketed by filing a Notice of Appeal with the clerk of the trial court and paying the docketing fee to the trial court clerk. Neb. Rev. Stat. § 25-1912; Neb. Ct. R. § 2-101. The Notice of Appeal is deemed made with the Court of Appeals unless the notice contains language specifically requesting appeal to the Supreme Court along with citation to statutory authority allowing a direct appeal. Neb. Ct. R. § 2-101(B)(1)(a).

A Notice of Appeal must be filed within 30 calendar days after entry by the lower court clerk of the judgment, decree or order appealed. Neb. Rev. Stat. § 25-1912. A trial court may not extend the appeal period. Motions for new trial can do so, but only by keeping proceedings alive in the trial court so that the appeal time runs from the order disposing of the motion for new trial. Motions for new trial must be filed within 10 days after entry of a final judgment, order or decree. Neb. Rev. Stat. § 25-1142.

The Notice of Appeal and docketing fee are jurisdictional. Non-jurisdictional steps are also required when an appeal is docketed. This involves requests for the transcript and bill of exceptions. These are discussed in part VI of this Chapter.

B. Docketing Statement. Nebraska does not use a docketing statement or a preliminary statement of issues on appeal.

C. Bonds and Stays. Nebraska's law governing bonds, and stays during appeal, do not appear in the state's appellate practice rules. These provisions are statutory. The bonds required fall into two categories: Cost bonds for appellate practice costs, and supersedeas bonds designed to stay or halt judgments.

1. Cost Bonds. An appellant is required to file "within 30 days after the entry of the judgment, decree or final order sought to be reversed, vacated or modified or within 30 days after the entry of order overruling a motion for new trial," a cost bond. Neb. Rev. Stat. § 25-1914, requiring the bond, provides that it must be filed:

"In the district court . . . in the sum of seventy-five dollars (\$75) to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him or her in the appellate court, or (2) make a cash deposit with the clerk of at least \$75 for the same purpose."

As a practical matter, lawyers taking appeals in Nebraska pay the filing fee, determined under Neb. Rev. Stat. § 33-103, and the \$75 cost bond, by making a cash deposit for this sum, when the appeal is taken.

If a supersedeas bond is executed, no bond for cost is required. The trial court clerk must certify that bond has been given when the transcript is filed in the appellate court. The appeal "may be dismissed on motion and notice in the appellate court if no bond has been given and certified in the transcript..." *Id.*

2. Supersedeas Bonds. Appeals do not prevent execution on judgments. Neb. Rev. Stat. § 25-1916 provides "no appeal in any case shall operate as a supersedeas unless the appellant or appellants within 30 days after the entry of such judgment . . . execute to the adverse party a bond with one or more sureties, make a deposit of United States government bonds with a clerk, or . . . make a cash deposit with the clerk for the benefit of the adverse party...." The amount to be deposited must be sufficient to cover the judgment, courts costs, and accruing estimated interest that will accrue during appeal. The floor on this sum is 50% of the appellant's net worth and the ceiling is \$50 million. Neb. Rev. Stat. § 25-1916.

The appellate court may issue orders to protect a judgment's collectability "if an appellee proves by a preponderance of the evidence that an appellant is dissipating or diverting assets . . . to avoid payment of a judgment...." *Id.* The trial court must determine the amount of the supersedeas if the appeal is from a trial court judgment awarding injunctive relief. *Id.*

Where the appeal judgment directs that land be conveyed, or impacts title to real estate, the actual deed must be deposited with the clerk. The clerk of the court in which the judgment was rendered must approve the supersedeas bond. Neb. Rev. Stat. §§ 25-1917 & 1918.

VI. RECORD COMPOSITION AND TRANSMITTAL

A. Form of Record. The record presented to the appellate court in Nebraska comprises a “transcript,” which includes relevant pleadings, filings, and orders from the trial court and a “bill of exceptions,” which includes relevant testimony, evidence, and argument recorded and transcribed in the trial court. The transcript always includes the pleadings upon which the case was tried, as designated by the appealing party; the judgment, decree, or final order being reviewed, and the lower court’s memorandum opinion, if any; and any other filings the appealing party deems necessary for proper presentation of the errors assigned on appeal. See Neb. Ct. R. § 2-104(A)(1). The bill of exceptions presented to the appellate court is to contain a verbatim record of each portion of the testimony, argument, and evidence offered at any hearing the appealing party believes material to the issues presented to the appellate court for review. See Neb. Ct. R. § 2-105(B)(1). Appellate consideration of cases is limited to the record presented, and the bill of exceptions is the only vehicle for making evidence presented to the trial court properly before the appellate court. See *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998).

