

# CHAPTER 3

## Appellate Court Practices

### I. SUPREME COURT

#### § 3.1 Hearings

After an appeal is docketed, it is subjected to the court's screening procedures. Most appeals are placed on the general calendar with oral argument limited to 15 minutes per side. Either the appellant or the appellee may request 20, 25, or 30 minutes by printing "oral argument" on the lower right portion of the front of the brief cover, followed by the desired amount of time. The appellant and the appellee will be granted the same amount of time and the amount of time granted will be designated on the oral argument calendar. See Rule 7.01(e).

Appeals meeting the criteria of Rule 7.01(c)(2) may be placed on a summary calendar. Summary calendar appeals are generally deemed submitted on the record and the briefs. However, the parties will be notified if an appeal is placed on a summary calendar and, within 14 days of receiving notification, any party may file a motion for oral argument. If the motion is granted, oral argument will be limited to 15 minutes per side, unless sufficient reason is given to grant additional time. See also § 7.39, *infra*.

The Supreme Court regularly sits in Topeka six times a year for one – week periods periods and convenes occasionally for one – day "travel dockets" at different locations around the state.

Shorter special sessions may be scheduled as needed. The Chief Justice sets the hearing docket four to six weeks ahead of each session. The court gives priority to expedited appeals and hears other appeals in the order docketed. See Rule 7.01(b).

At the time the hearing docket is prepared, each appeal is tentatively assigned to an authoring justice. A research attorney, under supervision of the assigned justice, prepares a prehearing memorandum setting forth the essential facts, the contentions of the parties, the main authorities relied upon, any additional authorities discovered, and the attorney's analysis. Those prehearing memoranda are distributed to all justices prior to oral argument, eliminating the need for extensive factual recitation during arguments. The Supreme Court often asks counsel to begin oral arguments with a brief summary of the facts and relevant procedural history for the benefit of the live stream audience following the proceedings online.

### **§ 3.2 Decision**

The Supreme Court's decision conference begins on the day an appeal is argued with additional conferences scheduled as needed. Each case is presented to the court for discussion by the tentatively assigned authoring justice. The form of the opinion, whether formal (published) or memorandum (unpublished), also is tentatively determined at the decision conference. The tentatively assigned justice retains the assignment if he or she is in the majority.

### **§ 3.3 Opinions**

After the authoring justice has drafted an opinion, the opinion is circulated among the other justices for comments and suggestions. When a written dissent or concurrence is to be attached, the majority opinion and the dissent or concurrence are returned to the justice writing the opinion and then both are circulated to all justices.

When approved, opinions generally are filed on Fridays at 9:30 a.m. in the appellate clerk's office. Copies are sent to unrepresented parties and the district judge on the day of filing.

See Rules 7.03 and 7.04. Published opinions are also posted to the Kansas Judicial Branch website each Friday, generally within ten minutes of being filed in the clerk's office. See [www.kscourts.org/Cases-and-Opinions/opinions](http://www.kscourts.org/Cases-and-Opinions/opinions).

The Supreme Court has adopted internal time standards to aid in the timely issuance of opinions. The Court has set for itself the goal to publish 25% of its opinions within 90 days of the completion of case conferencing, 50% of its opinions within 180 days of the completion of case conferencing, and 95% of its opinions within 270 days of the completion of case conferencing. More information about time standards, including the Court's annual time standards performance report, can be found on the Court's website.

### **§ 3.4 Motions and Original Actions**

Routine motions may be ruled on by the Chief Justice. Other motions are assigned to the justices for presentation to the full court based on a predetermined rotation. Those motions are taken up at motions conferences scheduled by the Chief Justice or, if expedited consideration is warranted, at special ad hoc meetings.

Petitions in original actions (quo warranto, mandamus, habeas corpus) are assigned to justices, except the Chief Justice, on a predetermined rotation basis for presentation to the full court in conference. The court takes appropriate action under Rule 9.01.

Motions for rehearing are referred to the authoring justice; that justice presents the motion in conference to the full court. Four votes are required to grant or deny a motion for rehearing or modification.

### **§ 3.5 Petitions for Review**

Petitions for review of Court of Appeals decisions are assigned to individual justices for consideration and suggested disposition. Three votes are sufficient to grant a petition for review. See § 7.48-7.60.

### **§ 3.6 Disqualification and Recusal**

A justice who is disqualified or who otherwise recuses from an appeal does not participate in the consideration or decision of that appeal. This situation can create unique issues in the court's ability to reach a decision. If the remaining justices are evenly divided as to the decision, the decision appealed from is affirmed. See *NEA-Topeka v. U.S.D No. 501*, 269 Kan. 534, 540, 7 P.3d 1174 (2000) (discussing prior appeal in which trial court's judgment controlled in light of an equally divided Supreme Court); *Pierce v. Pierce*, 244 Kan. 246, 767 P.2d 292 (1989) (review of Court of Appeals decision by equally divided Supreme Court); *Paulsen v. U.S.D. No. 368*, 239 Kan. 180, 182, 717 P.2d 1051 (1986) (review of trial court decision by equally divided Supreme Court). In all cases, whether appeals or original actions, four votes are required for a decision. See Kansas Const. art. 3, § 2.

Accordingly, when one or more justices is disqualified or recused from an appeal, the court may assign an active district judge, an active Court of Appeals judge, or a retired justice or judge to sit with the court and participate fully in the hearing and decision process in lieu of the disqualified or recused justice. Kansas Const. art. 3, § 6(f); K.S.A. 20-2616; K.S.A. 20-3002(c).

