



Supreme Court of South Dakota

OFFICE OF THE CLERK
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M E M O R A N D U M

TO: ATTORNEYS AND PRO SE LITIGANTS INVOLVED IN
APPELLATE PROCESS

FROM: SHIRLEY A. JAMESON-FERGEL

RE: PROBLEM AREAS IN APPELLATE PROCEDURE

DATE: APRIL 2013

This memorandum addresses those areas of appellate procedure in which errors are most often made. It is not a comprehensive summary and should not be used in place of the rules, which for the most part are fully set out at SDCL 15-26A (civil) and SDCL 23A-32 (criminal). It should, however, answer the questions that most frequently arise concerning the rules of appellate procedure.

For ease in future reference, the areas addressed below are set out in alphabetical order.

APPEAL TIME

Civil appeals: 30 days after the judgment or order has been signed, attested, filed and written notice of entry thereof shall have been given to the adverse party. SDCL 15-26A-6.

Criminal appeals: 30 days after judgment is signed, attested and filed. SDCL 23A-32-15.

Intermediate appeals: 10 days from notice of entry of the order from which appeal is sought. SDCL 15-26A-13.

Note 1: The Court considers these times jurisdictional.

Note 2: Timely filing of a motion for judgment n.o.v. or motion for new trial tolls appeal time in both civil and CRIMINAL actions. Civil-SDCL 15-26A-6; Criminal-SDCL 23A-32-15.

BRIEFS

(SDCL 15-26A-60 through 15-26A-81 generally)

Appellant's brief. If no transcript is ordered, the time for service and filing of appellant's brief is computed from the date of **SERVICE** of the notice of appeal. (Most computations are erroneously made from the date of **FILING** of the notice of appeal.) SDCL 15-26A-75. Additionally, since appellant makes service of the notice of appeal, three days cannot be added to appellant's briefing time when service is made by mail.

SDCL 15-26A-75 was amended in 1997 to shorten the time for service and filing of briefs in adoption and dependency and neglect actions. All briefing times are set out as follows:

15-26A-75. Time for serving and filing briefs.

(1) **Appellant's brief.** If a transcript is obtained prior to appeal, or if no transcript is ordered, the appellant's brief shall be due within forty-five days after service of the notice of appeal. If a transcript is ordered but not received prior to appeal, or if procedures pursuant to § 15-26A-54 or 15-26A-55 are followed, the appellant's brief shall be due within forty-five days after service of the transcript or filing of the statements provided for in § 15-26A-54 or 15-26A-55.

(2) **Appellee's brief.** The appellee's brief shall be due for service and filing within forty-five days after service of the appellant's brief, or in the case of multiple appellants, within forty-five days after service of the last appellant's brief.

(3) **Appellant's reply brief.** The appellant's reply brief shall be due for service and filing within fifteen days after service of the appellee's brief, or in the case of multiple appellees, within fifteen days after service of the last appellee's brief.

In any appeal from a judgment or order in an adoption or an abuse and neglect proceeding, including a judgment or order terminating parental rights, all time periods under subdivisions (1) and (2) of this section shall be reduced to twenty-five days.

Typeface and length of briefs are set out in SDCL 15-26A-66.

The table of cases must be alphabetically arranged and should include parallel citations to both South Dakota and Northwestern Reporters. SDCL 15-26A-60; SDCL 15-26A-69.1 SDCL 15-26A Appendix of Forms, Form 4.

The ORIGINAL proof of service must be filed. Oftentimes all briefs sent for filing are copies and each brief contains a copy of the proof of service. This is not acceptable. The original proof of service must accompany the briefs. SDCL 15-26A-79.

A supplemental brief must be filed in the same form and number as a brief-in-chief. SDCL 15-26A-73.

Service of defendant's brief in a CRIMINAL action must be made on both the Attorney General and the State's Attorney. SDCL 23A-32-17.

COMPUTING TIME

If required to perform some act within a specific period of time that commences to run from the date of service of an instrument upon you, the time is computed on the basis of whether the service upon you was personally made or was effected by mail.