B. Requesting, Selecting, Compiling, and Transmitting the Record. Requests for preparation of the record must be filed with the trial court at the same time as the Notice of Appeal. See Neb. Ct. R. §§2-104 and 2-105. Procedures for preparing and delivering the transcript are located in Neb. Ct. R. § 2-104. Rule 2-104 specifically allows for the filing of a supplemental transcript, so long as the court rule is complied with. See Neb. Ct. R. § 2-104(C). Procedures for preparing and delivering the bill of exceptions are located in Neb. Ct. R. § 2-105. The Nebraska Supreme Court Rules for practice in the appellate courts specifically mandate that court reporters preparing bills of exception prepare and submit electronic copies in addition to paper copies, so long as the court reporter has access to proper technology to do so. See Neb. Ct. R. §§2-105 (b)(i) and (b)(ii). Rule 2-105 specifically allows for the filing of amendments to the bill of exceptions, so long as the court rule is complied with. See Neb. Ct. R. § 2-105(B)(5).

C. The Transcript. As noted above, in Nebraska the relevant excerpts of the trial transcript are part of the appellate record that is requested by counsel, prepared by the court reporter, and transmitted to the appellate court for consideration of the appeal.

The appellant must file with the trial court a praecipe directing the clerk to prepare a transcript. Neb. Ct. R. § 2-104.

The transcript “shall contain”:

1. The pleadings upon which the case was tried, as designated by the appellant;
2. The judgment, decree, or final order sought to be reversed, vacated or modified and the lower court’s memorandum opinion, if any;
3. A copy of the supersedeas bond, if any, given in the district court, or, if none has been given, a recital of the fact that a bond for costs was given and approved by the district court, or a deposit made as required by Neb. Rev. Stat. § 25-1914; and
4. The bond or deposit for costs must be paid as required by Neb. Rev. Stat. § 25-1914. Presently the required bond is \$75.00.

The transcript contains the request (praecipe) for the transcript, which is filed with the trial court and must identify by name each specific document to be included in the transcript. It is wise to include the date of each filing. It is also wise to exclude extraneous material like briefs, or motions not related to an error or issue expected to be raised on appeal.

Any party may request a supplemental transcript if additional items are required because they were omitted from the original transcript. This request must be made in writing. Neb. Ct. R. § 2-104(C). Leave of court is not required.

D. The Bill of Exceptions. The term “bill of exceptions” describes the record of the proceedings in the trial court, including all pertinent evidence and proceedings before the trial judge at relevant hearings on motions, or at trial. The appellant “shall file” a request for a bill of exceptions. This praecipe or request must be filed with the trial court clerk; it is due at the same time the notice of appeal is filed. A copy must be delivered to the official court reporter. This document must specifically identify each hearing, portion of trial, other proceeding, and exhibit the appellant believes is material to issues to be presented on appeal. The appellee must supplement the request for a bill of exceptions within 10 days after the appellant’s praecipe is served if the appellee believes additional materials should be included in the bill of exceptions. This supplemental request must be filed with the trial court clerk and served on the official court reporter.

Counsel must order the bill of exceptions by describing specifically what is requested. The official court reporter prepares and files the bill with the trial court clerk who then transmits it to the appellate court clerk. See Neb. Ct. R. § 1-210 and § 2-105. Work with the reporter to make the bill of exceptions available electronically. As of early 2010, the bill of exceptions can be transmitted electronically. Neb. Ct. R. § 2-105(B)(3)(a)(i).

The bill of exceptions (testimony, exhibits, hearing transcripts, and court orders) “shall contain only matters of evidence or exhibits which are necessary for a determination of the issues on appeal.” Neb. Ct. R. § 2-105(B)(1)(d). The court reporter is entitled to payment for the record in advance. *Id.*

Special rules apply to video depositions and video exhibits, which must be submitted in forms complying with the Supreme Court’s evolving Neb. Ct. R. § 2-106(7).

VII. APPELLATE MEDIATION OR CONFERENCE PROGRAMS

At the present time, Nebraska does not have any appellate mediation or conference programs. Parties can certainly reach settlement on their own and then seek dismissal of the appeal, but there is no program mandating or encouraging such action administered by the appellate courts.

VIII. FILING AND SERVICE REQUIREMENTS

Filing and service requirements are specifically addressed in the discussions herein concerning commencing the appeal (Section V. above); motions (Section IX. below); and briefing (Section XI. below). At the present time the Nebraska appellate courts do not utilize electronic filing methods.

