

STATE OF MINNESOTA
IN SUPREME COURT
C4-84-2133

OFFICE OF
APPELLATE COURTS

MAY 27 2009

FILED

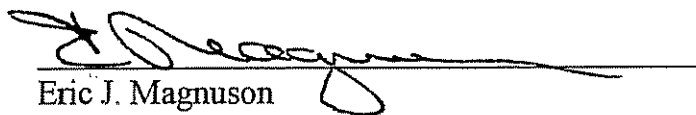
**ORDER ESTABLISHING DEADLINE FOR
SUBMITTING COMMENTS ON PROPOSED
AMENDMENTS TO THE MINNESOTA RULES
OF CIVIL APPELLATE PROCEDURE**

The Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure has proposed changes to the Rules of Civil Appellate Procedure in a report filed on April 16, 2009. This Court will consider the proposed changes without a hearing after soliciting and reviewing comments on the proposed changes. A copy of the committee's report containing the proposed changes is annexed to this order.

IT IS HEREBY ORDERED that any individual wishing to provide statements in support or opposition to the proposed changes shall submit twelve copies in writing addressed to Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Boulevard, St. Paul, Minnesota 55155, no later than July 21, 2009.

DATED: May 27, 2009

BY THE COURT:



Eric J. Magnuson
Chief Justice

No. C4-84-2133

**STATE OF MINNESOTA
IN SUPREME COURT**

In re:

**Supreme Court Advisory Committee
on Rules of Civil Appellate Procedure**

**Recommendations of Minnesota Supreme Court
Advisory Committee on
Rules of Civil Appellate Procedure**

**Final Report
April 15, 2009**

**Hon. Jill Flaskamp Halbrooks, Chair
Hon. G. Barry Anderson, Liaison Justice**

**Richard S. Slowes, Supreme Court Commissioner
Frederick K. Grittner, Clerk of the Appellate Courts
*Ex Officio***

**Thomas C. Atmore, Minneapolis
Hon. Louise Dovre Bjorkman, Saint Paul
Diane B. Bratvold, Minneapolis
Scott A. Buhler, Crookston
Prof. Bradley G. Clary, Minneapolis
Gary A. Debele, Minneapolis
Bradford S. Delapena, Saint Paul
Rita Coyle DeMeules, Saint Paul
C. David Dietz, Saint Paul
Jill I. Frieders, Rochester
Erik F. Hansen, Eden Prairie**

**Kay Nord Hunt, Minneapolis
Hon. Kurt D. Johnson, Mankato
Bruce Jones, Minneapolis
Cynthia L. Lehr, Saint Paul
Timothy J. Pramas, Minneapolis
David T. Schultz, Minneapolis
James S. Simonson, Minneapolis
Gregory R. Solum, Edina
Roy G. Spurbeck, Minneapolis
Paula D. Vraa, Saint Paul
Charles F. Webber, Minneapolis**

**David F. Herr, Minneapolis
Reporter**

Advisory Committee on Rules of Civil Appellate Procedure

EXECUTIVE SUMMARY

Advisory Committee Process Summary

The Court's Advisory Committee on the Rules of Civil Appellate Procedure met twice in early 2009 to discuss issues relating to the operation of the rules and to continue its consideration of the questions surrounding Minnesota appellate practice generally. The committee reviewed and further revised its Recommendation 2 from its October 17, 2008, Final Report, relating to notices of review, and also completed its review of Rule 108 on stays and supersedeas bonds. With this report the committee has considered all of the issues brought to its attention regarding the Rules of Civil Appellate Procedure and does not intend to meet again until there are additional issues requiring its consideration.

Summary of Advisory Committee Recommendations

Recommended Rule Amendments

This report contains five recommendations for amendments to the rules.

These amendments are briefly summarized:

1. Rule 106 should be amended to abolish use of the notice of review and to create a procedure whereby any respondent seeking to assert issues on appeal can proceed by separate "Notice of Related Appeal." (The rule does not modify the currently available appellate avenue of commencing a separate appeal by Notice of Appeal.) A new Form 103C is included in the rules. The court should also adopt related amendments to Rules 103 and 104 to provide for notices of related appeal after the first party appeals and to Rule 131 to provide a modified briefing schedule for cases involving cross-appeals. (This issue was reported to the Court in this committee's report dated October 17, 2008, as Recommendation 2, but was held in abeyance so the committee could consider it further. The proposal made in October 2008 has been revised in minor detail and is now ready for adoption.)

2. Rule 108 should be replaced with a completely revamped rule to clarify and prescribe stay and supersedeas bond procedures.
3. Rules 114 and 115 should be modified to defer briefing until after the itemization of the record has been transmitted in declaratory-judgment and certiorari cases and to modify the process for transmittal of the record itself in certiorari cases under Rule 115.
4. The Court should adopt a new Rule 112 to provide guidance on how confidential information and sealed documents are handled in appellate proceedings. The rule is intended to address recurring issues about the handling of documents filed under seal in the trial courts.
5. The Court should amend Rule 128 to require parties to address in specific detail in the statement of legal issues in a brief two new things: how the issue was raised in the trial court and how it was preserved for appeal. The rule should also be amended to make explicit what is now only a crucial expectation: that parties address the standard of appellate review for every issue in their briefs.

Recommendations Not Requiring Rule Amendments

In addition to the recommendations for rule amendments, which are discussed in detail later in this report, the committee addressed one subject on which it concluded that no rule amendment is warranted at this time. The committee considered a suggestion that it is fundamentally unfair and unnecessary to exempt public parties from the taxation of costs in certiorari proceedings under Rule 115. The committee concluded that this change would likely have significant budgetary ramifications for the affected agencies, and the change should not be made at this time.

Recommendations for Further Study

The committee continues to monitor developments and potential amendments to both the federal rules and other Minnesota rules on the calculation

of time for service, filing, and other action. The committee is particularly mindful of proposed changes to the federal rules whereby all days would be counted—including Saturdays, Sundays, and holidays—and the rules requirements adjusted to reflect the changed periods. (For example, five days under the current rules, not counting weekends, would normally become seven days, including weekends.) In late 2008 those changes were recommended to the United States Supreme Court for possible adoption effective on December 1, 2009; and the Supreme Court has now adopted them. *See* Orders, March 26, 2009, available for review, along with letters transmitting amendments to Congress, at <http://www.uscourts.gov/rules/supct0309.html>. The committee believes that the changes should be evaluated for possible adoption in state court, as having “state days” and “federal days” calculated differently does not seem an ideal approach to court rules. The decision in *Commandeur LLC v. Howard Hartry, Inc.*, 724 N.W.2d 508, 511 (Minn. 2006), recognized the virtue of consistent treatment of state and federal holidays. Any such change should, however, be considered for several sets of Minnesota rules, so that the procedure for counting days is the same in all Minnesota courts.

Effective Date

The committee believes that the changes to Rule 106 (and related changes in Recommendation 1) should probably have at least 60 days between adoption and their effective date. As to all the amendments, the amended rules can apply to appeals pending on that date and filed thereafter. The amendment to Rule 104.01, subdivision 1, may extend the time for a party to file a cross-appeal during a short period following the effective date, but this result is not particularly problematic.

The committee discussed the question of whether a public hearing should be required for these amendments. The committee does not believe that these amendments are likely to be controversial, and a public hearing may not be necessary. This may be a set of recommended changes that would best be

evaluated by a public-comment period, with a hearing only if unexpected controversy were to arise.

Further Work of the Committee

The committee will continue to monitor the operation of the rules and the administration of appellate practice in Minnesota, in addition to the two subjects identified above where its work is continuing. The committee does not intend to meet again in 2009.

Style of Report

The specific recommendation is reprinted in traditional legislative format, with new wording underscoring and deleted words ~~struck through~~. Because the advisory committee comments are all new, no underlining is included.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON THE
RULES OF CIVIL APPELLATE
PROCEDURE

Recommendation 1: Amend Rule 106 to Replace the Notice-of-Review Procedure with Provisions for Filing a Separate Notice of Appeal.

Introduction

Minnesota’s notice-of-review provision has been the source of confusion in appeals. The rule does not have a direct counterpart in federal appellate practice. Two problems most commonly encountered, failure to file a notice of review and filing a notice of review when a separate notice of appeal should have been filed, may result in the court not considering the merits of a potential appellate claim. The committee believes that the problems can best be minimized by replacing the notice of review with a separate procedure for filing a notice of related appeal.

Specific Recommendation

The committee’s recommendation to deal with this issue comprises amendment of Rule 106 and related changes to Rules 103, 104, and 133. A new Form 103C is also adopted and Form 106 is deleted. In addition to creating a new procedure for an appeal by a respondent, these amendments create a single deadline for responding to a notice of appeal, regardless of whether a cross-appeal is asserted. These various amendments are intended to work together and should be viewed as a connected group.

