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OFFICE OF
APPELLATE COURTS

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FILED

May 8, 1998

Mr. Frederick K. Grittner
Clerk of Appellate Courts
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: Minnesota Supreme Court Advisory Committee
on Rules of Civil Appellate Procedure
File No. C4-84-2133

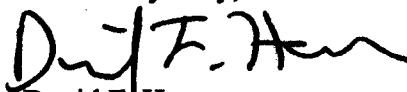
Dear Mr. Grittner:

Enclosed for filing please find the Supplemental Report of the Minnesota Supreme Court Advisory Committee on Rules of Civil Appellate Procedure (May 8, 1998). I enclose an original and 12 copies of the Report, together with a disk containing the rules in WordPerfect 6.1 format.

If you require anything further with respect to these rules, please let me know.

Best personal regards.

Yours very truly,



David F. Herr
Co-Reporter

DFH/psp
Enclosure

cc: Honorable Sandra S. Gardebring
Eric J. Magnuson
Committee Members

C4-84-2133
**STATE OF MINNESOTA
IN SUPREME COURT**

In re:

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

**SUPPLEMENTAL RECOMMENDATIONS OF THE
MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF
CIVIL APPELLATE PROCEDURE
(May 8, 1998)**

Introduction

The Court's Advisory Committee on Rules of Civil Appellate Procedure respectfully submits this supplemental report to advise the Court with respect to matters raised in the public comments and public hearing on the pending amendment recommendations and to provide advice on the issues relating to the effective date of these rules.

Summary of Supplemental Recommendations

Response to Public Comments.

The committee responded to the various public comments with an undertaking to revise some of the rules and comments it had previously recommended to the Court. This Supplemental Report includes four changes, each provided as a separate replacement for the language in the January 30, 1998, Final Report of the advisory committee. These changes:

1. Modify Rule 108.01 to incorporate express provision for stays in matters of appellate review of administrative rulemaking under new Rule 115.
2. Modify the proposed language of Rule 110.02, subd. 4 to address concerns of court reporters regarding the transcription of recorded evidence.

3. Modify the Advisory Committee Comment to Rule 114 to improve its accuracy and clarity.

4. Modify Form 115A to refer to “Petitioner” as such until a writ issues.

These changes should improve the operation of the rules and should eliminate some confusion over their interpretation.

Effective Date.

Although every set of rules amendments requires consideration of the potential effective date, these changes to the Rules of Appellate Procedure present particularly knotty problems because they shorten some time periods to appeal and lengthen others. It is important that any order adopting these rules contain an express provision and avoid cutting off important rights to appeal. We recommend the following language for inclusion in any order adopting these rules:

Effective Date. The Effective Date of these amendments is January 1, 1999. These amendments shall apply to all actions or proceedings pending on or commenced on or after [the effective date]. As to matters pending on the effective date of these rules, the following special rules apply:

1. The time to appeal from appealable orders entered before the Effective Date shall be governed by Rule 104, as amended.

2. As to appeals from judgments entered before the effective date of these rules, appeals may be taken within the time permitted by either the old or new version of Rule 104.

3. For appeals of orders entered before the Effective Date of these rules and governed by former Rule 104.04 an appeal may taken within the time permitted by either the old or new version of the rules, including consideration of any tolling effect of former Rule 104.04.

4. As to all matters where post-trial motions as defined in new Rule 104.01, subd. 2, are served and filed but not decided as of the Effective Date, the time to appeal shall be governed by that rule.

This effective date provision will avoid any problems where deadlines for appeal would otherwise be shortened under the new rules for cases pending in some status at the time of adoption. This order limits the transition period generally to 30 days or so, extended for the pendency of post-trial motions for however long they may take to be decided. During all periods appellants are allowed rules that are either as long as, or longer than, the period that would apply were the rules not amended.

Conclusion

These further changes should improve the rules initially submitted to the Court, and we recommend them for adoption.