IX. MOTIONS

A. Motions in General. Neb. Ct. R. § 2-106 governs general issues related to motion practice in the Nebraska appellate courts. Motions for summary disposition and motions for rehearing are covered by Neb. Ct. R. §§ 2-107 and 2-113, respectively. The most common motions filed in the Nebraska appellate courts include motions for extension of time (discussed below in sub-section B), motions for summary disposition, and motions for rehearing (discussed below in sub-section F). Rule 2-106 generally allows for motions to be filed seeking any kind of relief, and specifies that motions must be typewritten and in particular typeface and font. Rule 2-106 generally requires the motion to set forth the relief requested and either be agreed to by opposing counsel in the form of a stipulation or be submitted to the court for decision 14 days after it is filed with the Clerk’s office. Responses to motions must be in writing and filed prior to the motion’s submission to the court. An original and one copy of the motion must be filed with the Clerk’s office and a copy must be served upon the opposing party or counsel of record. Finally, no oral argument is permitted on motions except as ordered by the court; if argument is ordered, it is limited to 5 minutes per side. Arguments are rarely ordered on motions in the Nebraska appellate courts. In addition, counsel should be aware that the filing of motions, including those for summary disposition, does not

automatically extend the date upon which briefs on the merits are due; a motion for extension of briefing time is generally required to accompany other motions to accomplish such an extension.

Motions for summary disposition are governed by Neb. Ct. R. § 2-107. In Nebraska, cases may be disposed of summarily either on the motion of the parties or on the motion of the court. On the court's own motion, cases may be summarily affirmed, summarily dismissed, or summarily reversed. The particular guidelines for the court exercising its authority to summarily dispose of cases are set forth in detail in Neb. Ct. R. § 2-107 (1)-(3). Motions for summary disposition may be filed by the parties pursuant to Neb. Ct. R. § 2-107(B), which authorizes motions to summarily dismiss or to summarily affirm; where appropriate, a motion to summarily dismiss may be joined, in the alternative, with a motion to summarily affirm. A motion to summarily dismiss for lack of jurisdiction may be filed at any time after an appeal has been docketed and shall document the claimed lack of jurisdiction with citations to the record and to relevant authority. A motion to summarily affirm on the ground that the questions presented for review are so unsubstantial as not to require argument may be filed after the appellant's brief has been filed or the time for such filing has expired and shall document the claimed lack of substance of the appeal with citations to the record and to relevant authority. Although Neb. Ct. R. § 2-106 specifies that it does not apply to motions for summary disposition, Rule 2-106(H) authorizes a typewritten brief in support of motions, in memorandum form, and memorandum briefs routinely accompany motions for summary dismissal or summary affirmance and are commonly used to detail the required documenting of lack of jurisdiction or substance and authorities supporting the motion. Motions for summary disposition must be typewritten, an original and three copies of the motion and/or supporting briefs and proof of service must be filed with the Clerk's office, and a copy must be served upon all other parties or attorneys of record. Written objections may be filed within 10 days from the date of service of the motion.

In addition to the commonly filed motions for summary disposition, Neb. Ct. R. § 2-107 includes provisions governing stipulations for summary reversal and suggestions of mootness. Although neither is common, specific details governing them are detailed in Neb. Ct. R. § 2-107(C) and (D). Additionally, Neb. Ct. R. § 2-108 provides the appropriate guidance for an appellant to dismiss his or her own appeal, and allows for responses to be filed by appellees.

B. Motion for Extension of Time. Motions for extension of briefing dates are filed with the appellate court pursuant to Neb. Ct. R. § 2-106. Motions for extension of briefing dates are governed by Neb. Ct. R. § 2-106(F), which provides that no extension is allowed in advanced cases (a list of which is set forth in Neb. Ct. R. § 2-111(B)(2)) except upon a showing of "exceptional cause." For non-advanced cases, one request for extension is routinely allowed without providing good cause, but any request for extension beyond the first 30-day extension must be supported by a showing of good cause, and neither the stipulation of the parties nor the press of other business constitutes good cause. Neb. Ct. R. § 2-106(F)(2).

C. Motion for Extension of Length. Neb. Ct. R. § 2-109(B)(5) governs the page restrictions for briefs filed in the Nebraska appellate courts. That rule specifies that the briefs of the parties may not exceed 50 pages. There is no specific rule governing motions for extension of length, so the general rule allowing motions for relief would govern such a request. As a practical matter, only the most complex of cases (such as capital cases) are likely to garner a favorable response to a motion seeking to extend the briefing page limit beyond 50 pages.

D. Motions for Reconsideration. A detailed discussion of motions for rehearing is below in section XVIII.

E. Motions to Stay. Parties desiring to prosecute proceedings to the United States Supreme Court and desiring an order staying the Nebraska appellate court’s mandate may file a motion for such a stay pursuant to Neb. Ct. R. § 2-114, as discussed more fully below in section XXI.B.

X. BRIEFING SCHEDULE

The briefing schedule is dictated by the due date of the bill of exceptions, which must be filed by the court reporter. Neb. Ct. R. § 2-105 governs the deadlines. The court reporter is to file the bill of exceptions with the clerk of the district court “as soon as possible.” Section 2-105(b)(3) requires that:

“The bill of exceptions must be filed within the following time limits unless an extension of time is approved by the Supreme Court...:

Civil cases or criminal trials – 7 weeks

Guilty or nolo contendere pleas – 3 weeks.”

