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Cost of Appeal

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NOTES

COST OF APPEAL

Montana attorneys frequently decry the bulk and expense of the record on appeal, and, fearing their clients' protests, have hesitated to charge the full worth of their legal services. The new Montana Rules of Appellate Procedure simplify the mechanics and reduce the costs of the appeal process. This report will direct attention to changes in procedure, and how such changes can result in a considerable reduction in costs. Since the new rules have been in effect only a short time, costs under the old system will be reviewed first, so that the expense-saving features of the new rules may be better illustrated.

COSTS UNDER THE OLD RULES

After filing the required notices, the attorney commencing an appeal requests the court reporter to prepare the record.[1] Prior to January 1, 1966, the record on appeal consisted of the judgment roll, the bill of exceptions, and a complete transcript of the proceedings transcribed from the reporter's stenographic tape. Neither reporter nor attorney knew positively which papers were to be included in the bill of exceptions and the judgment roll. This uncertainty, combined with fear that a required document might be mistakenly omitted and thus jeopardize the appeal, resulted in unnecessary bulk and expense.

In order to determine the cost of making an appeal under the old rules, two surveys were conducted: the first requested from selected attorneys a statement of the costs involved in a recent appeal, and the second was addressed to reporters in the eighteen judicial districts of the state, asking for a breakdown of preparation costs for an appellate record.[2]

The Attorney Survey

The following is a brief summary of the responses, which represented all judicial districts:

1. The average transcript on appeal was produced in nine copies, was 152 pages in length, and was prepared at a total cost of $411.54, or a cost per page of $2.70;
2. Briefs averaged forty four pages in length, and the cost of printing averaged $140.77, for a cost per page of $3.20. Ten or more copies were prepared, of which six were filed with the Court;
3. Attorneys were asked if they had ever declined an appeal because

[1]The salary paid to reporters does not include compensation for the transcription or preparation of any document on appeal. Compensation for appeal work is set by statute. See note 4 *infra*.

[2]The survey of attorneys was conducted during the Fall and Winter of 1964-65, and the reporters survey took place during 1965.

the expense was considered prohibitive. Of fifty one answers to this question, twenty seven stated that they had so declined, nineteen answered that they had not, and five replied that they had not, but would not hesitate to do so;[3]

4. The Montana lawyer spends an average of seventy nine hours preparing an appeal, charges $12.24 per hour, for a total fee charge to the client of $966.96, plus travelling and incidental expenses.

Reporters Survey

When the replies to the attorney survey revealed a wide variation in the cost of appellate record preparation between judicial districts, it became necessary to determine the basis on which the charges were made. Questionnaires were sent to the reporters of each district, asking for a breakdown of costs. While nine of the reporters charged only the 7½¢ folio rate prescribed by statute, at least six were, in addition, charging "costs," that is paper, carbon, ribbons, and in some instances, typing.[4] The reporters justified this practice by asserting that the present rate of payment for record preparation, set by statute, does not allow a reasonable profit to be realized.[5] Should further inquiry show this to be true, two alternative solutions are possible. (1) raise the present rate so as to allow the reporters a reasonable profit,[6] or (2) permit the

[3]Attorneys were also asked for suggestions as to reduction of appellate costs. The responses are as follows (in order of most frequent mention): an abbreviated record, simplification of procedure, fewer copies of the record on appeal, elimination of the bill of exceptions, and less expensive methods of reproducing records. All of these suggestions have to some extent been incorporated in the new rules, either as a permissive or mandatory provision.

[4]REVISED CODES OF MONTANA, 1947, § 93-1904 requires a reporter, upon request, to prepare from his notes and the other papers on file, the record on appeal, for which the reporter may charge 7½¢ a folio. (REVISED CODES OF MONTANA will hereafter be cited R.C.M.) A folio is defined as 100 words or ten typewritten lines. There are approximately three folios to the page, for a cost of 22½¢. This amount, when multiplied by the nine transcripts ordinarily prepared equals a total of $2.025 per page. Montana reporters charge the same rate for the original and all carbon copies, a practice not used elsewhere, and not expressly allowed by R.C.M. 1947, § 93-1904. In other states a reduced rate is charged for carbon copies.

[5]This practice is neither sanctioned nor prohibited by statute or court rule, and several reporters who charge only the folio rate, note 4 *supra*, were not aware that other reporters were also charging "costs." Only four of the six reporters who charge costs do so regularly. The other two occasionally charge costs, depending upon the client's wealth and the time allowed them for preparation. Nine of the reporters (not the same nine who charge only the statutory rate) type transcripts, usually in one run, and the other six use one of the duplicating or lithograph processes other than printing. Those who quoted printing costs as compared to other methods, indicated that printing was approximately three times more costly. Several who now charge only the folio rate said they would also charge costs in the future should the number of transcripts be reduced. The reporters were asked for a cost breakdown based on a hypothetical transcript of 100 pages, in six copies, for which total cost under the statutory rate would be $1330. The "costs" which are added to the $1330 by six of the reporters varied from $606 to $1524, or a total charge to the litigant of $1935 to $2854. Reporters in three districts failed to reply to the questionaire, and it is believed that they also charge costs.