Separate from those related amendments, the Court should amend Rule 131 to provide for an augmented briefing schedule in cases where cross-appeals are filed. The schedule for cross-appeals would allow four briefs, affording both sides an opening brief and an opportunity to respond and reply. This procedure is followed in the federal courts and appears to work well.

1. Rule 106 should be amended as follows:

1 **RULE 106. RESPONDENT’S RIGHT TO OBTAIN REVIEW**

2 A After an appeal has been filed, respondent may obtain review of a
3 judgment or order entered in the same underlying action ~~which~~ that may adversely
4 affect respondent by filing a ~~separate~~-notice of review related appeal in accordance
5 with Rule 103.02, subdivision 2, and Rule 104.01, subdivision 4. ~~with the clerk~~
6 ~~of the appellate courts. The notice of review shall specify the judgment or order to~~
7 ~~be reviewed, shall be served and filed within 15 days after service of the notice of~~
8 ~~appeal, and shall contain proof of service. A filing fee of \$100 shall accompany~~
9 ~~the notice of review.~~

10 **Advisory Committee Comment—2009 Amendments**

11 Rule 106 is amended to abolish the former notice of review,
12 replacing it with the notice of related appeal for all situations where a
13 respondent seeks appellate review of a trial court decision. The
14 amendment avoids the limitations of the former notice of review that
15 could be fatal to an attempt by a respondent to seek review. *See, e.g.,*
16 *Leaon v. Wash. County*, 397 N.W.2d 867, 872 (Minn. 1986)(holding
17 that a respondent seeking appellate relief against parties other than the
18 appellant may obtain review only by separate notice of appeal, but
19 nonetheless considering issue raised improperly). As a practical matter,
20 the amended rule serves only to give notice to a respondent that the
21 proper procedure is no longer contained in this rule but is now found in
22 Rule 103.02, subdivision 2, as to procedure, and Rule 104.01,
23 subdivision 4, as to timing.

24 The amended rule is intended to create a single procedure that will
25 allow a respondent seeking review to file a notice of related appeal.
26 Under the amended rule a notice of related appeal should suffice to
27 permit a respondent to obtain appellate review of any issues arising in
28 the same trial court case but does not foreclose the right of any party to
29 proceed by separate notice of appeal.

30 The new procedure is not intended to change the scope of appellate
31 review. This notice of related appeal procedure is not meant to expand
32 what can be reviewed on appeal or to limit that review. For example,
33 the defendant’s filing of an appeal under Minn. R. Crim. P. 28.02 does
34 not currently create a right to file a cross-appeal or notice of review;
35 and this amendment should not affect that result. *See State v. Schanus*,
36 431 N.W.2d 151, 152 (Minn. Ct. App. 1988). The court of appeals has
37 recognized that the former notice of review could be used to seek
38 review of an otherwise non-appealable order. *See Kostelnik v.*
39 *Kostelnik*, 367 N.W.2d 665, 669 (Minn. Ct. App. 1985); *see also Arndt*
40 *v. Am. Family Ins. Co.*, 394 N.W.2d 791, 794 (Minn. 1986)(citing
41 *Kostelnik* with apparent approval). The committee intends that the
42 notice of related appeal be treated similarly and that an independent
43 basis for jurisdiction not be required.

[Reporter’s Note: As part of this amendment, Form 106 should also be deleted in its entirety.]

2. Rule 103 should be amended as follows:

RULE 103. APPEAL—HOW TAKEN

Rule 103.02. Joint Appeals; Related Appeals; Consolidated Appeals

* * *

Subd. 2. Related Appeals. After one party timely files a notice of appeal, any other party may seek review of a judgment or order in the same action by serving and filing a notice of related appeal. The notice of related appeal shall specify the judgment or order to be reviewed. The notice of related appeal shall be accompanied by:

- (1) a filing fee of \$100,
- (2) a certified copy of the judgment or order from which the related appeal is taken if different than the judgment or order being challenged in the original appeal, and
- (3) two copies of a statement of the case.

A separate cost bond is not required unless ordered by the court.

Subd. 23. Consolidated Appeals. Related appeals from a single trial court action or Appeals in separate actions may be consolidated by order of the appellate court on its own motion or upon motion of a party.

Advisory Committee Comment—2009 Amendments

Rule 103.02 is amended to add a new subdivision 2 to establish a new procedure for filing of a cross-appeal or another related appeal after any party has filed a notice of appeal. This rule applies in civil cases, as the Minnesota Rules of Criminal Procedure address the right to file a cross-appeal in criminal cases. See MINN. R. CRIM. P. 28.04, subd. 3. The new notice is denominated a “Notice of Related Appeal.” See Appendix for form of Notice of Related Appeal (Form 103C). This procedure replaces the notice-of-review procedure formerly established by Rule 106. Existing subdivision 2 is renumbered as subdivision 3 and

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is amended to provide for consolidation of related appeals from a single trial court proceeding. This consolidation may be ordered by the court based on information in the statement of the case or may be ordered upon motion of any party to any related appeal.

3. A new Form 103C should be adopted in the Appendix as follows:

FORM 103C. NOTICE OF RELATED APPEAL (COURT OF APPEALS)

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STATE OF MINNESOTA
COUNTY OF _____

_____ DISTRICT COURT
_____ JUDICIAL DISTRICT

CASE TITLE:

Plaintiff,

NOTICE OF RELATED APPEAL
TO COURT OF APPEALS

vs.

TRIAL COURT CASE NUMBER:

Defendant.

DATE OF ORDER OR JUDGMENT
BEING CHALLENGED:

APPELLATE COURT
FILE NUMBER: _____

TO: Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Please take notice that the above-named [plaintiff/defendant] (state full name) appeals to the Minnesota Court of Appeals and seeks review of the (specify order or judgment by title) of the _____ court, which was [filed/entered] on the date noted above and [granting/denying (describe nature of ruling, such as plaintiff’s motion for a new trial on liability)].

DATED:

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107 NAME, ADDRESS, ZIP CODE, TELEPHONE NUMBER, AND ATTORNEY
108 REGISTRATION LICENSE NUMBER OF ATTORNEY(S) FOR PLAINTIFF:

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110 NAME, ADDRESS, ZIP CODE, TELEPHONE NUMBER, AND ATTORNEY
111 REGISTRATION LICENSE NUMBER OF ATTORNEY(S) FOR DEFENDANT:

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114 _____
115 SIGNATURE

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117 (The trial court caption is used on the notice of appeal and any notice of related appeal.
118 Subsequent documents shall bear the appropriate appellate court caption. RCAP 103.02,
119 subd. 1, specifies the contents of the notice of related appeal and filings required to
120 perfect an appeal, including filing fees. RCAP 104.01, subd. 4, specifies time limits for
121 filing and service of the notice of related appeal. This document must be accompanied by
122 2 copies of a completed statement of the case. RCAP 133.03.)

123 **Advisory Committee Comment—2009 Amendments**

124 This form is new as part of the amendments deleting Rule 106 and
125 abolishing the notice of review and substituting the notice of related
126 appeal. The caption provides information about the earlier appeal to
127 which the later appeal related, including identification of the date of the
128 order or judgment to be reviewed and the appellate court file number of
129 that action, if known.

4. Existing Form 106 should be deleted.

5. Rule 104 should be amended as follows:

130 **RULE 104. TIME FOR FILING AND SERVICE OF NOTICE OF**
131 **APPEAL AND NOTICE OF RELATED APPEAL**

132 **Rule 104.01. Time for Filing and Service**

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134 **Subd. 3. Premature Appeal.** A notice of appeal filed before the
135 disposition of any of the above motions is premature and of no effect, and does not
136 divest the trial court of jurisdiction to dispose of the motion. A new notice of

137 appeal must be filed within the time prescribed to appeal the underlying order or
138 judgment, measured from the service of notice of filing of the order disposing of
139 the outstanding motion. If a party has already paid a filing fee in connection with
140 a premature appeal, no additional fee shall be required from that party for the
141 filing of a new notice of appeal or notice of related appeal pursuant to Rule ~~106~~
142 103.02, subdivision 2.

143 **Subd. 4. Multiple Appeals.** After one party timely files a notice of
144 appeal, any other party may serve and file a notice of related appeal within 14 days
145 after the filing of the first notice of appeal, or within the time otherwise prescribed
146 by subdivisions 1 and 2 of this rule, whichever period ends later.

147 **Advisory Committee Comment—2009 Amendments**

148 Subdivision 4 of Rule 104.01 is a new provision. It is modeled on
149 Fed. R. App. P. 4(a)(3) and, for respondents, replaces the notice of
150 review under former Rule 106 of these rules. The amended rule
151 explicitly recognizes that a party may elect to appeal an issue only after
152 learning that another party has appealed. Where a prior appeal has been
153 filed and remains pending, a subsequent notice of appeal should be
154 denominated “Notice of Related Appeal” and will suffice to raise any
155 issue arising from the same trial court action. *See* Appendix for form of
156 Notice of Related Appeal (Form 103C). The rule permits a party to
157 serve and file a subsequent notice of related appeal within 14 days of
158 the service of a notice of appeal by another party, even if that occurs on
159 the last day to appeal; it does not shorten the normal appeal period even
160 if a party serves and files an appeal on the first possible day.