Respectfully submitted,

MINNESOTA SUPREME COURT ADVISORY
COMMITTEE ON RULES OF CIVIL APPELLATE
PROCEDURE

Specific Further Recommendations

1. The following revised Rule 108 replaces completely Rule 108 in the Final Report at 15-16, lines 477–513.

RULE 108. SUPERSEDEAS BOND; STAYS

RULE 108.01 SUPERSEDEAS BOND

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

Unless otherwise provided by law, ~~An~~ a proper and timely appeal ~~from~~ does not stay an order or judgment ~~shall stay~~ or enforcement proceedings in the trial court ~~and save all rights affected by it only if,~~ but the appellant may obtain a stay by providing a supersedeas bond or other security in the amount and form which the trial court shall order and approve, in the cases provided in this rule, or as otherwise provided by rule or statute.

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

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

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

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

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

Subd. 5. If the appeal is from a judgment directing the sale or delivery of possession of real property, the condition of the bond shall be the payment of the value of the use and occupation of the property from the time of the appeal until the delivery of possession of the property if the judgment is affirmed and the undertaking that the appellant shall not commit or suffer the

commission of any waste on the property while it remains in the appellant's possession during the pendency of the appeal.

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

Subd. 67. In cases not specified in subdivisions 2 to 56, filing the bond specified in Rule 107 shall stay proceedings in the trial court.

Subd. 78. Upon motion, the trial court may require the appellant to file a supersedeas bond if it determines that the provisions of Rule 108 do not provide adequate security to the respondent.

Advisory Committee Comment—1998 Amendments

The 1998 revisions to Rule 108 make explicit a number of principles regarding appellate jurisprudence previously found in case law. First, the mere filing of an appeal does not, except where provided by statute, rule, or case law, stay proceedings in the trial court to enforce the judgment or order which has been appealed. Second, while an appeal may (with some exceptions) suspend the authority of the trial court to modify the order or judgment appealed from, the suspension of the trial court's jurisdiction is not all-encompassing. Generally, the trial court retains authority to enforce the judgment, and to consider and rule on matters that are supplemental or collateral to the judgment. If there is uncertainty about the scope of the trial court's ongoing jurisdiction, a motion to resolve the question may be directed to the appellate court.

The posting of a supersedeas bond or a request for stay on other grounds is not required for an appeal to be perfected or proceed. However, because the order or judgment that is the subject of the appeal is not generally stayed automatically, a matter may, in some circumstances, become moot while the appeal is pending. Under prior practice, stays in appellate proceedings relating to administrative rulemaking were obtained under MINN. STAT. § 14.65 (1996).

The revisions also set out more clearly the procedure for obtaining a stay. Application for the stay is made in the first instance to the trial court, and not the appellate court. The bond, whether approved by the trial court, or upon review by the appellate court, is still filed in the trial court, and the rule now so specifies.

(Underlining to show changes from initial report in comments only; further changes to text of rule not marked).

2. **The following revised Rule 110 replaces completely Rule 110 in the Final Report at 39–41, lines 1256–1329.**

RULE 110. THE RECORD ON APPEAL

* * *

RULE 110.02 THE TRANSCRIPT OF PROCEEDINGS; DUTY OF APPELLANT TO ORDER; NOTICE TO RESPONDENT IF PARTIAL TRANSCRIPT IS ORDERED; DUTY OF REPORTER; FORM OF TRANSCRIPT

* * *

Subd. 4. Transcript Requirements. The transcript shall be typewritten on 8 ½ by 11 inch or 8 ½ by 10 ½ inch unglazed opaque paper with double spacing between each line of text, shall be bound at the left-hand margin, and shall contain a table of contents. To the extent possible, the transcript of a trial or other single court proceeding shall be consecutively paginated, regardless of the number of volumes. The name of each witness shall appear at the top of each page containing that person's testimony. A question and its answer may be contained in a single paragraph. The original and final copy of the transcript shall be filed with the trial court administrator and a copy shall be transmitted promptly to the attorney for each party to the appeal separately represented. All copies must be legible. The reporter shall certify the correctness of the transcript.