EXAMPLE: Assume that you represent appellee, that service of appellant's brief was made upon you personally on July 1, and that you have 45 days from the date of service to serve and file appellee's brief:

Exclude the day of service (July 1) and count forward 45 days, which would be August 15--the due date of appellee's brief.

Using the same dates, assume that service of appellant's brief was made upon you by mail: (note that service by mail is complete on the date mailed pursuant to SDCL 15-6-5(b):

Exclude the day of service (July 1) and count forward 45 days, which would be August 15; add three days because service of appellant's brief was made by mail; and the due date of appellee's brief would be August 18.

Note: If the due date falls on a Saturday, Sunday or holiday, it is moved to the first working day thereafter. SDCL 15-6-6(a).

COSTS

The following costs will be allowed the prevailing party only if proof of same is filed in the form required prior to issuance of the Court's decision:

- (1) Cost of reproducing brief. SDCL 15-30-6(3).
- (2) Cost of transcript. SDCL 15-30-6(4).

Your particular attention is directed to the requirements concerning the form of proof of cost. An example of proof of costs of a brief and transcript is attached at Appendix 1.

DOCKETING STATEMENT

A Docketing Statement must be filed with each CIVIL appeal. SDCL 15-26A-4(2).

Findings of fact, conclusions of law, and the memorandum decision, if any, must be attached to the Docketing Statement. SDCL 15-26A-4(2).

Service of the Docketing Statement must be made and proof thereof filed with the Statement. (Proof of the Notice of Appeal and the Docketing Statement may be made in one instrument, or separate certificates of service may be made.)

Your particular attention is directed to the form of the Docketing Statement. A sample is attached at Appendix 2.

FILING

When something is to be filed by a certain date, it must be in the office of the Clerk.

EXCEPTIONS: Mailing constitutes filing for briefs SDCL 15-26A-81; petitions for permission to take

discretionary appeals SDCL 15-26A-13, and responses to petitions SDCL 15-26A-16.

If a due date falls on a Saturday, Sunday or legal holiday, it is moved to the first working day thereafter. SDCL 15-6-6(a).

INTERMEDIATE APPEALS

SDCL 15-26A-13 through 15-26A-21 generally

An intermediate appeal must be filed in the first instance with the Clerk of the Supreme Court. SDCL 15-26A-13.

The petition at the outset should clearly identify by date of document and filing date the order from which appeal is sought.

An answer to the petition, if any, must be filed within seven days of service of the petition. SDCL 15-26A-16.

Note: A period of time less than eleven days, intermediate Saturdays, Sundays, and any legal holidays are excluded from the computation. SDCL 15-6-6(a).

MULTIPLE CLAIMS OR PARTIES

(SDCL 15-6-54(b) Problems)

If multiple claims for relief or multiple parties are involved in an action, a judgment as to one or more but fewer than all of the claims or parties may not be a final appealable judgment if the trial court has not made the required determination as to finality. Even if the trial court makes this determination, the Supreme Court is not bound by it. SDCL 15-6-54(b).

Note: A significant number of parties fail to recognize that a judgment to which 54(b) applies is not a final appealable judgment and that the trial court should be requested to make the necessary determination with regard to finality.

NOTICE OF APPEAL

The notice of appeal must specify the party or parties taking the appeal. SDCL 15-26A-4(1).

The notice of appeal must designate the judgment(s) and/or order(s) from which appeal is sought. (Identify these by date of instrument and date of filing.) SDCL 15-26A-4(1). Also in criminal actions, note that multiple judgments are frequently entered pursuant to SDCL 23A-27-4. Make sure, therefore, that the notice of appeal specifies ALL judgments from which appeal is taken.

The notice of appeal must be accompanied by proof of service thereof upon counsel for each party other than appellant and upon each party other than appellant unrepresented by counsel. SDCL 15-26A-4(3).

In criminal actions and abuse and neglect proceedings, service of the notice of appeal must be made upon both the State's Attorney and the Attorney General. SDCL 23A-32-17; SDCL 26-7A-112.

A notice of appeal filed under chapter 26-8A shall be signed by the appellant and his or her attorney. (SDCL 15-26A-4(1)). The clerk of the trial court shall not accept for filing a notice of appeal under chapter 26-8A that is not signed by the appellant and his or her attorney (SDCL 15-26A-4(4)).