6. Rule 128 should be amended as follows:

161 **RULE 128. BRIEFS**

162 **Rule 128.02. Formal Brief**

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164 **Subd. 2. Brief of Respondent.** The formal brief of the respondent shall
165 conform to the requirements of Rule 128.02, subdivision 1, except that a statement
166 of the issues or of the facts need not be made unless the respondent is dissatisfied
167 with the statement of the appellant. If a notice of ~~review~~ related appeal is filed
168 pursuant to Rule ~~106~~ 103.02, subdivision 2, the respondent’s brief shall present the

169 issues specified in the notice of ~~review~~ related appeal. A respondent who fails to
170 file a brief either when originally due or upon expiration of an extension of time
171 shall not be entitled to oral argument without leave of the appellate court.

7. Rule 131 should be amended to add a new subdivision 5 that would provide for a different briefing schedule in cases where cross-appeals are filed.

172 **RULE 131. FILING AND SERVICE OF BRIEFS, THE APPENDIX,**
173 **AND THE SUPPLEMENTAL RECORD**

174 **Rule 131.01. Time for Filing and Service**

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176 **Subd. 5. Briefing Schedule for Cross-Appeals; Form of Briefs in**
177 **Cross-Appeals.**

178 **(a) Cross-Appeal Defined.** A cross-appeal, for the purpose of this rule,
179 exists when a notice of appeal and at least one notice of related appeal or separate
180 notice of appeal are filed by parties adverse to each other on appeal. Multiple
181 notices of appeal or related appeal filed by parties who are not adverse to each
182 other do not create cross-appeals.

183 **(b) Designation of Appellant.** The party who files a notice of appeal first
184 is the appellant for the purposes of this rule. If notices are filed on the same day,
185 the plaintiff in the proceeding below is the appellant. These designations may be
186 modified by the parties' agreement or by court order.

187 **(c) Schedule for Filing.** In a case involving a cross-appeal, the appellant's
188 principal brief shall be filed in accordance with Rule 131.01, subdivision 1, and
189 the respondent/cross-appellant's principal brief shall be filed as one brief within
190 30 days after service of appellant's brief. Appellant's reply/cross-respondent brief
191 shall be filed as one brief within 30 days after service of cross-appellant's brief.

192 Respondent/cross-appellant’s reply brief may be filed within 10 days after service
193 of appellant/cross-respondent’s brief.

194 **(d) Form of Briefs in Cross-Appeals.** In a case involving a cross-appeal:

195 **(1) Appellant’s Principal Brief.** The appellant must file a
196 principal brief in the appeal. That brief must comply with Rule 128.01
197 or Rule 128.02, subdivision 1.

198 **(2) Respondent/Cross-Appellant’s Principal and Response**
199 **Brief.** The respondent/cross-appellant must file a principal brief on the
200 cross-appeal and may, in the same brief, respond to the appellant’s
201 principal brief. The respondent/cross-appellant’s brief must comply with
202 Rule 128.01 or 128.02, subdivision 1, as to the cross-appeal and Rule
203 128.02, subdivision 2, as to the appeal, except the brief need not include
204 a statement of the case or a statement of the facts unless the
205 respondent/cross-appellant is dissatisfied with the appellant’s statement.

206 **(3) Appellant’s Response and Reply Brief.** The appellant may file
207 a brief that responds to the principal brief of the respondent/cross-
208 appellant in the cross-appeal and may, in the same brief, reply to the
209 response in the appeal. That brief must comply with Rule 128.02,
210 subdivision 2, as to the response to the cross-appeal and subdivision 3
211 as to the reply on the original appeal.

212 **(4) Respondent/Cross-Appellant’s Reply Brief.** The
213 respondent/cross-appellant may file a brief in reply to the response in
214 the cross-appeal. The brief must comply with Rule 128.02, subdivision
215 4, and must be limited to the issues presented by the cross-appeal.

216 **(5) No Further Briefs.** Unless the court permits, no further briefs
217 may be filed in a case involving a cross-appeal.

218 **(6) Cover.** If briefs are formally bound, the cover of the appellant’s
219 principal brief must be blue; the respondent/cross-appellant’s principal
220 and response brief, red; the appellant’s response and reply brief, yellow;

221 the respondent’s reply brief, gray; and intervenor’s or amicus curiae’s
222 brief, green.

223 **(7) Length limit.**

224 (A) The appellant’s principal brief is acceptable if it complies
225 with the length limits of Rule 132.01, subdivision 3(a).

226 (B) The respondent/cross-appellant’s principal and response
227 brief is acceptable if:

- 228 (i) it contains no more than 16,500 words; or
- 229 (ii) it uses a monospaced font and contains no more than
230 1,500 lines of text.

231 (C) The appellant’s response and reply brief is acceptable if:

- 232 (i) it contains no more than 10,000 words; or
- 233 (ii) it uses a monospaced font and contains no more than
234 750 lines of text.

235 (D) The respondent/cross-appellant’s reply brief is acceptable
236 if they comply with the length limits of Rule 132.01,
237 subdivision 3(b).

238 **Advisory Committee Comment—2009 Amendments**

239 Rule 131.01, subdivision 5, is a new rule to establish alternative
240 rules for briefing in cases where a cross-appeal is filed. The provisions
241 are drawn from Fed. R. App. P. 28.1. The amended Minnesota rule
242 operates as a default timing and brief-length rule; in any case the
243 parties may seek alternate limits by motion, and the court may impose
244 them on its own initiative.

245 The briefing process for cross-appeals under the amended rule is
246 summarized as follows:

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Brief (in order of filing)	Cover Color	Length limit (word count method)
1 Appellant’s principal brief	Blue	14,000 words (unchanged)
2 Respondent/cross-appellant’s principal and response brief	Red	16,500 words
3 Appellant’s response and reply brief	Yellow	10,000 words
4 Respondent/cross-appellant’s reply brief	Gray	7,000 words (unchanged)

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Subdivision 5(a) makes it clear that only multiple appeals by adverse parties create cross-appeals. If several parties on the same side of a case file separate appeals that are not adverse to each other, the normal three-brief schedule of Rule 131.01 applies.

8. Rules 115.03, 116.03, and 133.03 should be amended to create a uniform 14-day deadline for a respondent to serve and file a statement of the case and to make the due date coincide with the date for filing a notice of related appeal.

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RULE 115. COURT OF APPEALS REVIEW OF DECISIONS OF THE COMMISSIONER OF JOBS AND TRAINING ECONOMIC SECURITY DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT AND OTHER DECISIONS REVIEWABLE BY CERTIORARI AND REVIEW OF DECISIONS APPEALABLE PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT

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Rule 115.01. How Obtained; Time for Securing Writ

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Review by the Court of Appeals of decisions of the ~~Commissioner of Economic Security~~ Department of Employment and Economic Development and other decisions reviewable by certiorari and review of decisions appealable pursuant to the Administrative Procedure Act may be had by securing issuance of a writ of certiorari. The appeal period and the acts required to invoke appellate jurisdiction are governed by the applicable statute.

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Advisory Committee Comment—2009 Amendments

Rule 115.01 is amended to change the reference, in both the title and body of the rule, to the Department of Employment and Economic Development, the current name of this agency. See MINN. STAT. § 15.01 (2008).

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* * *

282 **Rule 115.03. Contents of the Petition and Writ; Filing and Service**

283 **Subdivision 1. Contents and Form of Petition, Writ and Response.**

284 The petition shall definitely and briefly state the decision, judgment, order or
285 proceeding which is sought to be reviewed and the errors which the petitioner
286 claims. A copy of the decision and an original and one copy of a completed
287 statement of the case pursuant to Rule 133.03 shall be attached to the petition.

288 The title and form of the petition and writ ~~should~~shall be as shown in the
289 appendix to these rules. The respondent's statement of the case, if any, shall be
290 filed and served ~~within 10~~ not later than 14 days after service of the petitioner's
291 statement.

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293 **Advisory Committee Comment—2009 Amendments**

294 Rule 115.03, subd. 1, is amended to change the timing for filing a
295 statement of the case by a respondent to 14, rather than 10, days after
296 service of the petitioner's statement of the case. This change makes the
297 respondent's statement of the case due on the same day a notice of
298 related appeal would be due. *See* Rule 104.01, subdivision 4, as
299 amended.