Briefs “must be filed within the times stated” in the rules. Neb. Ct. R. § 2-109(A). The rules specifically provide that “NO EXTENSIONS OF TIME WILL BE ALLOWED IN ADVANCED CASES EXCEPT UPON A SHOWING OF EXCEPTIONAL CAUSE.”

A. Appellant’s Brief. The appellant’s brief is due:

In a case where there is no request for a bill of exceptions – two months from the date the appeal is filed. If a bill of exceptions is requested one month after the date the bill of exceptions is due to be filed.

B. Appellee’s Brief. The appellee’s brief “must be served and filed within one month after appellant has served and filed briefs. If service of appellant’s brief is by mail, three days are added to allow for delivery time.” *Id.*

C. Reply Brief. The appellant’s optional reply brief must be served and filed “within 14 days after appellee has served and filed briefs.” Three days are added for service by mail.

D. Amicus Curiae Briefs. Briefs of amicus curiae may not be filed without leave of court, and generally leave must be considered within 20 days of oral argument.

XI. BRIEF FORMAT AND CITATIONS

A. Timing and physical requirements. Briefing requirements are governed by Neb. Ct. R. § 2-109. Appellant's brief must be served and filed within 1 month after the date the bill of exceptions is due to be filed or within 2 months from the date the appeal is filed in the appellate court if no bill of exceptions is requested. Appellee's brief must be served and filed within 1 month after Appellant's brief has been served and filed. Reply briefs must be served and filed within 14 days after Appellee's brief has been served and filed. If briefs are served by mail, 3 days are added to the time limit for responsive briefs. Briefs of amicus curiae may not be filed without leave of court, and such leave is not considered within 20 days of oral argument. Neb. Ct. R. §§ 2-109(6)–(7) provides the current requirements concerning the number of copies of the brief that must be served on the opposing parties and with the Clerk's office.

Neb. Ct. R. § 2-109(B) sets forth detailed physical requirements for briefs and governs everything from the size and type of paper to the font and line spacing required. A few specific items that merit noting include that the use of footnotes is not permitted in briefs submitted to the Nebraska appellate courts, that printing shall be only on one side of each sheet of paper, and that specific colors are mandated for the cover page depending on whether the brief is submitted on behalf of Appellant (gray), Appellee (tan), or amicus (white). The Clerk's office reviews briefs for compliance with the briefing rules set forth in Neb. Ct. R. § 2-109(B) and will return briefs for correction if they do not comply with the rules.

B. Citation Form Rules and Conventions. Neb. Ct. R. § 2-109(C) includes specific guidance concerning proper citation form in briefs submitted to the Nebraska appellate courts. Specific formats are required and set forth for references to the transcript and to the bill of exceptions, to allow the appellate court and court staff to readily locate relevant portions of the court record. Citations to authorities need not strictly follow the Uniform System of Citation (bluebook) or other conventional style manuals, but Neb. Ct. R. §§ 2-109(C)(4)-(6) provide direction concerning what specific information must be included in citations to reported cases, statutes, textbooks, encyclopedias, or other works. Citations to reported decisions from the Nebraska appellate courts should include the official reporter citation, but may also include parallel citations to the regional West reporter. It should go without saying that the most important thing to keep in mind when citing authorities to the court is to provide a citation that makes the court's job in locating the relevant authority and the relevant portion of that authority as easy as possible.

C. Citable Authorities. There are very few limitations on what authorities may be cited to the Nebraska appellate courts. Reported cases, statutes, and secondary authorities may all be cited. The Nebraska Court of Appeals does not designate every decision it issues for publication (or reporting), however, and Neb. Ct. R. § 2-102(E) (4) specifically prohibits citation to unpublished opinions and memorandum opinions issued by the Nebraska Court of Appeals unless the case is related, by identity between the parties or the causes of action, to the case then before the court.

XII. BRIEF CONTENTS

The required content for briefs filed in the Nebraska appellate courts is set forth in Neb. Ct. R. § 2-109(D).

A. Appellant's Brief. The appellant's brief, or the plaintiff's in an original action, must contain these sections under appropriate headings, in this order:

1. Title Page. The title page serves as the brief's cover and should be gray in color. The title page should include the appellate docket number, the names of the parties, the court being appealed from, and the preparing counsel's contact information and bar number.

2. Tables. A table of contents with page references, and an alphabetically arranged table of cases, statutes, and other authorities cited, with references to the pages of the brief on which those authorities are cited.