## **II. COURT OF APPEALS**

### **§ 3.7 Prehearing**

The Chief Judge's Office establishes all the dockets for the Court of Appeals. As soon as the docketing statement is filed, all cases are screened by the court's staff. They assess the cases for factual and legal complexity, determine whether jurisdictional questions exist, and generally assist in the process of placing the case on an appropriate calendar.

After the appellant's and appellee's briefs are filed, cases are then again screened by senior staff attorneys to focus the Court's research on the issues and to help in making the final placement of the case on the Court's calendar. At this point,

cases may be placed on the summary calendar if they meet the criteria found in Rule 7.02(c)(2). All other cases are placed on the Court's general calendar.

Summary calendar cases are deemed submitted to the court on the briefs without oral argument. Any party who wants oral argument on a case assigned to the summary calendar docket may file a motion requesting oral argument. The written motion for oral argument must be served on all parties and filed with the appellate court clerk within 14 days after notice of calendaring has been mailed by the clerk. Rule 7.02(c)(4).

In cases on the general calendar or where a motion for oral argument has been granted, oral argument is limited to 15 minutes per side. Either the appellant or appellee may request additional time for oral argument by printing "oral argument" on the lower right portion of the front cover of the parties' initial brief, followed by the desired amount of time: 20, 25, or 30 minutes. If oral argument is granted, the court will designate the amount of time allowed on the docket. The appellant and the appellee will be granted the same amount of time. Rule 7.02(f)(2).

About 60 days ahead of each scheduled hearing the Chief Judge sets the docket. Cases expedited by statute, or by court policy, are the first assigned to a docket. The docket is electronically filed by the Clerk of the Appellate Courts. Counsel may then view a digital copy of the docket by signing on to the e-filing system. The Clerk will mail a copy to parties who appear without counsel.

**PRACTICE NOTE:** If counsel know ahead of time the days when they are unavailable, they may send a letter to the Chief Judge's Office advising the staff of those dates.

Factors taken into account in setting each hearing docket include: where the cases arose; suggestions by counsel as to the desired location for hearing (Rule 7.02[d][3]); suitability and availability of courtroom facilities; and the number of cases in a given area that are ready for argument. The court hears cases in panels of three judges each. Normally, five panels sit simultaneously, each in a different location, once a month for

eleven months of the year. The Court of Appeals often uses retired senior judges to complete panels, two full-time Court of Appeals judges plus one senior judge on a panel.

Each case is tentatively assigned by the Chief Judge to a judge on the hearing panel. Under judicial supervision, the research attorney for the judge to whom the case is assigned then prepares a prehearing memorandum setting forth the essential facts, the contentions of the parties, the main authorities relied upon, any additional authorities discovered, and the attorney's analysis.

The prehearing memorandum is distributed to each judge on the panel at least one week prior to hearing. Before the hearing, each judge on the panel reads at least the briefs and the prehearing memorandum. When feasible, a prehearing conference of the panel members may be held to sharpen issues and guide questions to counsel from the bench.

### **§ 3.8 Decision**

The panel of judges that heard a case holds a decision conference after the hearing. Time permitting, decision conferences are often held after the day's hearings are concluded. Otherwise, they begin the day after a session is completed, although they may be adjourned from time to time to permit further research. If the judge to whom the case was tentatively assigned is in the majority, that judge prepares the opinion. If that judge is in the minority, the presiding judge reassigns the case to another judge in the majority. The now-dissenting judge receives a case of the transferee's choice. At the decision conference, a tentative decision is made as to whether a formal (published) or memorandum (unpublished) opinion is required. Rule 7.04.

### **§ 3.9 Opinions**

Draft opinions are circulated first to members of the hearing panel for comments, suggestions, and approval. Any dissent is returned with the original opinion to the author of the majority opinion. If the majority opinion is modified in response to the dissent, it is submitted again first to the dissenter for possible

modification of the dissent. Each published opinion is circulated to the entire court, but only after judges joining in the majority opinion and dissent are satisfied with the respective opinions. Further modifications to the opinions may be made but, if modifications go beyond formalities of punctuation or style, each member of the court is given an opportunity to read and comment on the opinion in final form before filing.

All opinions ready for filing are delivered to the clerk and the reporter's office for filing. Copies are sent to unrepresented parties and the district judge at the same time the opinions are officially filed and made public at 9:30 a.m. on Friday.

### **§ 3.10 Motions**

All routine motions not disposed of by the clerk under Rule 5.03 are referred to the court's motions attorney who works under the supervision of a motions panel composed of three Court of Appeals judges designated by the Chief Judge. Each member of the panel serves as motions judge on a rotating basis. The motions judge is responsible for ruling on most routine motions that come before the court. The motions judge has discretion to refer any matter to the full motions panel for decision.

Motions for rehearing are decided by the panel that decided the case. Motions for rehearing by the entire court are distributed to all members of the court and, on the request of any member of the court, a nonbinding poll is taken of the entire court for the guidance of the panel ruling on the motion.

### **§ 3.11 Disqualification**

Before a docket is set, the Chief Judge circulates to each judge on the panel a list showing case captions, the name of the trial judge, and the names of counsel in each case. Each judge examines the list and reports to the Chief Judge if disqualified in a case. Another judge is then assigned to sit with the panel on that case, or the case is assigned to another panel.

### III. CONFIDENTIALITY

#### § 3.12 Confidentiality in the Appellate Courts

The integrity of the judicial process requires that many of the internal workings of the appellate courts be held in strictest confidence. Justices, judges, and court staff and personnel must keep confidential the results of a decision conference or the views expressed by, or vote of, any participant. Likewise, the identity of a justice or judge to whom a case has been assigned is confidential until the opinion is filed. If the opinion is filed *per curiam*, the identity of the author remains confidential indefinitely. Copies of all writings and papers concerning court matters, including the contents of research memoranda, are confidential.