300 **RULE 116. SUPREME COURT REVIEW OF DECISIONS OF THE**
301 **WORKERS' COMPENSATION COURT OF APPEALS,**
302 **DECISIONS OF THE TAX COURT, AND OF OTHER**
303 **DECISIONS REVIEWABLE BY CERTIORARI**

304 **Rule 116.03. Contents of the Petition and Writ; Filing and Service**

305 **Subdivision 1. Contents and Form of Petition, Writ and Response.**

306 The petition shall definitely and briefly state the decision, judgment, order or
307 proceeding which is sought to be reviewed and the errors which the petitioner
308 claims. A copy of the decision and two copies of a completed statement of the
309 case pursuant to Rule 133.03 shall be attached to the petition. The title and form
310 of the petition and writ should be as shown in the appendix to these rules. The

311 respondent's statement of the case, if any, shall be filed and served within ~~10~~ 14
312 days after ~~receiving~~ service of the petitioner's statement.

* * *

313 **Advisory Committee Comment—2009 Amendments**

314 Rule 116.03, subd. 1, is amended to change the timing for filing a
315 statement of the case by a respondent to 14, rather than 10, days after
316 service of the petitioner's statement of the case. This change makes the
317 respondent's statement of the case due on the same day a notice of
318 related appeal would be due. See Rule 104.01, subdivision 4, as
319 amended.

320 **RULE 133. PREHEARING CONFERENCE; CALENDAR;
321 STATEMENT OF THE CASE**

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323 **Rule 133.03. Statement of the Case**

324 Two copies of a statement of the case in the form prescribed by the
325 appellate court shall be filed with ~~the~~ any of the following:

- 326 a. a notice of appeal pursuant to Rules-103.01,
327 b. a notice of related appeal pursuant to 103.02, subdivision 2,
328 c. a petition for declaratory relief pursuant to Rule 114.02, or with
329 d. ~~the~~ a petition for the writ of certiorari or notice of appeal pursuant to
330 Rules 115 and 116.

331 The appellant shall serve the attorney for each party separately represented and
332 each party appearing pro se and shall file proof of service with the clerk of the
333 appellate courts.

334 Within ~~ten~~ 14 days after ~~receiving~~ service of the appellant's statement, the
335 respondent may serve on all parties and file with proof of service two copies of its
336 statement clarifying or supplementing the appellant's statement. If the respondent
337 agrees with the particulars set forth in the appellant's statement, no additional
338 statement need be filed. If a party desires oral argument, a request must be
339 included in the statement of the case. If a party desires oral argument at a location

340 other than that provided by Rule 134.09, subdivision 2(a) to (e), the location
341 requested shall be included in the statement of the case.

342 **Advisory Committee Comment—2009 Amendments**

343 Rule 133.03 is amended to change the timing for filing a statement
344 of the case by a respondent or cross-appellant to 14, rather than 10,
345 days after service of the notice of appeal. This change is intended to
346 create a single response date upon which any notice of related appeal
347 and respondent's statement of the case are due. The rule is also
348 amended to make it clear that the 14-day period is measured from the
349 date of service, not the date of receipt of the notice of appeal.

350 The rule is also amended to include reference to declaratory relief
351 proceedings, which also require a statement of the case. Because
352 certiorari proceedings under Rules 115 and 116 are commenced by
353 petition, a reference to notices of appeal under those rules is deleted.

354 **RULE 142. DISMISSAL; DEFAULT**

355 **Rule 142.03. Default of Respondent**

356 If the respondent fails or neglects to serve and file its brief, the case shall be
357 determined on the merits. If a defaulting respondent has filed a notice of ~~review~~
358 related appeal pursuant to Rule ~~106~~ 103.02, subdivision 2, the ~~appellant party~~
359 opposing the related appeal may serve and file a motion for affirmance of the
360 judgment or order specified in the notice of review or for a dismissal of the
361 respondent's review proceedings, subject to a motion to reinstate the review
362 proceedings in accordance with the criteria specified in Rule 142.02.

363 If the appellant fails or neglects to serve and file its brief in response to a
364 respondent's brief in support of a cross-appeal, the case shall be determined on the
365 merits as to those issues raised by the cross-appeal.

Recommendation 2: Rule 108 Should Be Replaced with a Completely Revamped Rule.

Introduction

Rule 108 has historically been one of the more cumbersome, and sometimes opaque, rules in the rulebook. It does not provide sufficient guidance on some of the following questions litigants and judges repeatedly have relating to stays and superseding judgments and orders:

- Does filing an appeal suspend the trial court’s order or judgment?
- If not, can I obtain a stay of the order or judgment?
- What procedure is followed?
- Can I post something other than a supersedeas bond as security?
- What amount of security is required?

Existing Rule 108 answers some of these questions, but in many cases the answer is either hard to find or simply not contained in the rule. For this reason, the committee undertook a complete revamping of Rule 108 and believes it is a vast improvement, primarily as a matter of form. The new rule is intended to address these issues, and to do so in a manner that preserves important aspects of existing law, including judicial discretion in matters of stays, supersedeas bonds, and alternative forms of security.

Specific Recommendation

Existing Rule 108 should be deleted and replaced in its entirety as follows:

~~RULE 108. SUPERSEDEAS BOND; STAYS~~

~~Rule 108.01 Supersedeas Bond~~

~~Subdivision 1. Effect of Appeal; Stay. Except in appeals under Rule 103.03 (b), or as otherwise provided by law, the filing of a proper and timely~~

370 appeal suspends the authority of the trial court to make any order necessarily
371 affecting the order or judgment appealed from. The trial court retains jurisdiction
372 as to matters independent of, supplemental to, or collateral to the order or
373 judgment appealed from, and to enforce its order or judgment.

374 Unless otherwise provided by law, a proper and timely appeal does not stay
375 an order or judgment or enforcement proceedings in the trial court, but the
376 appellant may obtain a stay by providing a supersedeas bond or other security in
377 the amount and form which the trial court shall order and approve, in the cases
378 provided in this rule, or as otherwise provided by rule or statute.

379 An application to approve a supersedeas bond, or for a stay on other terms,
380 shall be made in the first instance to the trial court. Upon motion, the appellate
381 court may review the trial court's determination as to whether a stay is appropriate
382 and the terms of any stay.

383 A supersedeas bond, whether approved by the trial court or appellate court,
384 shall be filed in the trial court.

385 **Subd. 2.** If the appeal is from an order, the condition of the bond shall be
386 the payment of the costs of the appeal, the damages sustained by the respondent in
387 consequence of the appeal, and the obedience to and satisfaction of the order or
388 judgment which the appellate court may give if the order or any part of it is
389 affirmed or if the appeal is dismissed.

390 **Subd. 3.** If the appeal is from a judgment directing the payment of money,
391 the condition of the bond shall be the payment of the judgment or that part of the
392 judgment which is affirmed and all damages awarded against the appellant upon
393 the appeal if the judgment or any part of it is affirmed or if the appeal is dismissed.

394 **Subd. 4.** If the appeal is from a judgment directing the assignment or
395 delivery of documents or personal property, the condition of the bond shall be the
396 obedience to the order or judgment of the appellate court. No bond pursuant to
397 this subdivision is required if the appellant places the document or personal
398 property in the custody of the officer or receiver whom the trial court may appoint.

399 ~~**Subd. 5.** If the appeal is from a judgment directing the sale or delivery of~~
400 ~~possession of real property, the condition of the bond shall be the payment of the~~
401 ~~value of the use and occupation of the property from the time of the appeal until~~
402 ~~the delivery of possession of the property if the judgment is affirmed and the~~
403 ~~undertaking that the appellant shall not commit or suffer the commission of any~~
404 ~~waste on the property while it remains in the appellant's possession during the~~
405 ~~pendency of the appeal.~~

406 ~~**Subd. 6.** In appeals brought pursuant to Rule 115, the trial court may upon~~
407 ~~motion grant a stay of the order, judgment or enforcement proceedings upon such~~
408 ~~terms as to bond or otherwise as it considers proper for the security of the rights of~~
409 ~~the adverse party.~~

410 ~~**Subd. 7.** In cases not specified in subdivisions 2 to 6, filing the bond~~
411 ~~specified in Rule 107 shall stay proceedings in the trial court.~~

412 ~~**Subd. 8.** Upon motion, the trial court may require the appellant to file a~~
413 ~~supersedeas bond if it determines that the provisions of Rule 108 do not provide~~
414 ~~adequate security to the respondent.~~

415 ~~**Rule 108.02 Judgments Directing Conveyances**~~

416 ~~If the appeal is from a judgment directing the execution of a conveyance or~~
417 ~~other instrument, its execution shall not be stayed by an appeal until the instrument~~
418 ~~is executed and deposited with the trial court administrator to abide the judgment~~
419 ~~of the appellate court.~~

420 ~~**Rule 108.03 Extent of Stay**~~

421 ~~When a bond is filed as provided by Rule 108.01, it shall stay all further~~
422 ~~proceedings in the trial court upon the judgment or order appealed from or the~~
423 ~~matter embraced in it; but the trial court may proceed upon any other matter~~
424 ~~included in the action and not affected by the judgment or order from which the~~
425 ~~appeal is taken.~~

426 **~~Rule 108.04 Respondent's Bond to Enforce Judgment~~**

427 Notwithstanding an appeal from a money judgment and security given for a
428 stay of proceedings thereon, the trial court, on motion and notice to the adverse
429 party, may grant leave to the respondent to enforce the judgment upon his filing
430 the bond herein provided, if it be made to appear to the satisfaction of the trial
431 court that the appeal was taken for the purpose of delay. The bond shall be
432 executed by, or on behalf of, the respondent and shall be conditioned that, if the
433 judgment is reversed or modified, the respondent will make any restitution the
434 appellate court directs.