3. Jurisdictional Statement. A jurisdictional statement, identifying the statute, court rule, or case law believed to confer appellate jurisdiction, and stating the relevant facts establishing why the judgment or order below is an appealable order. The jurisdictional statement must include:

- i.** The date of entry of the judgment or order sought to be reviewed.
- ii.** The date when any motion claimed to toll the time to appeal was filed and disposed of.
- iii.** The date when the notice of appeal was filed and the docket fee paid.

If the order sought to be reviewed and adjudicated fewer than all claims or interest of all parties, the jurisdictional statement must also recite the language of the lower court's order providing the basis for an interlocutory appeal or otherwise identify the statute, court rule or case law authorizing the interlocutory review.

4. Statement of the Case. A statement of the case including, in this order:

- i.** The kind of action or nature of the case.
- ii.** The issues actually tried in the court below.
- iii.** How the issues were decided and what judgment or decree was entered by the trial court.

iv. A statement of the appellate court's standard of review.

5. **Assignments of Error.** A separate and concise statement of each error a party contends was made by the trial court together with the issues pertaining to the assignments of error. Each assignment of error is to be separately numbered and paragraphed. Consideration of the case is limited to the errors assigned and discussed, with the exception of plain error. It is important to concisely state the error claimed to have been committed. Nebraska is an assignments of error jurisdiction, not a statement of issues jurisdiction. Failure to assign an error will preclude consideration of an issue.

6. **Propositions of Law.** The propositions of law relied upon throughout the argument in the brief are to be listed. They are to be set forth in separate and numbered paragraphs and stated concisely, without argument or elaboration. Only propositions discussed in the argument are to be set forth. Each proposition of law is to be followed by a list of supporting authorities, in order of importance. Authorities cited must be quoted or otherwise discussed in the argument.

7. **Statement of the Facts.** The factual statement is to be in narrative form and consist of so much of the record as necessary to present the case. "Each and every recitation of fact, whether in the statement of facts or elsewhere in the brief, shall be annotated to the record." Neb. Ct. R. § 2-109(D)(1)(g).

8. **Summary of the Argument.** The summary of the argument must be a succinct, clear, and accurate statement of the arguments made in the brief and not merely a recitation of the argument headings.

9. **Argument.** The argument is to "present each question separately" and it "may make such further statements of fact or quotations for the record as deemed necessary...." Neb. Ct. R. § 2-109(D)(1)(i). A premium is placed in Nebraska appellate courts on clear and logically organized arguments. The argument should include separate sub-sections and headings that correspond to the assignments of error, and each argument should include both a discussion of relevant authority and the facts of the case at bar, illustrating how the authority supports the requested conclusion on each argument.

B. Appellee's Brief. The brief of the appellee, or the defendant in an original action, contains some, but not all, items in the appellant's brief. It must include:

1. **Title Page.** The cover page of the appellee's brief should contain the same information as the appellant's brief, but should be tan in color.

2. **Tables.** The appellee's brief should include the same tables of contents and authorities as the appellant's brief.

3. **Jurisdictional Statement.** The appellee's brief should include a statement of the basis of jurisdiction if the appellant's statement is not accepted as correct.

4. **Statement of the Case.** The appellee's brief should include a statement of the case if the appellant's statement is not accepted as correct.

5. **Propositions of Law.** The appellee's brief should include propositions of law prepared in the same manner as discussed above in the appellant's brief.

6. **Statement of the Facts.** The appellee's brief should include a statement of the facts prepared in the same manner as discussed above in the appellant's brief. The relevant court rule specifies that the statement of the facts in the appellee's brief is necessary only if the appellant's statement thereof is not accepted as correct.

7. **Argument.** The appellee's brief should include an argument section prepared in the same manner as discussed above in the appellant's brief.

C. **Cross-Appeals.** Cross-appeals are presented in the appellee's brief. There are no separate filings in the trial court, and no notice of a cross-appeal is required before the appellee's brief is filed with the appellate tribunal. Where a cross-appeal is presented in an appellee's brief it must "be noted on the cover of the brief and it shall be set forth in a separate division of the brief." Neb. Ct. R. § 2-109(D)(4). The brief on cross-appeal must be prepared "in the same manner and under the same rules as the brief of appellant." *Id.* This means all briefing sections identified above and required of an appellant must be included in the portion of the appellee's brief headed "Brief on Cross-Appeal," which generally appears after the appellee's brief, but within the same submission. Failure to properly designate the cross-appeal on the cover of the appellee's brief or failure to properly set forth the cross-appeal in a separately designated section of the appellee's brief can result in the appellate court declining to consider the issues raised on cross-appeal. The inclusion of a cross appeal does not expand the length limitations of the appellee's brief.

D. **Reply Briefs.** Reply briefs are optional in the Nebraska appellate courts. If a reply brief is filed, it is to be prepared in the same manner as the appellee's brief. If the reply brief includes the answer of appellant to any cross-appeal, that answer shall be set forth in a separate division of the reply brief and shall be headed, "Answer to Brief on Cross-Appeal," and shall be noted on the cover of the brief.