The transcript should include transcription of any testimony given by audiotape, videotape, or other electronic means unless that testimony has previously been transcribed, in which case the transcript shall include the existing transcript of testimony, with appropriate annotations and verification of what portions were replayed at trial, as part of the official trial transcript.

Advisory Committee Comment—1998 Amendments

Subdivision 2 is divided into two sections to emphasize that the court reporter has to file both a transcript certificate and a certificate of filing and delivery, each with different requirements. Court reporters sometimes do not include their telephone number on the certificates, which makes it difficult for the clerk's office to contact them if there is a problem with the certificate. The proposed amendment includes the reporter's telephone number as one of the pieces of information that must be included on the certificate.

Currently, the delivery certificates filed by most reporters only specify the date that the transcript was filed with the trial court administrator, together with a general statement that the transcript was "transmitted promptly" to counsel. The clerk's office uses the filing date as the delivery date for the purpose of calculating the briefing period, which may not be accurate if the reporter does not deliver the transcript on the same day filed. In addition, the certificates usually do not indicate the method of delivery. This makes a difference for calculation of the briefing period, because if the transcript is delivered by mail, three days are added to the briefing period. *See* MINN. R. CIV. APP. P. 125.03. The amended rule introduces the certificate of filing and delivery, which must specify the dates the transcript was filed with the court administrator and delivered to counsel. This certificate may show delivery by hand, by courier, or may show mailing. The court reporter and counsel should insure that the certificate accurately reflects the date and method of delivery of the transcript, because those factors determine the due date of appellant's brief. *See* MINN. R. CIV. APP. P. 125.03, 131.01.

Subdivision 4 includes a new requirement that the transcript be paginated consecutively, to the extent possible. This requirement is intended to reduce the number of transcripts requiring complicated citation forms. The goal is to have consecutive pagination of the entire trial, and any pretrial proceedings that immediately precede the trial as well as any other portions of the transcript that are ordered at the same time. If multiple court reporters were involved in transcribing the proceedings, various segments of the transcript can be assigned blocks of numbers so that pagination will be consecutive, albeit with potential for "missing" numbers. In that event, the transcript should clearly show that the missing numbers are intentionally omitted and identify the correct following transcript page number. There may be situations where it is impossible to paginate the transcript in this manner, and the rule recognizes such occasions may exist. The Committee believes that consecutive pagination should become the norm for transcripts, however, and this rule should make consecutive pagination the standard practice of court reporters.

The rule also includes the requirement that ~~videotaped depositions~~ any testimony given by audio, video or other electronic means must be transcribed unless the court reporter provides an existing transcript of the videotape testimony, verifying its accuracy. The requirement for transcription applies only to testimony offered as such at trial, and not to non-testimonial evidence such as ordinary audio or video recordings, witness statements used for impeachment, or other recordings received as exhibits. If an existing transcript exists, it must be submitted with the electronic testimony and it is made part of the record on appeal. The reporter at trial certifies that what is included in the transcript is what transpired at the trial, but does not need to certify the accuracy or quality of the previously-prepared transcription. This rule change does not affect the procedure for criminal appeals, as they are governed by MINN. R. CRIM. P. 28.02, subd. 9.

See Appendix for form of certificate as to transcript and certificate of filing and delivery (Forms 110A and 110B).

(Underlining to show changes from initial report in comments only; further changes to text of rule not marked).

3. **The following revised comment to Rule 114 replaces completely the comment in the Final Report at 18, lines 565–585.**

Advisory Committee Comment—1998 Amendments

By statute the Court of Appeals is granted original jurisdiction to review by declaratory judgment the validity of administrative rules promulgated by a state agency. MINN. STAT. § 14.44 (1996). The statute contains no provisions regarding the procedure by which this review is to be accomplished. The Court of Appeals promulgated MINN. APP. SPEC. R. PRACT. 10, effective October 25, 1991, to provide a procedural framework for such proceedings, but the Special Rules of Practice are not routinely referred to by the practicing bar when trying to determine matters of appellate procedure. To remedy this problem, a new rule, Rule 114, has been adopted.