Your attention is directed to examples of a well-prepared notice of appeal and certificate of service that are attached at Appendix 4.

NOTICE OF REVIEW (SDCL 15-26A-22)

A notice of review must be filed within 20 days of service of the notice of appeal.

A notice of review is filed directly with the Clerk of the Supreme Court.

Failure to file a notice of review prevents an appellee from raising any issues not raised by appel-

lant. See State v. O'Connor, 344 N.W.2d 684 (S.D. 1984); Application of Northwestern Bell Telephone Co., 326 N.W.2d 100 (S.D. 1982); Gridley v. Engelhart, 322 N.W.2d 3 (S.D. 1982).

Note: The Court considers the time for filing jurisdictional.

PETITION FOR REINSTATEMENT OF AN APPEAL

Appeals: A petition for reinstatement of an appeal must be filed within 20 days of the date of entry of the order of dismissal. (Dismissing the appeal without reaching the merits.) SDCL 15-26A-91.

An answer to a petition for rehearing, if any, must be served and filed within 10 days of service of the petition. SDCL 15-26A-91.

PETITIONS FOR REHEARING

Appeals: A petition for rehearing in an appeal must be filed within 20 days of the date of entry of the written opinion on the merits. SDCL 15-30-4.

An answer to a petition for rehearing, if any, must be served and filed within 10 days of service of the petition. SDCL 15-30-4.

Original Proceedings: A petition for rehearing of an original proceeding must be served and filed within 20 days after a copy of the decision has been mailed or delivered by the Clerk. SDCL 15-25-3.

An answer to a petition for rehearing may be served and filed within 10 days of service of the petition. SDCL 15-25-4.

Note: These times are considered jurisdictional. Mailing does not constitute filing.

SERVICE

Service of every nature is timely if it is made before or on the due date either by mail or in person. SDCL 15-6-5(b).

A certificate of service may only be signed by an attorney. Proof of service made by one other than an attorney (a secretary, for instance) should be made in affidavit form. SDCL 15-6-5(b).

TRANSCRIPTS

SDCL 15-26A-48 THROUGH 15-26A-52 generally

A transcript must be ordered within 10 days of filing of the notice of appeal. SDCL 15-26A-48.

An order for transcript must be in writing and the original sent to each court reporter who took proceedings at the trial. SDCL 15-26A-48.

A copy of the order for transcript must be served on all parties, and a copy must be filed with the clerk of the trial court. SDCL 15-26A-48.

If a transcript is not timely ordered, the right to order one is deemed to have been waived. SDCL 15-26A-49.

The order should be specific as to which proceedings are to be transcribed. SDCL 15-26A-48.

- Note 1: The "order" for transcript must be on the prescribed form. A copy of the form is attached at Appendix 6.
- Note 2: Provisions of SDCL 15-26A-48 and 15-26A-49 are strictly enforced.
- Note 3: An order for transcript accompanied by an oral or a written request to "hold off" preparation of the transcript will not be accepted by the reporter and is not considered a valid order.

A P P E N D I X

CERTIFICATE OF COSTS.....APPENDIX 1
DOCKETING STATEMENT APPENDIX 2
NOTICE OF APPEAL & CERTIFICATE OF SERVICE (Civ)..... APPENDIX 3
NOTICE OF APPEAL & CERTIFICATE OF SERVICE (Term).... APPENDIX 4
NOTICE OF APPEAL & CERTIFICATE OF SERVICE (Crim).... APPENDIX 5
TRANSCRIPT ORDER FORM APPENDIX 6

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

PATRICK JONES,)
Plaintiff and Appellant))
vs.))
JOHN SMITH,))
Defendant and Appellee.))

CERTIFICATE OF COSTS

Don Jones, being first duly sworn on oath, deposes and says
as follows:

That he is the attorney for the appellant in the above-entitled action. That the cost of the reproduction and copying of appellant's brief in this action is \$120.00, calculated by multiplying 40 pages x the number of copies (20) x \$.15. That the cost of the transcript is \$175.00, which cost has not been taxed in the trial court; a copy of the court reporter's bill is attached hereto.