E. **Remittitur.** If the appellee seeks remittitur, the appellee may make a special assignment of error in the appellee's brief or may raise the issue as a cross-appeal. Neb. Ct. R. § 2-109(D)(3).

F. **Constitutional Issues.** Any party presenting an issue of the constitutionality of a statute "must file and serve notice thereof with the Supreme Court clerk by written notice or by a notice in a Petition to Bypass at the time of the

filing of the party’s brief.” Neb. Ct. R. § 2-109(E). If the attorney general is not a party to the action, a copy of the brief assigning unconstitutionality must be served upon the attorney general. *Id.*

XIII. APPENDIXES AND EXCERPTS OF RECORD

Appellate briefing in Nebraska does not routinely make use of appendixes or excerpts of record. Although appendixes including key exhibits or municipal ordinances are occasionally attached to appellate briefs filed with the courts, the proper practice in Nebraska is to ensure that the necessary items are included in the record (the Transcript or Bill of Exceptions) and simply to provide accurate references to the items in the briefs. The court rules governing briefs indicate that the page limitations for briefs are “inclusive of . . . appendixes, indices, exhibits, and other documents of any nature, character, kind, or description whatsoever.” Neb. Ct. R. § 2-109(B)(5).

XIV. AMICUS CURIAE PRACTICE

Nebraska’s appellate tribunals have few rules governing practice by amicus curiae. Amicus curiae may not file briefs without leave of court. Neb. Ct. R. § 2-109(A)(4). Section 2-109 of the rules refers to Section 2-106 governing motion practice. By inference, this is understood to mean that one who seeks to file an amicus curiae brief must file a motion in the case requesting permission to do so, and must be granted leave to submit the amicus curiae brief, in advance. No rule specifies the form of amicus curiae briefs, except that Neb. Ct. R. § 2-109(B)(4) specifies that the cover of an amicus brief shall be white. Generally, leave to file an amicus brief must be filed in time so it can be considered by the court more than 20 days before oral argument. Neb. Ct. R. § 2-109(A)(4).

XV. SUPPLEMENTAL AUTHORITIES

If additional authorities come to the attention of a party subsequent to filing of that party’s brief, the party may request leave of court to file a supplemental brief through the motion procedures discussed and may make the court aware of such supplemental authorities at oral argument.

XVI. ORAL ARGUMENT

A. Argument as of Right or by Motion; Waiver. In Nebraska, oral argument is generally granted as of right in most cases. Neb. Ct. R. § 2-111(E) includes a number of exceptions to this general rule, including that no party is permitted oral argument unless he or she has a brief on appeal; that except where the penalty prescribed is life imprisonment or death, no oral argument is permitted in criminal cases where the accused entered a plea of guilty or no contest or where the sole allegation of error on appeal is that the sentence imposed by the trial court was excessive or excessively lenient.

Additionally, the court may order the submission of any case without oral argument and, unless otherwise directed by the appellate court, the parties may elect to waive oral argument and submit a case solely on the briefs.

B. Procedures for Granting and Calendaring Oral Argument. Cases are eligible for submission to the Supreme Court at any time after the appellee’s brief is filed. Submission may occur in any case without oral argument by court order. The deadline for the appellant’s reply brief must expire before such an order is issued. Neb Ct R App P § 2-111(B)(1).

Argument scheduling involves the court’s Proposed Call. Neb Ct App P § 2-111(C) & (D). Cases on the Proposed Call cannot be continued unless leave is granted. Section 2-106 of the appellate rules governs the form of application for continuance “which must be accompanied by a showing of exceptional cause.” Cases scheduled on the call, or final schedule of oral argument, cannot be continued except under similar circumstances. The appellate tribunal then “will hear oral argument as scheduled.”

Cases advanced to oral argument go on the oral argument list as soon as the appellee’s brief is due to be filed. Nebraska statutes require that these cases be advanced for consideration in the appellate courts:

1. Criminal cases.
2. Workers’ compensation cases.
3. Unemployment compensation cases.
4. Questions certified by other courts.
5. Original actions.
6. Appeals involving custody of minor children.
7. Appeals within original concurrent jurisdiction of the court.
8. Cases where a “case stated” has been prepared and filed by the parties.
9. Appeals from the tax equalization and review commission.
10. Appeals from the Department of Natural Resources.

Parties may request advance argument in other cases. Neb Ct R App P § 2-111(B)(3).

C. Identification of Panel Members. Once a case is scheduled for oral argument, it is placed on a “call” which is published on the court’s website. The parties are also sent notice of the scheduled oral argument date. The Nebraska Supreme Court hears appeals en banc, and the Nebraska Court of Appeals hears oral argument in panels of three

judges. For cases being argued before the Nebraska Court of Appeals, both the call and the notice sent to the parties identifies the judges sitting on the panel to hear the case.

