Citizen's Guide to the Nebraska Appellate Courts

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NEBRASKA SUPREME COURT
Office of Public Information

I. INTRODUCTION

This guide is designed to provide a self-represented person, or "pro se litigant," with an overview of the Nebraska appellate court system. The creation of this material stems from the need to ensure that the self-represented litigant can effectively access the appellate system. By providing this information, we hope the litigant will acquire a better understanding of the structure and purpose of the appellate system, how to effectively access the appellate system, and how appeals are decided. Additionally, experience teaches that self-represented litigants may have unrealistic expectations about what the appellate courts can and will do, and that to their own detriment they do not always follow the procedural rules established for the handling and progression of cases through the appellate system.

While it is our hope that the Guide will be a useful tool to assist the self-represented litigant who wishes to pursue an appeal, this material does not replace the formal rules practice and procedure of the Supreme Court and Court of Appeals of the State of Nebraska which set forth the Nebraska Court Rules of Appellate Practice and may be accessed via the Internet on the Nebraska Judicial Branch Web site. Neither is the Guide intended to be a substitute for the statutes and procedural rules which govern appeals and which pro se litigants must consult and follow—just as practicing lawyers are required to do.

II. APPEAL

Stated simply, an appeal is an attempt by a litigant to secure a different result in a legal controversy, civil or criminal, than that rendered by the trial court or administrative agency which has already decided the matter after a trial or hearing. To appeal, the litigant must take certain steps within certain time limits in order to "perfect" the appeal. "Perfect" simply means that the necessary steps have been accomplished on time so that the appeal is properly before the appellate courts. Perfection of the appeal will be discussed in more detail shortly.

III. NEBRASKA APPELLATE SYSTEM

We now turn to the two courts which make up the Nebraska Appellate System; however, the reader is cautioned that certain cases may require an intermediate appeal to the district court before the case can be appealed to the appellate system. For example, a misdemeanor criminal conviction in the county court must be appealed first to the district court. Other than this cautionary note, intermediate appeals to the district court are beyond the scope of these materials, and the applicable statutes and procedural rules governing these cases must first be consulted.

The Nebraska Supreme Court and the Nebraska Court of Appeals comprise the appellate courts of Nebraska. The seven-member Supreme Court, headed by the Chief Justice, is the State's highest court and is often called the court of last resort. The Supreme Court has the power to regulate the dockets of the two appellate courts, which is typically done by the Supreme Court "reaching down" into the docket of the Court of Appeals to move cases to its own docket. The Court of Appeals can also suggest that a case be moved to the Supreme Court's docket. See *Neb. Ct. R. App. P. § 2-102(C).* The Supreme Court will move a case, for example, if it believes that the issue presented is one which ultimately should be decided by the Nebraska Supreme Court because of the nature of the case. Although the Supreme Court has an internal process to identify appeals which should be moved to its docket, the statutes allow a litigant to file a written request with the Clerk of the Supreme Court/Court of Appeals asking that the Supreme Court allow an appeal to bypass the Court of Appeals and be heard and decided directly by the Nebraska Supreme Court. See *Neb. Ct. R. App. P. § 2-102(B).*

The Nebraska Court of Appeals is a six-judge court which includes a Chief Judge who has administrative responsibilities for the court. The Court of Appeals hears the majority of the appeals in Nebraska. All appeals except those in which the death penalty or life imprisonment is imposed, those which challenge the constitutionality of a state statute, or limited "original" actions as defined by the Nebraska Constitution and by state statute are filed in the Court of Appeals. The mentioned exceptions are filed in the Nebraska Supreme Court and processed from the outset in that court.

The fundamental difference in the roles of the two appellate courts is that the Court of Appeals is intended to be a court which handles a high volume of cases. Its caseload typically involves cases in which only the parties involved are deeply interested. The basic functions of the Court of Appeals are to review decisions of the trial courts for errors in law or procedure and to correct those errors which have affected a litigant to his or her prejudice. Only errors which are prejudicial to a party or made a difference in the trial court's decision are grounds for an appellate court to intervene. In summary, in most of the appeals it hears, the Court of Appeals looks primarily at whether the trial court correctly applied the law, and when the trial court exercised discretion in its decision, that such discretion was not abused.