435 **~~Rule 108.05 Joinder of Bond Provisions; Service on Adverse Party~~**

436 The bonds provided for in Rule 107 and Rule 108.01 may be in one
437 instrument or several, at the option of the appellant, and shall be served on the
438 adverse party.

439 **~~Rule 108.06 Perishable Property~~**

440 If the appeal is from a judgment directing the sale of perishable property,
441 the trial court may order the property to be sold and the proceeds deposited or
442 invested to abide the judgment of the appellate court.

443 **~~Rule 108.07 Effect of Proceedings in Supreme Court~~**

444 Where a petition to the Supreme Court for review of a decision of the Court
445 of Appeals is filed or a case is transferred to the Supreme Court pursuant to these
446 rules, and a supersedeas bond has previously been filed to stay the trial court
447 proceedings, the bond shall remain in full force and effect during the pendency of
448 the review unless otherwise ordered by the Supreme Court. The Supreme Court
449 may make any other order appropriate to preserve the status quo or to promote the
450 effectiveness of any judgment which may subsequently be entered.

[Reporter's Note: Because this rule is entirely new, underscoring is omitted for clarity.]

451 **RULE 108. STAYS PENDING APPEAL; SECURITY**

452 **Rule 108.01. Effect of Appeal on Proceedings in Trial Court**

453 **Subdivision 1. Generally No Stay of Enforcement of Judgment or**
454 **Order on Appeal.** Except as otherwise provided by rule or statute, an appeal
455 from a judgment or order does not stay enforcement of the judgment or order in
456 the trial court unless that court orders relief in accordance with Rule 108.02.

457 **Subd. 2. Suspension of Trial Court’s Authority to Make Orders**
458 **Affecting Judgment or Order on Appeal.** Except in appeals under Rule
459 103.03(b), the filing of a timely and proper appeal suspends the trial court’s
460 authority to make any order that affects the order or judgment appealed from,
461 although the trial court retains jurisdiction as to matters independent of,
462 supplemental to, or collateral to the order or judgment appealed from.

463 **Advisory Committee Comment—2009 Amendments**

464 Rule 108.01 is a new rule, but it is not intended to create new law.
465 Its provisions are drawn from existing Rule 108.01, subdivision 1, and
466 codify long-standing common law. Neither the filing of an appeal nor
467 the posting of a cost bond required by Rule 107 stays the order or
468 judgment appealed from. *See Spaeth v. City of Plymouth*, 344 N.W.2d
469 815, 824 (Minn. 1984); *Bock v. Sauk Ctr. Grocery*, 100 Minn. 71, 110
470 N.W. 257 (1907); *Floberg v. Joslin*, 75 Minn. 75, 77 N.W. 557 (1898).
471 An appeal divests the trial court of jurisdiction over the matters
472 appealed but only over matters necessarily involved in the order or
473 judgment appealed from. *See Spaeth*, 344 N.W.2d at 824; *State v.*
474 *Barnes*, 249 Minn. 301, 302-03, 81 N.W.2d 864, 866 (1957). The trial
475 court retains jurisdiction over matters collateral to or supplemental to
476 the order or judgment. *See, e.g., Kellar v. Von Holtum*, 605 N.W.2d
477 696, 700 (Minn. 2000)(trial court retained jurisdiction over motions for
478 attorney fees and costs after appeal was perfected); *Phillips-Klein Cos.*
479 *v. Tiffany P’ship*, 474 N.W.2d 370 (Minn. Ct. App. 1991).

480 **Rule 108.02. Motion for Stay or Injunction in Trial Court; Security.**

481 **Subdivision 1. Motion in Trial Court.** A party seeking any of the
482 following relief must move first in the trial court:

- 483 (a) a stay of enforcement of the judgment or order of a trial court pending
484 appeal;

485 (b) approval of the form and amount of security, if any, to be provided in
486 connection with such a stay; or

487 (c) an order suspending, modifying, restoring, or granting an injunction
488 while an appeal is pending pursuant to Minn. R. Civ. P. 62.02.

489 **Subd. 2. Security Required.** Except as to cases in which a governmental
490 body is the appellant or as otherwise provided by rule or statute, a trial court may
491 grant the relief described in subdivision 1 of this rule if the appellant provides
492 security in a form and amount that the trial court approves. The security provided
493 for in this rule may be in one instrument or several. The appellant must serve
494 proof of the security in accordance with Rule 125.02.

495 **Subd. 3. Form of Security.** The form of the security may be a
496 supersedeas bond, a letter of credit, a deposit of cash or property with the trial
497 court administrator, or any other form of security that the trial court approves as
498 adequate under the circumstances. The appellant bears the burden of
499 demonstrating the adequacy of any security to be given. Unless the trial court
500 orders otherwise, a stay of an order or judgment does not take effect until any
501 security ordered is filed and notice of filing is provided to all parties.

502 **Subd. 4. Amount of Security.**

503 (a) In all cases, the amount of the security, if any, must be fixed at such
504 amount as the trial court determines will preserve the value of the judgment or
505 order to the respondent during the pendency of appeal.

506 (b) When the judgment or order is for the payment of money not
507 otherwise secured, the amount of the security normally must be fixed at such sum
508 as will cover the unpaid amount of the judgment or order, costs on appeal (to the
509 extent security for costs has not already been given under Rule 107), interest
510 during the pendency of the appeal, and any other damages that may be caused by
511 depriving the respondent of the right to enforce the judgment or order during the
512 pendency of the appeal.

513 (c) When the judgment or order determines the possession, ownership,
514 or use of real or personal property (such as in actions for replevin, foreclosure, or
515 conveyance of real property), the amount of the security normally must be fixed at
516 such sum as will compensate the respondent for the loss of use of the property
517 during the pendency of the appeal, costs on appeal (to the extent security for costs
518 has not already been given under Rule 107), interest during the pendency of the
519 appeal, and any other damages (including waste) that may be caused by depriving
520 the respondent of the right to enforcement of the judgment or order during the
521 pendency of the appeal.

522 (d) If a party seeks to stay enforcement of only part of the judgment or
523 order on appeal, the security must be fixed at such sum as the trial court
524 determines is sufficient to secure that portion of the judgment or order on appeal.

525 **Subd. 5. Providers Submit to Jurisdiction of District Court.** If security
526 is provided in the form of a bond, letter of credit, or undertaking with one or more
527 sureties, each provider (whether surety, issuer, or other person liable for the
528 security) submits to the jurisdiction of the district court. A provider's liability may
529 be enforced on motion in the district court, served on the provider or providers in
530 accordance with the Minnesota Rules of Civil Procedure as if the provider or
531 providers were a party or parties to the action, without the necessity of an
532 independent action.

533 **Subd. 6. Review by Court of Appeals.** On a motion under Rule 127, the
534 Court of Appeals may review the trial court's determinations as to whether a stay
535 is appropriate, the terms of any stay, and the form and amount of security pending
536 appeal. The motion for review must:

537 (a) set forth the reasons for granting the relief requested and the facts relied
538 on;

539 (b) include originals or copies of affidavits or other sworn statements
540 supporting the facts that are subject to dispute; and

541 (c) include a copy of any submissions to the trial court, any order entered
542 by the trial court relating to security pending appeal, and any other relevant parts
543 of the record in the trial court.

544 If the Court of Appeals grants the motion, it may give relief on the same
545 terms that a trial court may give relief under Rule 108.02, subds. 2, 3, and 4, and
546 may require that any security that the appellant must provide be posted in the trial
547 court.

548 **Advisory Committee Comment—2009 Amendments**

549 Rule 108.02, subdivision 1, requires that an application for stay of a
550 judgment or order be brought in the trial court. Subdivision 6 of the
551 rule provides for the trial court decision on the stay to be reviewed by
552 the court of appeals and establishes the procedure for allowing the
553 appellate court to conduct that review. Although the matter is raised by
554 motion in the appellate court, the review is for abuse of fairly broad
555 trial court discretion in these matters. *See Axford v. W. Syndicate Inv.*
556 *Co.*, 141 Minn. 412, 168 N.W. 97 (1918).