C. The Day of Argument. The call indicates the time that cases are scheduled to be argued, and generally all cases listed are eligible to be called in any order at the scheduled time and date. Attorneys must be present prior to the commencement of oral arguments on the scheduled date, must sign-in with the court bailiff, and must be prepared to argue whenever called during the scheduled arguments. As a practical matter, cases are usually called in the order listed; counsel must always be prepared, however, for the court to call cases out of order for whatever reason.

Generally, oral argument “shall not exceed 10 minutes per side in any civil or criminal case.” First and second degree murder cases are heard for 20 minutes per side. The court, on its motion or on application, may grant additional time, but a motion for more time must be filed within 10 days after the proposed call is mailed and be accompanied by a showing of good cause.

XVII. DECISIONS.

The Supreme Court is required to report each case it decides “with as much brevity as practicable” when it “reverses or modifies the judgment of the district court, and also each other decision, whether made in disposing of a motion or otherwise, which determines or modifies any theretofore unsettled or new important question of law.” Neb. Rev. Stat. § 24-408. This statute governs the publication of opinions issued by the Nebraska Supreme Court. The court rules provide, in Neb. Ct. R. § 2-112, that the court “will prepare a written opinion in cases where the court believes explanation of its decision is required or that the case is of value as a precedent. Opinions are released as ordered by the court.”

Copies of opinions are mailed to counsel.

The court decides which opinions shall be bound and published in the Nebraska reports. *Id.* Not all decisions of the court are reported in the Nebraska reports. These methods of disposition, containing the mandate of the court, are possible: published opinions; unpublished memoranda; or unpublished orders. Where unpublished memoranda and unpublished orders are used by the Supreme Court to dispose of cases, disposition is simply noted, with disposition, and the outcome of the appeal noted by case name and number, only, in a table.

Disposition by the Court of Appeals is governed by Neb. Rev. Stat. § 24-1104 which requires that decisions of the Court of Appeals be “in the form of an order which may be accompanied by a memorandum opinion.” Court of Appeals’

opinions are not published “unless publication is ordered by the Court of Appeals.” Memorandum opinions are filed with the clerk of the appellate courts and are public records.

Memorandum opinions of the Court of Appeals are published if any of the following are true of the decision:

The decision announces a new rule of law;

The decision applies an established rule to a factual situation significantly different from other published opinions;

The decision resolves or identifies a conflict in prior Court of Appeals’ decisions;

The decision contributes to legal literature by collecting case law or reciting legislative history; or

The decision has substantial and continuing public interest.

Neb. Rev. Stat. § 24-1104.

XVIII. MOTIONS FOR REHEARING AND REHEARING EN BANC

Motions for rehearing are specifically permitted by Neb. Ct. R. § 2-113, in both the Nebraska Supreme Court and the Nebraska Court of Appeals. The motion and a brief in support must be filed within 10 days after the release of the opinion of the court or the entry of the order of the court disposing of the appeal. An original and 10 copies of the motion and brief are required in cases in the Nebraska Court of Appeals, and an original and 16 copies of the motion and brief are required in cases in the Nebraska Supreme Court. Neb. Ct. R. § 2-113(D) specifically details the requirements of the brief in support of such a motion. Parties to the case not seeking rehearing may file responsive briefs within 10 days after the motion for rehearing is filed. No oral argument is allowed on motions for rehearing. As a practical matter, motions for rehearing are unlikely to be successful unless the moving party can establish that the court erred with respect to some matter concerning the record or overlooked some controlling legal decision; merely requesting the court to reconsider its decision on the basis of the same arguments initially advanced on appeal is unlikely to be fruitful.

Because the Nebraska Supreme Court hears its cases en banc, cases granted rehearing are also heard en banc. There is currently no procedure to request an en banc rehearing in cases heard by the Nebraska Court of Appeals, and if a motion for rehearing is granted in the Nebraska Court of Appeals the rehearing usually takes place before the same panel of the court as heard the case initially.

XIX. COSTS AND ATTORNEYS’ FEES

A. Taxable costs. Neb. Ct. R. § 2-114(B) governs taxable costs to be assessed against the unsuccessful party in the Nebraska appellate courts. Taxable costs itemized on the mandate include docket fees and fees for copies of

documents and certificates (see Neb. Rev. Stat. § 33-103), transcript preparation fees in cases where Appellant is successful on appeal, printing costs, attorney fees where appropriate, and “other fees and costs as awarded by the court.”

