

Appellate Practice

Three judges from the Missouri Court of Appeals, Western District, Robert Ulrich, Hal Lowenstein and Ron Holliger, and Court Clerk Terry Lord discussed appellate practice at the November 13, 2002 BCBA meeting.

Lord said that notices of appeal are screened when they are received from the circuit court to determine if they were timely filed, whether they relate to a final judgment subject to appeal, and whether they are appropriate for scheduling for pre-submission conference.

Lord said most civil cases are scheduled for settlement conferences. Approximately 20-25 percent of civil appeals are settled prior to oral argument. The court's goal whenever possible is to set cases for settlement conference before the parties are required to spend the money on transcripts. The court generally uses senior judges for settlement conferences, but sometime has to use active judges.

Lord said that when the appellant's brief is filed, it is reviewed in the clerk's office where a preliminary determination is made whether the case seems appropriate for submission on briefs, normal argument, or extended argument.

Lord said that any given time, there are four panels of judges, and the cases are assigned to the panels not by specialty but rather in the order the cases are ready for submission.

Judge Ulrich said the court's general practice now is to assign cases for the writing of opinions before oral argument. However, all the judges read all the briefs before argument. Writing assignments are made by chance before argument. The chief judge assigns judges to panels.

Judge Ulrich said the court has a monthly conference at which it handles administrative matters and can also discuss cases for possible opinion by the court en banc. Proposed panel opinions are circulated to the entire court. If a judge not on the panel disagrees with a proposed panel opinion, that judge can raise the issue to be discussed at the monthly conference. If six of the judges vote to do so, the case can be assigned to be heard by the court en banc and then is argued en banc. This is an infrequent occurrence, happening only three or four times per year at the most.

Judge Ulrich said that the chief judge handles all motions filed, except that while appeal bond motions usually go to the chief judge, they sometimes go to the presiding judge of a panel.

Judge Ulrich said Lori Kelly, the staff attorney in the clerk's office, reviews all briefs to see if they comply with the minimum requirements. If not, the chief judge enters an order striking the brief. After a case has been assigned to a panel, a motion to strike a brief would go to the panel for ruling.

Judge Lowenstein said that everyone that has been a chief judge has also been a practicing attorney and can understand the problems lawyers have, so lawyers may be able to call up a motion in person before the chief judge and plead for procedural leniency if a deadline has been missed.

Judge Holliger said some judges have their law clerks prepare a memo before oral argument; in doing so, the clerks may or may not perform legal research beyond that contained in the briefs. Some

panels are now holding pre-argument conferences. All panels usually hold a conference immediately after oral argument and take a preliminary vote on each case at that time. A panel may meet again to discuss cases after preliminary opinions are written.

Judge Ulrich said the court tries to hand down opinions within 90 days after argument, but may take longer in some cases where there may be a major impact on the law in order to allow additional time for reflection.

Judge Ulrich said that a motion for rehearing or transfer goes to the judge who wrote the opinion. This judge usually has the motion reviewed by law clerk, and after that the motion is discussed by the panel at a conference. The basic rule is that if the motion is not affirmatively granted, it is automatically denied. Any judge of the court can on his own motion order a case transferred to the Missouri Supreme Court, but the Western District rarely does this, feeling that the parties have an option to apply to the Supreme Court for transfer and the Supreme Court can take the case if it wants.

Judge Ulrich said that two judges of the court are assigned to a writ division, with one of them being designated as the presiding judge of the writ division. The writ division immediately reviews any petitions for writs when they come in, and then the presiding judge drafts an order. They try to act on writs very quickly, often the same day or the next day, but can take longer if necessary. The vast majority of writs are denied, particularly if there is another potential remedy such as an appeal. Judge Lowenstein said lawyers filing writs should give concise information in the writ because the writ division knows nothing about the case, and it is also a good practice to attach and highlight any relevant legal authorities.

Judge Ulrich said that appeals which are submitted on briefs do not get short shrift – they are handled the same as other cases.

Judge Ulrich said that if an attorney wants to provide a citation of new authority to the court which is not in a brief, the lawyer must send a letter to the court citing the case and must send a copy to opposing counsel so that opposing counsel can respond if desired.