[6]The statutory rate could be adjusted in two ways: (1) continue to allow reporters to charge the same rate for the original and each carbon, and raise the present rate, or (2) adopt the system of other states, in which the charge for the original is much higher, and the cost of each carbon is lower, *e.g.*, $1.50 for the first copy, and 10¢ for each additional copy. The latter system is more realistic because the cost of typing is nearly the same whether one or nine copies are made.

present practice to continue—the statutory rate would remain the basic charge, to which labor and materials would be added. The second alternative is undesirable because costs would not be uniform throughout the state, and also because of the opportunity for overcharging. The first solution, therefore, commends itself.

THE NEW RULES

The new rules supersede all of chapter 80, title 93 of the Revised Codes of Montana, 1947, and absorb all previous rules relating to appeals to the Supreme Court. The Montana attorney who carefully studies the new rules and complies with both the mandatory and permissive provisions will drastically decrease the costs of an appeal.

Rule 9: Changes the composition of the record on appeal. The judgment roll and bill of exceptions have been eliminated. In their place, three items are now required: (1) the original papers and exhibits filed in the district court, (2) the transcript of the proceedings, if any, and (3) a certified copy of the docket entries prepared at the district court. The entire transcript is required in only one instance—where appellant urges insufficiency of the evidence to support the verdict, judgment or order. In all other cases, only so much of the proceedings as are necessary and not already on file need be included.[7]

In lieu of the transcript, the parties may prepare a statement showing how the issues arose, the manner in which they were decided, and sufficient facts upon which to make a decision. Upon agreement of the parties and approval of the district court, the statement is certified to the supreme court as the record on appeal. The "agreed statement" may also be filed as an appendix to the brief under Rule 25, *infra*.

Rule 10: The court continues to require six copies of the record, although the proposed rules submitted by the Advisory Committee provided that only one transcript would be required. There is a wide variance in the practice of other states, and statistics are scarce. One study, published in 1958, indicates that at that time, twenty one states used a system in which the record on appeal consists of the original papers on file in the trial court, and a reporter's typed transcript. Montana has adopted this system, with optional use of the apendix system. Of the twenty one states, two required five copies, three required three copies, two required two copies, and fourteen required only one copy.[8] These figures indicate that the Montana requirement of six is greater than that of most other states operating under a similar appellate procedure. Notwithstanding the provisions for an abbreviated record under the

[7]If no transcript of the proceedings was taken, or if it is unavailable, the appellant may prepare a statement from the best means available, including his recollection. The statement is included in the record after respondent's approval and settlement by the judge. See MONT. R. APP. P. 9c.

[8]Willcox, *Justice Lost—By What Appellate Papers Cost*, 33 N. Y. U. L. REV. 934, 967-69 (1958). In 1958, fourteen states employed the appendix system, now optional in Montana. The number of abbreviated transcripts required in those states, therefore, is the same as the number of briefs required.

new rules, a future reduction in the number of copies required would result in a substantial saving.[9]

Rule 25: Provides for an appendix to the briefs, which may be submitted in place of the regular transcript. Either or both parties may use an appendix, and the court may order one at any time before final decision. The appendix is to contain (1) relevant docket entries of the lower court proceeding, (2) any relevant pleading and portions of the charge, finding or opinion, (3) the judgment, order or decision, and (4) parts of the record deemed essential in determining the issues. The opportunity to reduce the size of the appended portion is obvious. Brevity is suggested, since the entire record is available for closer examination. The appendix is arranged chronologically and keyed to the brief for quick reference.

In adopting the appendix on an optional basis, Montana joins at least fourteen other states who have found this system to be the best way of cutting down the amount of written material given to an appellate court.[10] The main advantage of the system is that it is a more effective way of focusing the attention of the court and counsel upon the crucial issues of the appeal. One inherent danger of the system is that in reducing the record, the added expense of counsel's time may outweigh any saving in printing costs. The record must be skillfully abbreviated. Reluctance of attorneys to spend the time eliminating unnecessary matter, the fear of omitting relevant matter, or inability of the two attorneys to "settle" the record, could defeat the appendix system. However, the sanction of costs, Rule 33 *infra,* and knowledge that the full record of the lower court is readily accessible should effectively deter this tendancy. Also Rule 23 limits briefs to fifty pages of printing or seventy pages of material produced by other means.[11]