The role of the Nebraska Supreme Court is somewhat different. The Supreme Court tends to decide cases involving issues which have a broader impact in the legal system or are of great public interest. As a result, cases of this nature are frequently moved from the docket of the Court of Appeals to the docket of the Supreme Court to be decided. In this way, the opinions of the Supreme Court assist in the development and clarification of the law for lawyers, trial court judges, and the public. While handling fewer appeals than the Court of Appeals, the Supreme Court bears the additional and substantial responsibility of overseeing the practice of law in the state as well as the administration of the entire judiciary of the State of Nebraska.

One result of this division of responsibility between the two courts is that the six judges of the Court of Appeals decide the great majority of the approximately 1,400 appeals filed each year in Nebraska, but the cases decided by the Supreme Court more often tend to have an impact which extends beyond the parties to the case.

IV. SIGNIFICANCE OF APPELLATE COURTS' STANDARD OF REVIEW

A term which is much discussed and used by the appellate courts is "standard of re-view." Standards of review are well-established guidelines or standards for the appellate courts' analysis of the trial court's decision and have a substantial impact on the outcome of the appeal. The standard of review might be thought of as the lens through which the appellate court looks at the evidence presented to the trial court, as well as the decision of that court. A pro se litigant's awareness of the standard of review for a particular type of case is critical because it bears on the initial question of whether an appeal should be filed, which necessarily involves consideration of the chances of obtaining a different result on appeal.

It is beyond the scope and purpose of this Guide to set forth the different standards of review for the various types of cases. That is something the litigants must determine for themselves by research—for example, by looking at the opinions of the appellate courts in similar cases. As a matter of routine, the applicable standard of review is virtually always clearly and separately set forth in the opinions of both appellate courts.

Although the reader is reminded that this Guide is not intended to cover all standards of review for all types of cases, there are some general principles which can be stated and will perhaps help highlight the importance of the standard of review in the appellate process. Appellate courts reach their own conclusions on questions of law. In other words, the appellate courts need not interpret a law, such as a statute, in the same way as the trial court. However, as to factual disputes (who said what to whom), appellate courts normally do not

interfere with or change a trial court's factual determinations unless the appellate court concludes that the trial court was "clearly wrong." When disputed questions of fact are reviewed on appeal, an appellate court will rarely "change" or reach a result different from the trial court's factual findings. This is because the trial judge has the opportunity to actually see and hear the witnesses testify, whereas the appellate court's review is limited to the printed transcription of the testimony, sometimes referred to as the "cold record." In other words, the appellate process is normally not a new trial, a retrial, or a second guessing of the trial court.

Nonetheless, in certain types of cases the appellate review is a "new trial," called de novo review, but it is done by the appellate court using only the record of the evidence introduced in the trial court. As an example, in "equity cases" such as the property division in a divorce case or a case seeking an injunction, Nebraska law requires the appellate court to review the factual issues raised by the appellant's assignments of error de novo (anew) on the record and reach its conclusions independent of the findings of the trial court. However, even in such situations, the appellate court is often not inclined to reach different factual determinations, again because the trial court heard and saw the witnesses and believed one witness over another.

In conclusion, it is crucial that a self-represented litigant understand that the type of case being appealed determines what the standard of review will be for the appellate court's analysis of the case. Such understanding will assist the litigant in determining whether to appeal, in gauging the chances of success on appeal, and in determining what arguments might be most persuasive to the appellate court.

V. HOW APPEALS REACH APPELLATE COURTS FROM TRIAL COURTS

The process by which litigants present an appeal involves three basic steps: (1) perfection of the appeal, (2) getting the trial record to the appellate court, and (3) writing and filing of briefs. While each of these steps will be discussed generally, it cannot be overemphasized that each of these steps is governed by statutes and court rules which must be consulted and followed.