557 Subdivision 3 recognizes that security may be provided in any of
558 several forms. The former rule's apparent limitation to a surety bond as
559 security is expressly removed in favor of a wider array of potential
560 security arrangements. In many cases, a deposit into court or posting of
561 a letter of credit may be preferable and less expensive. Deposit into
562 court is also allowed by statute as a means not only to stay enforcement
563 of a judgment but to remove a docketed judgment's lien against real
564 property. *See* MINN. STAT. § 548.12 (2008).

565 Subdivision 4 is intended to provide guidance to litigants and
566 judges on the appropriate standards for the setting of required security
567 for a stay. The rule addresses the amount of security required and
568 establishes a guiding principle in subdivision 4(a) of an amount
569 sufficient to preserve the value of the judgment or order during the
570 appeal. For money judgments, the unpaid amount of the judgment,
571 costs on appeal (less \$500 if secured by a cost bond), and interest
572 during the appeal will be the usual amount. This calculation is
573 consistent with the amount of security specified in statutes relating to
574 supersedeas bonds, MINN. STAT. § 550.36 (2008)(allowing stay upon
575 posting of bond in the amount of judgment and interest or a lesser
576 amount allowed by a court), and MINN. STAT. § 548.12
577 (2008)(allowing a party to deposit money into court in amount of
578 judgment, plus interest and costs). The determination of the amount of
579 a bond ultimately lies in the discretion of the courts and can even be
580 waived in its entirety, although the Minnesota Supreme Court has
581 recognized that this discretion must be exercised sparingly. *See N.*
582 *Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312
583 (Minn. 1977); *Briggs v. Shea*, 48 Minn. 218, 50 N.W. 1037 (1892).

584 Although not constrained by the rule, trial court discretion to
585 determine the amount of required security may be limited by statute or
586 common law. There are cases in which no stay may be available,
587 regardless of the amount of security. Child custody orders take effect as

588 directed by the trial court, notwithstanding an appealing party’s
589 willingness to post a bond for the purpose of obtaining a stay. See
590 *Petersen v. Petersen*, 296 Minn. 147, 149, 206 N.W.2d 658, 600 (Minn.
591 1973)(stating, for the purpose of “future guidance of the bench and bar,
592 . . . that orders changing the custody of children are not affected by
593 supersedeas or cost bonds[,] but are to take effect at whatever date the
594 trial court specifies”). For discussion of the factors to be weighed in
595 deciding whether or not to change custody while an appeal is pending,
596 see *Clark v. Clark*, 543 N.W.2d 685 (Minn. Ct. App. 1996)(holding
597 that trial court abused its discretion in denying a stay of custody
598 modification order, in light of drastic changes to living arrangements
599 that would result from modification and lack of endangerment or other
600 exigency requiring immediate change). The court of appeals has
601 addressed the criteria governing whether to grant a stay in the nature of
602 an injunction pending a certiorari appeal in *DRJ, Inc. v. City of St.*
603 *Paul*, 741 N.W.2d 141, 144 (Minn. Ct. App. 2007)(citing MINN. R.
604 CIV. P. 62.02 as to injunctive relief pending appeal; two juvenile rules,
605 one of which establishes a presumption that there will be no stay
606 pending appeal and the other of which explicitly stays further
607 proceedings; and a criminal rule that identifies criteria governing
608 whether to grant release pending appeal). MINN. STAT. § 525.714
609 (2008) provides that the filing of an appeal stays a probate order,
610 although an “additional bond” may be required to secure payment of
611 any damages that may be awarded as a consequence of the appeal. *But*
612 *see In re Estate of Goyette*, 376 N.W.2d 438 (Minn. Ct. App.
613 1985)(holding that failure to post bond ordered by probate court
614 precluded automatic stay of probate proceedings pending appeal).

615 **Rule 108.03. Proceedings in Supreme Court.**

616 Where a petition to the Supreme Court for review of a decision of the Court
617 of Appeals is filed, or a case is transferred to the Supreme Court in accordance
618 with these rules, and security has previously been given to stay proceedings in the
619 trial court, the security shall remain in full force and effect during the pendency of
620 review in the Supreme Court unless otherwise ordered by the Supreme Court. The
621 Supreme Court may make any order appropriate to preserve the status quo or
622 require security or additional security to any person who may suffer damage due
623 to the continued stay of proceedings in the trial court during the pendency of
624 review in the Supreme Court.

625 **Advisory Committee Comment—2009 Amendments**

626 Rule 108 is replaced by an entirely new rule. The changes are
627 intended to provide greater guidance to parties, attorneys, and the
628 courts on how stays of trial court orders and judgments can be obtained.

Recommendation 3: Rules 114 and 115 Should Be Modified to Change the Timing for Briefing in Declaratory Judgment and Certiorari Cases.

Introduction

Under Rules 114 and 115, the timing for briefing in appellate proceedings for review of administrative rulemaking and other administrative matters may result in a party's brief being due before the index of the record is transmitted to the parties. This results in uncertainty as to the contents of the record and in additional motion practice. The committee believes a simple change in the procedure, making the petitioner's brief due 30 days after the itemized list of the record is transmitted from the agency or administrative tribunal, would remedy many of these problems. Additionally, for certiorari proceedings under Rule 115, the rule currently requires that the record itself be transmitted to the appellate courts earlier than it is needed.

The record in proceedings under Rule 114 is transmitted to the appellate court within 30 days after the petition is served, even if a transcript is still being prepared. This procedure is not changed by the recommended amendment, but briefing is deferred until after the record is transmitted. Under Rule 115, the record is transmitted after the relator's brief is filed. But there are often disputes about what should be included in the record; and it would be preferable to ensure that any necessary transcripts are completed and the contents of the record are determined before briefs are filed, so that the parties can include accurate citations to the record in the briefs. The committee recommends that the process of indexing the record be differentiated from the process of transmitting the record to the appellate courts. Once the parties have the index, briefing can begin. If the record remains with the agency or body during the briefing process, the parties can more readily obtain necessary copies of documents for their appendices and addenda. Removing the existing deadlines for transmitting the record will give the

clerk of the appellate courts needed flexibility to request the record when appropriate, after briefs have been filed, and will help to relieve existing storage problems.

Specific Recommendation

1. Rule 114 should be amended as follows:

RULE 114. COURT OF APPEALS REVIEW OF ADMINISTRATIVE RULES

* * *

Rule 114.03 Record on Review of Petition for Declaratory Judgment; Transmission of Record

Subdivision 1. Review of the Record. Review of the validity of administrative rules shall be on the record made in the agency rulemaking process. To the extent possible, the description of the record contained in Rule 110.01 and the provisions of Rules 110.02, 110.05, and 111 shall apply to declaratory-judgment actions.

Subd. 2. Transmission of Record. Unless the time is extended by order of the court on a showing of good cause, the record shall be forwarded by the agency or body to the clerk of the appellate courts with an itemized list as described in Rule 111.01 within 30 days after service of the petition. A copy of the itemized list shall be served on all parties.

Rule 114.04 Briefing

~~Petitioner's brief and appendix shall be served and filed~~ serve and file a brief and appendix within 30 days after transmission of the record by the agency or body, in accordance with Rule 131.01 and briefing shall proceed in accordance with ~~that rule~~ Rule 131.01.

Advisory Committee Comment—2009 Amendments

Rule 114 is amended to alter the timing rules for briefing. The change is made to delay the first deadline for filing a brief to 30 days after the record is transmitted to the appellate courts and the itemized list is provided to all parties.

2. Rule 115 should be amended as follows:

**RULE 115. COURT OF APPEALS REVIEW OF
DECISIONS OF THE COMMISSIONER OF JOBS AND
TRAINING ECONOMIC SECURITY DEPARTMENT OF
EMPLOYMENT AND ECONOMIC DEVELOPMENT
AND OTHER DECISIONS REVIEWABLE BY
CERTIORARI AND REVIEW OF DECISIONS
APPEALABLE PURSUANT TO THE
ADMINISTRATIVE PROCEDURE ACT**

Rule 115.01 How Obtained; Time for Securing Writ

Review by the Court of Appeals of decisions of the ~~Commissioner of Economic Security~~ Department of Employment and Economic Development and other decisions reviewable by certiorari and review of decisions appealable pursuant to the Administrative Procedure Act may be had by securing issuance of a writ of certiorari. The appeal period and the acts required to invoke appellate jurisdiction are governed by the applicable statute.