Don Jones
PO Box 200
Pierre SD 57501
Attorney for plaintiff
and appellant

Subscribed and sworn to before
me this ____ day of _____, 201__.

Notary Public, South Dakota
My Commission expires: _____

y:\Training\Costs.Tng

(If section B is completed by an appellee filing a notice of review pursuant to SDCL 15-26A-22, the following questions are to be answered as they may apply to the decision the appellee is seeking to have reviewed.)

- 1. The date the judgment of order appealed from was signed and filed by the trial court: _____
- 2. The date notice of entry of the judgment or order was served on each party: _____
- 3. State whether either of the following motions was made:
 - a. Motion for judgment n.o.v., SDCL 15-6-50(b): _____ Yes _____ No
 - b. Motion for new trial, SDCL 15-6-59: _____ Yes _____ No

NATURE AND DISPOSITION OF CLAIMS

(Confine responses to questions 4 through 6 to the space provided.)

- 4. State the nature of each party's separate claims, counterclaims or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

- 5. Appeals of right may be taken only from final, appealable orders. See SDCL 15-26A-3 and 4.
 - a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims? _____ Yes _____ No
 - b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)? _____ Yes _____ No

State each issue intended to be presented for review. (Parties will not be bound by these statements.)

Date: _____

Signature _____

Attach a copy of any memorandum opinion and findings of fact or conclusions of law supporting the judgment or order appealed from. See SDCL 15-26A-4(2).

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES) SS

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

WATER SYSTEMS, INC.,)
Plaintiff,)

vs.)

RONALD G. ROE,)
Defendant,)

vs.)

PATRICK JOHNSON,)
Intervenor.)

(Sample)
NOTICE OF APPEAL

TO: THOMAS J. JONES, of Jones, Hill and Morris, P.O. Box
499, Pierre, South Dakota 57501, Attorneys for
Defendant

WILLIAM R. GRANT, P.O. Box 106, Pierre, South Dakota
57501, Attorney for Intervenor

Notice is hereby given that plaintiff, Water Systems,
Inc., appeals to the Supreme Court of the State of South Dakota
from the final judgment rendered in the above-entitled action on
March 7, 2013, and filed in the office of the Clerk of Courts
within and for Hughes County, South Dakota, on March 7, 2013.

DATED this 11th day of March, 2013.

Richard D. Smith
PO Box 367
Pierre SD 57501
Attorney for plaintiff and
appellant

CERTIFICATE OF SERVICE

I hereby certify that on 11th of March, 2013, I served a true and correct copy of the foregoing Notice of Appeal and Docketing Statement by depositing a copy thereof in the United States mail, postage for first class mail prepaid, to the following persons, to-wit:

Thomas J. Jones
Jones, Hill and Morris
PO Box 499
Pierre SD 57501-5070
Attorneys for defendant

William R. Grant
PO Box 106
Pierre SD 57501
Attorney for intervenor

Richard D. Smith
PO Box 367
Pierre SD 57501
Ph
Attorney for plaintiff and appellant

STATE OF SOUTH DAKOTA)
COUNTY OF STANLEY) SS

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

The People of the State of South)
Dakota, ex rel, South Dakota)
Department of Social Services)
in the Interest of T.S.,)
Child(ren) and concerning)
)
D.S.,)
Respondent Mother,)
and)
L.S.,)
Respondent Father)

(Sample)
NOTICE OF APPEAL
Under SDCL Ch. 26-8A

TO: THE STATE OF SOUTH DAKOTA, MARTY J. JACKLEY, Attorney General,
THOMAS P. MAHER, Stanley County State's Attorney,
_____, Attorney for Minor Child and
_____, Attorney for Respondent Father:
(Parties and Counsel clearly identified)

Notice is hereby given that Respondent Mother, D.S., -Appellant Identified
does hereby appeal to the Supreme Court of the State of South
Dakota from the whole of the final dispositional order rendered
in the above-entitled action on the 7th Day of March, 2013, -Date of Order
and having been filed in the office of the Clerk of Courts within
and for Stanley County, South Dakota, on March 7, 2013. -Filing Date

DATED this 11th day of March, 2013.