1. Perfection of Appeal

Not every decision of a trial court is immediately appealable. Typically, the appellate courts do not become involved in a case until a final resolution has been reached in the trial court. (There are exceptions to this general rule which are beyond the scope of this Guide.) The usual way of referring to this concept is that appeals can only be taken from "final, appealable orders." While it is not feasible to accurately and completely discuss the concept of "final, appealable orders" in this Guide, a generalized example will perhaps be helpful.

An order of a trial court requiring the parties to appear at a certain time and place for a pretrial conference is not a final, appealable order and the appellate courts will not review such a preliminary matter. On the other hand, an order requiring a person to serve a sentence in the penitentiary or pay a money judgment to another person, which order is properly signed by the judge, date-stamped, and filed by the clerk of the trial court, is normally a "final, appealable order." Therefore, the first step in the appeal process is to ensure that the trial court's order is a final, appealable order which requires that it be signed by the judge and date-stamped and filed by the clerk of the trial court.

Assuming that the order is a final, appealable order, the process of perfection of the appeal generally involves two basic requirements. First, a written notice of appeal must be prepared and filed with the clerk of the trial court. There are several "special" types of

appeals, which will not be discussed here, which require the filing of a different type of document to perfect the appeal. For example, an appeal from the Tax Equalization and Review Commission requires the filing of a petition in the Court of Appeals among other stringent requirements for such an appeal. It is for this reason that one must review the statutes, case law, and court rules to determine if a case is one of these "special" appeals. The notice of appeal must be filed within 30 days of the trial court's order. How those 30 days are counted can vary with circumstances which are beyond the scope of this Guide.

The second step in the perfection of the appeal must also be accomplished within those 30 days. This is the payment of a docket fee (click here for current fee). If a person cannot afford to pay the fee, he or she can request from the trial court a waiver of the fee. To do this, the litigant must file a poverty affidavit with the trial court, again within the 30-day time limit, signed and sworn to before a notary public, setting forth financial circumstances which show an inability to pay fees and costs of the appeal. Either within the affidavit or by a separate document, the person must also request that the court grant "indigent status," often formally referred to as "in forma pauperis" (unable to pay costs of appeal because of poverty). Indigent status allows the case to proceed without payment of the costs of the appeal, including the cost of preparation of the trial court record, which will be discussed shortly in more detail.

To summarize, an appeal is perfected from a final, appealable order by filing a notice of appeal and delivering the docket fee or poverty affidavit and request for in forma pauperis status to the clerk of the trial court within 30 days of the trial court's order from which the appeal is taken. Appeals that are not properly perfected will be dismissed, often on the appellate court's own motion, for lack of jurisdiction—which has the practical effect of leaving the trial court's order unchanged.

2. Securing Record From Trial Court

Two fundamental rules of appellate practice come into play in this step. First, appellate courts review only what happened in the trial court. Appellate courts do not hear new evidence or conduct their own trials. In other words, appellate courts only look at what occurred in the trial court (the "record") when deciding the appeal. Second, an appealing party has the responsibility to bring to the appellate court a record which supports the party's claim that the trial court was wrong in some way and that the trial court's decision must be changed. Therefore, as a result of these rules, the "record" is of paramount importance in any appeal. The "record" has two parts: the transcript and the bill of exceptions, which shall be separately discussed.

(a) Transcript

The transcript consists of the pleadings of the parties, as well as the orders and judgment of the trial court. From these documents, the appellate court can determine what issues were heard by the trial court. Also, examination of the transcript enables the appellate courts to know the basic nature of the case, how the parties brought their issues to the attention of the court, who the parties are, and what preliminary and procedural orders the trial court made, as well as the final decision made by the trial court.