* * *

Rule 115.04 The Record on Review by Certiorari; Transmission of the Record; Timing of Briefing

Subdivision 1. General Application of Rules 110 and 111. To the extent possible, the provisions of Rules 110 and 111 respecting the record ~~and the time~~ and manner of its transmission and filing or return in appeals shall govern upon the issuance of the writ; and the parties shall proceed as though the appeal had

676 been commenced by the filing of a notice of appeal, unless otherwise provided by
677 this rule, the court, or by statute. Each reference in Rules 110 and 111 to the trial
678 court, the trial court administrator, and the notice of appeal shall be read, where
679 appropriate, as a reference to the body whose decision is to be reviewed, to the
680 administrator, clerk or secretary thereof, and to the writ of certiorari respectively.

681 **Subd. 2. Transcript of Audiotaped Proceedings.** If a proceeding has
682 been audiotaped and a record of the proceeding is necessary for the appeal, the
683 relator shall order the transcript from the agency or body within ten days after the
684 writ of certiorari is filed. The relator shall make appropriate financial
685 arrangements with the agency or body for the transcription. The agency or body
686 shall designate a court reporter or other qualified person to transcribe the
687 audiotape. The agency or body shall serve and file a transcript certificate pursuant
688 to Rule 110.02, subdivision 2(a) within ten days after the transcript is ordered.
689 The reporter shall file the original and first copy of the transcript with the agency
690 or body, deliver a copy to the attorney for each party to the appeal separately
691 represented, and file a certificate of filing and delivery pursuant to Rule 110.02,
692 subdivision 2(b).

693 **Subd. 3. ~~Transmission of Record~~ Notice of Contents of Record.** ~~Within~~
694 ~~ten days after the due date for the filing of relator's brief, the agency or body shall~~
695 ~~transmit the entire record of the proceeding under review to the clerk of the~~
696 ~~appellate courts, pursuant to Rule 111.01. Unless the time is extended by order of~~
697 ~~the court on a showing of good cause, the itemized list of the contents of the~~
698 ~~record as described in Rule 111.01 shall be served on all parties and filed with the~~
699 ~~clerk of the appellate courts by the agency or body within 30 days after service of~~
700 ~~the petition or 14 days after delivery of the transcript in accordance with~~
701 ~~subdivision 2 of this rule, whichever date is later. Service and filing shall be~~
702 ~~accomplished by notice of service and filing, as in Form 115C of these rules,~~
703 ~~which shall constitute proof of service.~~

704 **Subd. 4. Timing of Briefing.** Relator shall serve and file a brief and
705 appendix within 30 days after the service of the itemized list of contents of the
706 record by the agency or body, and briefing shall proceed in accordance with Rule
707 131.01.

708 **Subd. 5. Transmission of Record.** The record shall be retained by the
709 agency or body until the clerk of the appellate courts requests that it be transmitted
710 to the court. The record shall thereupon be transmitted promptly to the clerk of
711 appellate courts with a copy of the itemized list of the contents, in quadruplicate.

712 **Advisory Committee Comment—2009 Amendments**

713 Rule 115.04 is amended to change the timing rules for certiorari
714 proceedings. Subdivision 3 establishes a new Form 115C to ensure that
715 the itemized list is provided to all parties and to determine the date and
716 means of service and filing. One of the purposes of this amendment is
717 to defer briefing until the contents of the record are known to the
718 parties. Subdivision 4 establishes the timing requirements for briefing.

719 Subdivision 5 clarifies that the record itself is then to be retained by
720 the agency or body until needed by the appellate court. This provision
721 does not directly affect the litigants—it is primarily a matter of
722 administration of the appellate court clerk’s office. The rule requires
723 that the record be accompanied by the itemized list of the contents in
724 quadruplicate because that form is used to document receipt by the
725 appellate courts and again to document receipt when the record is
726 returned to the agency or body.

3. Form 115B should be amended to reflect these timing changes.

727 **FORM 115B. WRIT OF CERTIORARI**

728
729 STATE OF MINNESOTA
730 IN COURT OF APPEALS

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732 CASE TITLE:

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734 WRIT OF CERTIORARI

735 Relator,

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737 COURT OF APPEALS NUMBER:

vs.

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Respondent,

(AGENCY OR BODY) NUMBER:

(Agency or Body),
Respondent.

DATE OF DECISION:

TO: (Agency or Body)

You are hereby ordered to return to the Court of Appeals and serve on all parties in accordance with Rule 115.04, subdivision 3, within 30 days after service of the petition or 14 days after delivery of a transcript, whichever is later, 10 days after the date relator's brief is due an itemized statement of the record, exhibits and proceedings in the above-entitled matter so that this court may review the decision of the (agency or body) issued on the date noted above.

You are further directed to retain the actual record, exhibits, and transcript of proceedings (if any) until requested by the Clerk of the Appellate courts to deliver them in accordance with Rule 115.04, subdivision 5.

Copies of this writ and accompanying petition shall be served forthwith either personally or by mail upon the respondent (agency or body) and upon the respondent or its attorney at:

(address)

Proof of service of the writ and of the itemized list shall be filed with the clerk of the appellate courts.

DATED:

Clerk of Appellate Courts

(Clerk's File Stamp)

By: _____
Assistant Clerk

4. A new Form 115C should be adopted as follows:

**FORM 115C. CERTIFICATE OF SERVICE AND FILING
OF ITEMIZED LIST**

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

Relator,

CERTIFICATE OF SERVICE AND
FILING OF ITEMIZED LIST

vs.

Court of Appeals

Respondent,

APPELLATE COURT CASE NUMBER:

(Agency or Body),

(AGENCY OR BODY) NUMBER:

Respondent.

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
St. Paul, MN 55155

A copy of the itemized list of the contents of the record is attached to this certificate, was served on each separately-represented party to this proceeding, and is transmitted to the Clerk of Appellate Courts in accordance with Rules 115.04, subdivision 3, and 111.01. Service was made as follows:

<u>Party Name</u>	<u>Address</u>	<u>Date Served</u>	<u>Method of Service</u>
Clerk of Appellate Courts	Minnesota Judicial Center St. Paul, MN 55155		

etc.

816 DATED:

817
818 _____
819 SIGNATURE

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821 ADDRESS AND TELEPHONE NUMBER

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824 cc: All Counsel of Record

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826 (Rule 115.04, subd. 3, requires the service and filing of the itemized list of the
827 contents of the record as specified in Rule 111.01 to take place within 30 days
828 after service of the petition for writ of certiorari or 15 days after delivery of a
829 transcript, whichever is later. This notice requires service and filing of the
830 itemized list of the record; the actual record is to be retained until the clerk of
831 appellate courts requests that it be transmitted to the court. *See* Rule 115.04, subd.
832 4.)

Recommendation 4: The Court Should Adopt a New Rule 112 to Provide Guidance on Handling Confidential and Sealed Information in Appellate Proceedings.

Introduction

The appellate courts have developed standard practices for dealing with information that is confidential—either by trial court order, by operation of rule in the trial courts dealing with restricted identifiers such as social-security or bank-account numbers, or in the very unusual circumstance where a party seeks to have materials treated as confidential for the first time on appeal. The committee believes it is appropriate that these practices be included in the appellate rules so that litigants and their attorneys are more likely to be aware of them and to allow the parties to deal more efficiently with sealing issues. The committee believes that the proposed rule is a true rule of procedure and that it does not expand or contract the right to have information sealed on appeal.

Specific Recommendations

Rule 112 should be amended as follows:

[Reporter’s Note: Because this rule is entirely new, underscoring is omitted for clarity.]

**RULE 112. CONFIDENTIAL INFORMATION; SEALING
OF PORTIONS OF RECORD**

Rule 112.01 Status of Confidential Record Material on Appeal.

Subdivision 1. Materials Filed Under Seal in the Trial Court. Materials that are filed under seal in the trial court pursuant to statute, court rule, or trial court order, as well as any documents containing restricted identifiers as defined in Rule 11 of the General Rules of Practice, will remain under seal on appeal unless either the trial court or appellate court orders otherwise.

841 **Subd. 2. Sealing of Materials on Appeal.** In extraordinary situations
842 where material in the record is confidential or trade-secret information that was
843 not protected by a confidentiality order in the trial court, a party may move to have
844 it filed under seal on appeal. The motion must demonstrate the need for sealing
845 the information and must set forth the efforts made to maintain the confidentiality
846 of the information before the motion was brought.

847 **Advisory Committee Comment—2009 Adoption**

848 Rule 112 is a new rule intended to codify existing practices relating
849 to handling confidential information on appeal.

850 The general policy of the Minnesota courts is that court records are
851 accessible to any member of the public. See Rule 2 of Minnesota Rules
852 of Public Access to Records of the Judicial Branch, *reprinted in*
853 *MINNESOTA RULES OF COURT: STATE 1083* (West 2009 ed.). This
854 general policy is carried forward by Rule 4 governing accessibility of
855 case records. Rule 4, subdivision 3, specifies that restricting access to
856 case records is governed by court rules. Many statutes limit access to
857 particular case types. *See* Minnesota Rules of Public Access to Records
858 of the Judicial Branch Rule 4, Advisory Committee Comment—2005,
859 *reprinted in* *MINNESOTA RULES OF COURT: STATE 1085-86* (West 2009
860 ed.)(collecting citations to statutes). In addition, Minn. Gen. R. Prac. 11
861 requires filing of personal identifying information in a separate
862 document filed under seal.