A declaratory judgment action in the Court of Appeals is the proper method to challenge a rule prior to its application or enforcement. The grounds for challenging a rule, which must be described in the petition required by Rule 114.02, are prescribed by MINN. STAT. § 14.45 (1996). Only formally promulgated rules may be challenged in a pre-enforcement action under MINN. STAT. § 14.44. *Minnesota Educ. Ass'n v. Minnesota State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. App. 1993). ~~This pre-enforcement challenge must be distinguished from a contested case action in which a rule is enforced against a particular party and the validity of the rule as applied to that party is adjudicated. The reasonableness of the rule as applied cannot be considered in a declaratory judgment action in the Court of Appeals, but it may be considered in a contested case proceeding. *Minnesota Ass'n of Homes for the Aging v. Department of Human Servs.*, 385 N.W.2d 65, 68 (Minn. App. 1986). This pre-enforcement challenge must be distinguished from a contested case action in which a rule is applied to a particular party and the validity of the rule, as illustrated by the application in the individual case, may be considered. See *Mammenga v. State, Dep't of Human Servs.*, 442 N.W.2d 786 (Minn. 1989).~~

(interlining and underlining to show changes from initial report).

4. The following revised Form 115A replaces completely Form 115A in the Final Report at 55-56, lines 1632–1680.

**FORM 115A. PETITION FOR
WRIT OF CERTIORARI**

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

PETITION FOR WRIT
OF CERTIORARI

~~Employee-Relator,~~
Petitioner,

COURT OF APPEALS
NUMBER:

vs.

~~Employer-~~
Respondent,

~~DEPARTMENT OF
JOBS AND TRAINING~~
(AGENCY OR BODY)

~~Commissioner of
Jobs and Training~~
(Agency or Body),
Respondent.

NUMBER:
DATE OF MAILING NOTICE
OF DECISION:

DATE AND DESCRIPTION OF
EVENT TRIGGERING APPEAL
TIME (for example, mailing of
decision, receipt of decision, or
receipt of other notice):

TO: The Court of Appeals of the State of Minnesota:

The above-named ~~relator~~ petitioner hereby petitions the Court of Appeals for a Writ of Certiorari to review a decision of the ~~Commissioner of Jobs and Training~~ (agency or body) ~~filed and mailed issued~~ on the date noted above, upon the grounds that it is not in conformity with the provisions of Minnesota Statutes, Chapter 268, and is unwarranted by the evidence (specify grounds and statute authorizing certiorari review).

DATED:

NAME, ADDRESS, ZIP CODE, ~~AND~~ TELEPHONE NUMBER, ~~AND~~ ~~OF RELATOR:~~
(ATTORNEY REGISTRATION LICENSE NUMBER ~~IF REPRESENTED BY COUNSEL~~) OF
ATTORNEY(S) FOR PETITIONER:

SIGNATURE OF ATTORNEY

OR, IF NOT REPRESENTED BY COUNSEL:

NAME, ADDRESS, ZIP CODE, AND TELEPHONE NUMBER OF PETITIONER:

SIGNATURE OF PETITIONER

(The procedure for obtaining a writ of certiorari from the Court of Appeals is set forth in the applicable statutes and in Rule 115, Rules of Civil Appellate Procedure. ~~The rule applicable statutes~~ prescribes the subject matter of writs in the Court of Appeals, ~~the manner of securing a writ,~~ time limitations, ~~contents of the petition, bond or security, filing and fees,~~ and requirements for service. The rule prescribes the manner of securing a writ, contents of the petition, bonds, filing and fees, and preparation of the record. ~~Two copies~~ An original and one copy of a completed statement of the case must accompany the petition.

The date of the event that triggered the appeal period must be indicated on the petition. The nature of this event varies, depending on the requirements of the statute authorizing certiorari review in the Court of Appeals. See MINN. R. CIV. APP. P. 115 comment.)