The transcript is obtained by filing in the trial court which heard the case a written document called a praecipe, which directs the clerk of such court to prepare a transcript. The praecipe should be filed at the same time the notice of appeal is filed. 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 (3) the trial court's memorandum opinion, if any. See *Neb. Ct. R. App. P. § 2-104.* Section § 2-104 also provides for

the inclusion of other pleadings or orders in the transcript, as well as details of how the clerk of the trial court prepares the transcript. However, the rule specifically provides: "The appellant [person appealing] shall limit his or her request for such additional material to only those portions of the record which are material to the assignments of error." The rule should be consulted before preparing the request for the transcript because not every piece of paper filed in the trial court needs to be a part of the transcript in the appellate court.

(b) Bill of Exceptions

The bill of exceptions contains the evidence offered in the trial court, including testimony of witnesses and exhibits offered as evidence in the trial court. It is a typed verbatim transcription of what the parties, the witnesses, the lawyers, and the judge said and did during the trial court proceedings as prepared by the court reporter who recorded those proceedings. As a cautionary note, the general rule is that if something is not in the bill of exceptions, then it cannot and will not be considered by the appellate court. However, not all court proceedings during the course of a case's progress through the trial court will be necessary for the appeal. Thus, the parties can and should limit the bill of exceptions only to those proceedings which they believe are necessary for the appellate court to review the case. Doing so saves on the preparation costs for the record, saves work for the parties and the court, and improves efficiency for all concerned.

The bill of exceptions is secured by the appellant filing with the office of the clerk of the court from which the appeal is taken a request to prepare a bill of exceptions at the same time the notice of appeal is filed. At that time, the appellant shall deliver a copy of the request to the court reporter so that he or she knows what to prepare. See *Neb. Ct. R. App. P. § 2-105.* Section 2-105 states in part:

> The request shall specifically identify each portion of the evidence and exhibits offered at any hearing which the party appealing believes material to issues to be presented to the [appellate court] for review. The court reporter shall prepare only those portions specified in the re-quest for preparation of the bill of exceptions. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the bill of exceptions must include all evidence relevant to the finding or conclusion.

Section 2-105 also contains specific directions about other matters such as amendments to the bill of exceptions, the format to be used by the court reporter, costs, and time limits for preparation, et cetera. Because of the importance of a proper bill of exceptions to the appellate process, the self-represented litigant must consult and follow § 2-105.

3. Writing and Filing of Briefs

The written brief is the time honored way by which the parties to an appeal present their issues and positions to the appellate courts. At the outset, the pro se litigant must understand that the Nebraska Supreme Court has established precise and detailed rules about the preparation of briefs which encompass all aspects of the briefing process before both appellate courts. See *Neb. Ct. R. App. P. § 2-109.* A pro se litigant must be aware that although self-represented, the appellate courts insist on strict compliance with the various provisions of § 2-109. Section 2-109 is designed to enable the parties to present their appeal (or opposition to a party's appeal) in a uniform, logical, clear, and understandable way, which in turn facilitates the decisionmaking process of the court and ensures the efficient handling of the numerous appeals filed each year.

The pro se litigant must consult § 2-109 and follow its provisions. This Guide will not attempt to summarize the provisions of the rule or emphasize one provision over another—with one exception. Section 2-109(D) requires that the

appealing party set forth "assignments of error" in their brief. In the words of the rule:

> The brief of appellant, or plaintiff in an original action, shall contain the following sections under appropriate headings and in the order indicated:
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> . . . .
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> e. A separate, 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 shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed. The court may, at its option, notice a plain error not assigned.

Assignments of error typically are limited to those claims of error (mistakes) in the trial court which are of significance—meaning that the alleged error made a difference in the outcome of the case. The importance of proper assignments of error is emphasized by the long-standing rule of appellate practice which states that appellate courts will not address or decide claims unless the alleged errors are both assigned in the brief and argued in the "Argument" section of the brief. The assignments of error and accompanying arguments focus the appellate court's attention on a party's claim. The pro se litigant is once again directed to the precise provisions of § 2-109 (which incidentally also governs briefing by lawyers) for guidance on proper briefing of the appeal.