Rule 27: Although the record on appeal may be typewritten, briefs, and appendices, must be printed or produced by "any duplicating or copying process capable of producing a clear black image on white paper." Although the rule is not new, it is mentioned in order to suggest another means of reducing expenses. The survey of attorneys, *supra,* showed that over seventy percent of briefs were printed. Printing is much more expensive than other processes. Alternate techniques other than typewriting include (1) mimeographing or the "ditto" process, which costs about one-third that of printing, and (2) multilithing and other forms of direct offset and photo-offset reproduction, which are about two-thirds as expensive as printing.[12] Each has certain merits and drawbacks in terms of quality, ease of use, and availability. Technical advances have so improved clarity that these methods now rival

[9]The saving probably would not be proportionate to the reduction in those jurisdictions where reporters charge costs, since typing labor, the largest single item of cost, would remain much the same. See note 6 *supra.*

[10]Willcox, *supra* note 8.

[11]R.C.M. 1947, § 93-8506 limits reasonable costs to the following: appellant's brief, fifty pages; respondent's, forty pages; reply brief, fifteen pages. In addition, reasonable cost is limited to $250 for appellant's, and $200 for respondent's brief.

[12]Interview, Delaney's Bureau of Printing, Missoula, Montana, November, 1965.

printing. In light of the potential savings, attorneys should not hesitate to use these newer processes. If the appendix system is utilized, the length of briefs will be increased considerably. Therefore any shrinkage in the cost of producing briefs will afford some saving to the litigant.

Rule 33: Costs of briefs and appendices taxable in the supreme court shall not be higher than is generally charged for such work. Subsection (e) imposes a sanction for unnecessary costs. Where a party has "caused any redundant, useless, or unnecessary matter to be incorporated in the record, briefs, or appendices. . .he shall not recover as part of his costs so much of the expense as is occasioned thereby." The court should not be reluctant to apply this and other sanctions to prevent violations of the new rules.

Rule 18: Not to be overlooked is an appeal in *forma pauperis,* under which an appellant may proceed without payment of fees or costs, and may also file all papers in typewritten form.[13]

POSSIBLE SAVING

The following exemplifies the amount that may be saved through maximum utilization of the new rules: *Old rules:* Nine copies of a 152 page transcript cost $411.54, and the ten or more copies of a forty four page brief were printed at a cost of $140.77. Based on figures obtained from the surveys, average total cost under the old rules was $552.31. *New rules:* Elimination of the judgment roll and the bill of exceptions would decrease the size of the transcript approximately ten percent, saving $41.00.[14] In addition, assuming that the parties formulate an "agreed statement" of the proceedings, the record might reasonably be reduced to fifty pages, which could be sent up as part of the record, or appended to the brief. If not appended, nine copies would cost $101.25 for fifty pages, $151.87 for a seventy five page settled statement, or $202.48 for a settled statement of 100 pages.[15] The forty four page brief, without appendix, if produced by a process other than printing, would cost as little as $93.85.[16] Therefore, with an agreed statement of fifty pages, unappended, total costs under the new rules would be approximately $195.10, a saving over the old rules of $357.21.

A further saving would be realized should the court reduce the number of transcripts required. On a hypothetical record of 150 pages, total cost would be cut by twenty-two and a half cents per page, or $33.75 for each copy of the transcript which is eliminated. Under the statutory rate, the reporters' total charge for preparation is computed on a cost per page times number of copies basis. If the court were to

[13]The applicant must file motion for leave so to proceed, along with an affidavit showing his inability to pay the fees and costs of an appeal. The affidavit may be patterned after form two in the appendix of forms to the rules.

[14]Interview with court reporter, 4th Judicial District, Missoula, Montana, October, 1965.

[15]The examples are computed according to the rate set by statute.

[16]Produced by the lithograph process, which costs two-thirds that of printing. Duplication would cost about one-third that of printing.

require only one copy as recommended by the Advisory Committee, in practice three copies would be prepared in order that each party could have a copy. Thus, where nine copies are now produced at a cost of $303.75, three would be produced at a cost of $101.25, a total saving of $202.50 for a 150 page record.[17]

CONCLUSION

The simplified procedure under the new rules may be quickly mastered through careful study. Full utilization of the permissive rules, and strict compliance with the mandatory provisions will diminish costs substantially. Experience will determine whether voluntary formulation of the settled statement and the appendix system will be effective. Success or failure of the new system depends largely on the good faith of counsel. The objectives of the new rules will be realized if there is a wholehearted acceptance of the principle that the bar owes a duty to all litigants to use every practicable means of reducing the costs of appeals.

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[17]See note 4 *supra*.

* The article was written by Gary L. Davis, and the surveys were conducted primarily by Joseph E. Rebar.