863 The majority of orders restricting access to court records in civil
864 cases are entered pursuant to Minn. R. Civ. P. 26.03(e)(limiting persons
865 present during discovery, (f)(allowing court to order sealing of
866 depositions), and (h)(allowing court to order parties to file other
867 documents under seal). *See generally* *Minneapolis Star & Tribune v.*
868 *Schumacher*, 392 N.W.2d 197 (Minn. 1986). Criminal case protective
869 orders are governed by Minn. R. Crim. P. 25. *See generally*
870 *Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550 (Minn.
871 1983); *Nw. Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn.
872 1977).

873 The most common situation relating to sealed materials on appeal
874 relates to the continued protection of materials filed under seal in the
875 trial court. Subdivision 1 of Rule 112 restates the general rule that
876 documents that are sealed in the trial court will remain sealed on
877 appeal.

878 **Rule 112.02. Handling of Sealed Portions of the Appellate Record.**

879 Any sealed materials that need to be included in an addendum or appendix
880 on appeal shall be prepared in a separately bound Confidential Addendum or
881 Confidential Appendix and filed in a sealed envelope designated as “Filed under

882 Seal pursuant to Order of the _____ Court dated _____” or in
883 substantially similar form. To the extent information filed under seal must be
884 discussed in motions or briefs on appeal, the parties must file separate “public”
885 and sealed versions of the motion or brief, with confidential information redacted
886 in the public version and stated as necessary in the sealed version. Each separately
887 represented party must be served with both the “public” and sealed versions of any
888 documents filed with the court.

889 **Advisory Committee Comment—2009 Adoption**

890 Rule 112.02 creates the required process for handling sealed records
891 on appeal. The rule is intended to permit the ready handling of
892 confidential documents by the court and to ensure that sealed
893 information remains inaccessible to the public. Because the parties to
894 an action have an interest in ensuring that any “public” version of a
895 document has appropriately been redacted, service of both the public
896 and sealed version must be made on all parties.

897 **Rule 112.03. Duty to Maintain Confidentiality.**

898 Every party to an appeal must take reasonable steps to prevent the
899 disclosure of confidential information, both in oral argument and written
900 submissions filed with the court, except in the manner prescribed in Rule 112.02.

901 **Advisory Committee Comment—2009 Adoption**

902 Rule 112.03 imposes an affirmative duty on all parties to maintain
903 the confidentiality of information that is protected by statute, rule, or
904 court order. This rule requires filing information separately and under
905 seal and may also require care at oral argument not to disclose
906 confidential information.

907 **Rule 112.04. Oral Argument.**

908 Appellate arguments are public hearings.

909 **Advisory Committee Comment—2009 Adoption**

910 Even in cases where portions of the record are confidential and filed
911 under seal, the oral argument hearing will be in open court, open to the
912 public, and possibly televised. The rule does not forbid closing a

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hearing to the public. Neither the Minnesota Supreme Court nor the Minnesota Court of Appeals has closed a hearing in the past.

Recommendation 5: Rule 128 Should Be Amended to Require the Appellant to State Where Every Issue was Raised in the Trial Court and How the Issue was Preserved for Appeal.

Introduction

As the Court is well aware, appellate courts generally do not review claims of error that were not raised in the trial court or that were not preserved for appeal by, for example, including them as grounds for a motion for a new trial. *See, e.g., Minn.-Iowa Tel. Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297, 305 (Minn. 1980)(issues must be raised in order to be reviewed); *Sauter v. Wasemiller*, 364 N.W.2d 833, 835 (Minn. Ct. App. 1985)(quoting *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976)), *aff'd*, 389 N.W.2d 200 (Minn. 1986)(without motion for a new trial, appellate court may review nothing other than whether the evidence supports the findings of fact and the findings support the conclusions of law and the judgment).

Despite the existence of a fair amount of appellate court guidance on what is required to preserve issues for appeal, numerous appeals continue to be taken where these crucial steps have been overlooked. Even where the appellate issues are properly preserved, many appellate briefs fail to help the court determine where and how issues were preserved. The committee believes it is appropriate to create a standardized procedure to help appellate attorneys focus on these issues and to help the appellate courts recognize potential issues. The recommended rule requires appellants to state, as part of the statement of the legal issues in the brief, exactly where in the record the issue was raised before the trial court and how it was preserved for appeal. The amendment is derived from a similar provision in the Iowa Rules of Appellate Procedure, which appears to be helpful to litigants and the courts there. *See generally* Iowa R. App. P. 6.903(2)(g)(1).

Specific Recommendations

Rule 128 should be amended as follows:

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RULE 128. BRIEFS

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128.02 Formal Brief

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Subdivision 1. Brief of Appellant. The formal brief of the appellant shall contain under appropriate headings and in the order here indicated:

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(a) A table of contents, with page references, and an alphabetical table of cases, statutes, and other authorities cited, with references to the pages of the brief where they are cited.

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(b) A concise statement of the legal issue or issues involved, omitting unnecessary detail. Each issue shall be stated as an appellate court would state the broad issue presented. Each issue shall be followed by:

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1. a description of how the issue was raised in the trial court, including citations to the record,

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2. a concise statement of the trial court’s ruling,

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3. a description of how the issue was subsequently preserved for appeal, including citations to the record, and

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4. a list of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions.

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(c) A statement of the case and the facts. A statement of the case shall first be presented identifying the trial court and the trial judge and briefly indicating the nature of the case and its disposition. There shall follow a statement of facts

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relevant to the grounds urged for reversal, modification or other relief. The facts

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must be stated fairly, with complete candor, and as concisely as possible. Where it

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is claimed that a verdict, finding of fact or other determination is not sustained by

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the evidence, the evidence, if any, tending directly or by reasonable inference to

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sustain the verdict, findings or determination shall be summarized. Each

941 statement of a material fact shall be accompanied by a reference to the record, as
942 provided in Rule 128.03.

943 (d) An argument. The argument may be preceded by a summary
944 introduction, but it must include the contentions of the party with respect to the
945 issues presented, the applicable standard of appellate review for each issue, the
946 analyses, and the citations to the authorities. Each issue shall be separately
947 presented. Needless repetition shall be avoided.

948 (e) A short conclusion stating the precise relief sought.

949 (f) The appendix required by Rule 130.01.

950 **Subd. 2. Brief of Respondent.** The formal brief of the respondent shall
951 conform to the requirements of Rule 128.02, subdivision 1, except that a statement
952 of the issues or of the case or facts need not be made unless the respondent is
953 dissatisfied with the statement of the appellant. If a notice of ~~review~~related
954 appeal is filed pursuant to Rule ~~106~~ 103.02, subdivision 2, the respondent's brief
955 shall present the issues specified in the notice of ~~review~~ related appeal. A
956 respondent who fails to file a brief either when originally due or upon expiration
957 of an extension of time shall not be entitled to oral argument without leave of the
958 appellate court.

959 **Advisory Committee Comment—2009 Amendments**

960 Rule 128.02, subdivision 1(b), is amended to require specification
961 of how each issue was raised in the record and preserved for appeal in
962 the trial court, including citations to the record. These are matters that
963 are important to many appeals and adding this requirement is intended
964 to make it easier for the court to determine that each issue was properly
965 raised, decided, and preserved for appeal. This requirement has been
966 implemented by other courts, *see, e.g.*, Iowa R. App. P. 6.14, and the
967 committee believes this requirement will improve the quality of
968 briefing in Minnesota appeals. For example, subparagraph 1 requires
969 specification of where an evidentiary objection or offer of evidence was
970 made, including a transcript citation, and subparagraph 3 where it was
971 raised in a motion for new trial to preserve it for appeal. The rule does
972 not expand what is required to raise or preserve an issue for appeal; it
973 only requires that specific information be provided in the statement of
974 issues in the appellant's brief about how these steps were taken.

975 Rule 128.02, subdivision 1(d), is amended to require that a brief
976 address the applicable standard of appellate review. The standard of

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review is crucial to the analysis of every issue by the appellate court. A useful compendium of the standards of review for particular issues is Minnesota Court of Appeals, Standards of Review (Aug. 2008), available for review or download at <http://www.lawlibrary.state.mn.us/casofrev.html>. The rule does not dictate how the standard of review be set forth—whether in a separate section or at the beginning of the argument for an issue—although in most cases it is best handled at the beginning of the argument for each issue. The applicable standard of review must be addressed for each issue in an argument.

Subdivision 2 is amended to reflect the amendment of rule 106 to abolish the notice of review and adoption of Rule 103.02, subdivision 2, to adopt the notice of related appeal.