VI. SUBMISSION OF APPEAL TO COURT FOR DECISION

Although both the Supreme Court and Court of Appeals hear oral arguments monthly, at which counsel or self-represented litigants orally present an argument before the court, not all appeals are eligible for oral argument. Generally, the Supreme Court hears oral argument in a great majority of the appeals it decides, whereas the Court of Appeals hears argument in approximately half of the cases it decides.

Oral argument is a formal proceeding, and parties appearing before the court are treated with respect and courtesy. Pro se litigants, like lawyers, are expected to discuss only the evidence which is before the court in the bill of exceptions. Although the process is called "argument," parties are expected to be civil and courteous to their opponents, the court, and court staff when presenting their case. The argument should be limited to the assignments of error discussed in the brief. Typically, the time allowed is 10 minutes per side, unless a written request for additional time has been filed and granted by the court. Pro se litigants should understand that the judges hearing the case will have read the briefs before argument and have familiarity with the record. The judges may have questions about the record or the argument. Some pro se litigants find it helpful to observe an argument session of the court, all of which are open to the public, before their case comes up for argument. Decisions are not announced at argument.

Whether a case will be orally argued, when and in what order it will be argued in relation to other cases, and other details of the submission of the appeal are generally set out by court rule. See *Neb. Ct. R. App. P. § 2-111.* This rule should be consulted for the particular details of this aspect of appellate procedure and to deter-mine if a case is one in which there may not be oral argument.

For a variety of reasons, not every appeal includes oral argument. A written motion and supporting brief asking that the court summarily affirm the trial court, summarily dismiss the appeal, or summarily reverse can be filed. See *Neb. Ct. R. App. P. § 2-107.* There is no oral argument on such motions except by order of the court—which is unlikely. If such a motion is granted, there will be no oral argument on appeal and the appeal is decided, usually without a formal opinion from the court. Section 2-107 sets forth the circumstances in which such motions may be filed and details the nature and form of such motions and supporting documents. The rule should be consulted and closely followed by the pro se litigant.

Additionally, the court may, on its own through its internal review processes, determine that oral argument is not necessary. For example, after examination of the briefs and

the record the court may conclude that the outcome of the case is clear, and oral argument will be of no assistance to the court in reaching its decision. If the court determines not to hear oral argument, the court will normally enter an order to that effect and the parties will be notified by the Clerk of the Supreme Court and Court of Appeals.

As a practical matter, the Clerk undertakes the vast majority of tasks associated with the submission of cases for decision, including arranging all aspects of the oral argument session for each appellate court. Under § 2-111, the Clerk takes action in this regard without request from the parties. When the Clerk takes such action, the parties are fully informed by the Clerk's office, including information as to when it is likely that the case will be orally argued—the "proposed call"—so that the parties can advise the Clerk's office of scheduling conflicts, for example. The Clerk's office then advises parties of when their case will actually be argued—"the call." The proposed call and call for the *Supreme Court* and the *Court of Appeals* can be accessed on the Nebraska Judicial Branch Web site.

VII. HOW APPELLATE COURTS DECIDE CASES

The work of an appellate judge in deciding an appeal revolves around reading briefs and records, researching the law, and writing the opinion which decides the appeal and becomes the law of the case and binding on the trial courts. This work is done without communication with the parties or lawyers. Appellate judges do not talk about cases that are before their court except with other members of the court and court staff.

The six judges of the Court of Appeals decide cases by sitting in two panels of three judges, the members of which rotate every several months whereas, as a general rule, all seven justices of the Supreme Court decide the matters before it. A case can be decided by a majority of the members of the court in which the case is heard.

1. Appellate Opinions

The decisions announced by written opinions of the appellate courts are released to the parties and the public on Friday morning for the Supreme Court and on Tuesday morning for the Court of Appeals. Earlier, some of the differences in the work and type of cases heard by the two courts were discussed. Those differences follow through in the opinions of the two courts. Because the Nebraska Supreme Court is our highest court, all of its opinions constitute binding precedent. Therefore, not only does the opinion control the appeal, but the Supreme Court's opinion is binding on all other courts of the state, including the Court of Appeals, and must be followed in the same or similar circumstances.