B. Attorneys’ Fees. In Nebraska courts, attorney fees are allowed only where specifically provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. See *Taylor v. Taylor*, 277 Neb. 617, 764 N.W.2d 101 (2009). As such, requests for attorney fees should generally always include reference to the specific statutory authorization or to prior cases in which the award of attorney fees has been allowed. Neb. Ct. R. § 2-109(F) provides that any person who claims the right to an attorney fee in a civil case appealed to the Nebraska Supreme Court or Nebraska Court of Appeals must file a motion for the allowance of such fee, supported by an affidavit which justifies the amount of the fee sought, no later than 10 days after the release of the opinion of the court or the entry of the order of the court disposing of the appeal, unless otherwise provided by statute. If the motion is statutorily authorized to be filed outside of the 10 day period, the motion must include citation to the statutory authority. A court-appointed attorney in a criminal case appealed to the Nebraska Supreme Court or Nebraska Court of Appeals may, after issuance of the mandate from the appellate court, apply to the appointing court for an attorney fee regarding services on appeal.

XX. FURTHER APPELLATE REVIEW IN MULTI-LEVEL SYSTEMS.

Dissatisfaction with a ruling by the Court of Appeals can lead to further appellate review by the Nebraska Supreme Court. The procedure for further review requires that an original and seven copies of a petition for further review and memorandum brief in support be filed “within 30 days after the release of the opinion... or the entry of the order of the Court of Appeals finally disposing of the appeal...” A docket fee, determined by Neb. Rev. Stat. § 33-103.01 (currently \$50) must be paid to the clerk of the Supreme Court when the petition for further review is filed.

The petition for further review is a simple pleading. It is sufficient to simply say:

“John Doe, appellant, respectfully requests that the Nebraska Supreme Court further review this appeal which was decided by the Nebraska Court of Appeals on _____. The docket fee of \$_____ is paid to the clerk with this petition for further review. Appellant’s memorandum brief follows.”

The supporting memorandum brief requires the party seeking further review to “set forth a separate, concise statement of each error alleged to have been made by the Court of Appeals, all of which must be annotated to the record...” Each assignment of error is required to be separately numbered and paragraphed, and discussed in the memorandum brief.

The prevailing party in the Court of Appeals “may respond to the petition for further review within 10 days, or simply notify the clerk that they decline to do so.” Neb. Ct. R. § 2-102(F)(4).

Oral argument is not permitted on a petition for further review. Neb. Ct. R. § 2-102(F)(6).

Further review is not a matter of right but of judicial discretion. The Supreme Court will review only errors assigned in the petition for further review and discussed in the supporting memorandum, and it may limit the issues to one or more of those raised by the parties. *Id.*, § 2-102(G).

When a matter is docketed for further review in the Supreme Court, the court may order supplemental briefs, or the parties may file additional briefs without order. The party filing the initial petition for further review is entitled to open and close at oral argument. *Id.*, § 2-102(H).

XXI. MANDATE

A. Procedure for Issuance. After the Nebraska Supreme Court or Court of Appeals has filed its decision, whether by opinion or by summary disposition, the Clerk's office will issue a mandate to the lower tribunal indicating the appellate disposition and, if appropriate, directing the lower court to act in conformance with the appellate disposition. The mandate also itemizes the taxable costs, as discussed more fully above in section XIX.A.

B. Stay or Recall of Mandate. Parties desiring to prosecute proceedings to the United States Supreme Court and desiring an order staying the mandate of the Nebraska appellate court must make application to the appellate court within 7 days from the date of filing of the opinion or other dispositive entry. Neb. Ct. R. § 2-114(A)(2). The request must be accompanied by a written showing that a federal question is involved and if the application is granted the court may require a bond as a condition of staying the mandate. Neb. Ct. R. § 2-114(A)(2). A motion to recall a mandate must comply with the general rules for motions set forth in Neb. Ct. R. § 2-106 and discussed in more detail above in section IX.A, and must be accompanied by a showing that no action has been taken on the mandate by the trial court.

C. Post-Mandate Issues. Once the mandate is issued by the Clerk's office, the trial court is obligated to enter judgment and take action pursuant to the directions of the mandate.

XXII. INTERLOCUTORY AND DISCRETIONARY REVIEW

In Nebraska, only final orders are reviewable on appeal. Neb. Rev. Stat § 25-1902. The law in Nebraska concerning what constitutes a final order is somewhat murky, but for purposes of this discussion it suffices to note that interlocutory appeals are generally not allowed. The situations that present somewhat of an exception include appeals from decisions in cases involving multiple parties or multiple causes of action, see Neb. Rev. Stat. § 25-1315. and cases where the State is given authority to appeal an order granting a motion to suppress evidence, see Neb. Rev. Stat. §29-824. For more

discussion of the law concerning final orders in Nebraska, see Daniel L. Real, *Appellate Practice In Nebraska: A Thorough, Though Not Exhaustive, Primer In How To Do It And How To Be More Effective*, 39 CREIGHTON L. REV. 29 (2005).