Appellant Mother's Full Name

Name
Attorney for Appellant Mother
Address
Phone Number

CERTIFICATE OF SERVICE

I hereby certify that on 11th of March, 2013, I served a true and correct copy of the foregoing Notice of Appeal, Affidavit of Indigence and Docketing Statement by depositing a copy thereof in the United States mail, postage for first class mail prepaid, to the following persons, to-wit:

The Honorable Marty J. Jackley
Attorney General
1302 E Hwy 14 Ste 1
Pierre SD 57501-8501

Mr. Thomas P. Maher
Stanley County State's Attorney
201 S Euclid #1
Pierre SD 57501

Attorney for Minor Child

Attorney for Respondent Father

Name
Attorney for Appellant Mother
Address
Phone Number

STATE OF SOUTH DAKOTA)
COUNTY OF STANLEY) SS

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,))
Plaintiff,))
vs.))
JOHN PAUL DOE,))
Defendant.))

(Sample)
NOTICE OF APPEAL

TO: THE STATE OF SOUTH DAKOTA and MARTY J. JACKLEY,
Attorney General, and THOMAS P. MAHER, State's
Attorney, for Stanley County, South Dakota:
(Parties and Counsel clearly identified)

Notice is hereby given that defendant, John Paul Doe,
Appellant Identified
does hereby appeal to the Supreme Court of the State of South
Dakota from the whole of the final judgment rendered in the above-
entitled action, said judgment being dated March 7, 2013, -Date of Judgment
and having been filed in the office of the Clerk of Courts within
and for Stanley County, South Dakota, on March 7, 2013. -Filing Date

DATED this 11th day of March, 2013.

Name
Attorney for Appellant
Address
Telephone Number

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2013, I served a true and correct copy of the foregoing Notice of Appeal by depositing a copy thereof in the United States mail, postage for first class mail prepaid, to the following persons, to-wit:

The Honorable Marty J. Jackley
Attorney General
1302 E Highway 14 Ste 1
Pierre SD 57501-8501

Mr. Thomas P. Maher
Stanley County State's Attorney
201 S Euclid #1
Pierre SD 57501

Name
Attorney for Appellant
Address
Telephone Number

vs.

ORDER FOR TRANSCRIPT(S)

TO: COURT REPORTER(S) _____:

Pursuant to SDCL 15-26A-48, (name(s) of party/parties placing order) hereby orders a transcript(s) of proceedings in the above-entitled action as indicated below:

DATE OF PROCEEDING	✓ TYPE OF PROCEEDING	NAME OF REPORTER
_____	<u>Arraignment</u>	_____
_____	<u>Closing Statements</u>	_____
_____	<u>Court Trial</u>	_____
_____	<u>Jury Trial</u>	_____
_____	<u>Motion Hearing(s)</u>	_____
_____	<u>Opening Statements</u>	_____
_____	<u>Sentencing</u>	_____
_____	<u>Voir Dire</u>	_____
_____	(Other-Specify)	_____

As the ordering party I hereby certify that notice of appeal was filed with the trial clerk on _____, and that this order is timely made within ten days of said filing date.

I also certify that pursuant to SDCL 15-26A-48, an original of this order has been transmitted to each Court Reporter who took the requested proceedings; that a copy has been filed with the trial clerk; and that service has been made upon all parties to the action as reflected in the attached certificate of service.

DATED this _____ day of _____, _____.

(Name and Address of Attorney/
Party placing order)

COURT REPORTER'S ENDORSEMENT

I, _____, hereby acknowledge receipt of this order for transcript on _____. My anticipated date of completion is _____.

(Explanatory comments should be noted by the reporter on the reverse side of this form.)

Court Reporter

(Nota to Ordering Party: Within ten days of the filing of the notice of appeal the original of this order must be transmitted to the Court Reporter. If more than one Reporter is involved, duplicate originals should be transmitted to each. One copy is to be filed with the trial clerk and a copy is to be served upon counsel for each party to the action or upon each party if unrepresented by counsel. A certificate of service should be attached to the original order and to each copy thereof. See SDCL 15-26A-48.)