In contrast, the Court of Appeals releases three types of opinions. However, only those "Designated for Permanent Publication" are precedential and binding on the trial courts of the state. Approximately 25 percent of the opinions from the Court of Appeals fall in this category. Opinions which are "Not Designated for Permanent Publication" are cases which have some degree of public interest or significance beyond that of the parties, but are not intended to state new or unique principles of law and therefore are not precedential for the trial courts. A "Memorandum Opinion and Judgment on Appeal" is used by the Court of Appeals in cases in which the court believes the case and its outcome are only of consequence to the parties involved, and while public record, such opinions are not released or distributed beyond the parties and the trial court. Approximately 25 percent of the Court of Appeals' opinions are of this type.

The opinions of the Nebraska Supreme Court and the opinions of the Nebraska Court of Appeals "Designated for Permanent Publication" become part of the fabric of law of the state and are accessible by a variety of legal research methods. Finally, a significant number of the cases in the Court of Appeals are

decided by a simple order rather than a detailed opinion because the court has determined for any number of reasons that an opinion will not be of benefit. Nonetheless, such cases still go through the same process of study and analysis as cases which generate opinions.

Within 10 days of the release of either court's opinion, a dissatisfied party may ask for a rehearing by filing a motion and brief in support of the motion for rehearing. See *Neb. Ct. R. App. P. § 2-113.* Section 2-113 sets forth in detail how such a motion is filed, its contents, and the response options for the opposing party. Such motions are not regularly filed and would not be granted unless the party is able to demonstrate that the appellate court "missed something" either in the record or in the law it used to render its opinion.

2. Petitions for Further Review

Once the Court of Appeals has decided an appeal, a litigant may petition the Supreme Court for "further review" of that decision by following a specific procedure, including the payment of a docket fee which is waived if a litigant has previously been granted in forma pauperis status to appeal by the trial court. See *Neb. Ct. R. App. P. § 2-102(F).* While the Court of Appeals decides approximately 1,200 cases per year, the Nebraska Supreme Court accepts only about 30 to 40 requests for further review of a decision of the Court of Appeals. Therefore, in the great majority of appeals, the decision of the Court of Appeals is the final decision.

VIII. CONCLUSION

The justices of the Nebraska Supreme Court and the judges of the Nebraska Court of Appeals recognize that most citizens are unfamiliar with the appellate process and that the process can be confusing to pro se litigants. The Nebraska Court Rules of Appellate Practice provide comprehensive direction on how to proceed in the appellate courts. This Guide does not replace, substitute, or supersede the Nebraska statutes, precedential appellate cases, or the Nebraska Court Rules of Appellate Practice which govern the appellate process. This Guide is an attempt to make the appellate process as understandable and accessible as possible to every citizen of Nebraska who finds it necessary to resort to the appellate courts and who proceeds without a lawyer. If you are in doubt about how to proceed, it is recommended that you consult an attorney.

This Guide is a product of the Nebraska Supreme Court Implementation Committee on Pro Se Litigation, Richard D. Sievers, Judge of the Nebraska Court of Appeals, Chairperson, and is provided as a public service to self-represented litigants. The Guide is being disseminated with the approval of the Nebraska Supreme Court to assist pro se litigants. However, the Supreme Court makes no representation that the information in this Guide will be appropriate for your circumstance. Again, it is recommended that any questions you have regarding the information in this Guide, or the proper means for appealing your case, should be directed to an attorney.

APPENDIX

Links

Neb. Ct. R. App. P.§ 2-102(B)
Neb. Ct. R. App. P. § 2-102(C)
Neb. Ct. R. App. P. § 2-102(F)
Neb. Ct. R. App. P. § 2-104
Neb. Ct. R. App. P. § 2-105
Neb. Ct. R. App. P. § 2-107
Neb. Ct. R. App. P. § 2-109
Neb. Ct. R. App. P. § 2-111
Neb. Ct. R. App. P. § 2-113
Supreme Court Call
Court of Appeals Call