STATE OF MINNESOTA

IN SUPREME COURT

C4-84-2133

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

The Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure in a report dated October 6, 2000 has recommended amendments to the Rules of Civil Appellate Procedure; and

This court will consider the proposed amendments without a hearing after soliciting and reviewing comments on the proposal;

IT IS HEREBY ORDERED that any individual wishing to provide statements in support or opposition to the proposed amendments shall submit twelve copies in writing addressed to Frederick K. Grittner, Clerk of the Appellate Courts, 25 Constitution Avenue, St. Paul, Minnesota 55155, no later than Friday, December 1, 2000. A copy of the committee's report containing the proposed amendments is annexed to this order.

Dated: October 10, 2000

BY THE COURT:

Kathleen A. Blatz
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

October 6, 2000

David F. Herr, Minneapolis
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Summary of Committee Recommendations

Advisory Committee on Rules of Civil Appellate Procedure

EXECUTIVE SUMMARY

Advisory Committee Process Summary

The Advisory Committee met twice during 2000 to review developments in the appellate rules and to consider the wisdom of any further amendments to the rules. The amendments recommended in this report do not depart from the traditional goals of this Committee—to create a set of rules which is understandable, workable in practice, and stable over time. With the completion of consideration of the rules reported here, the Committee is not aware of other issues of Minnesota civil appellate procedure that will require attention in the foreseeable future.

Summary of Advisory Committee Recommendations

The Advisory Committee's recommendations contained in this report are essentially for eight sets of amendments to the rules. They are summarized as follows:

1. Amend Rule 103.03 to provide explicitly for appealability of orders that modify custody, visitation, maintenance, and support;

1. Amend Rule 105 to clarify its application to direct appeals to the Supreme Court and to revise page limits;

1. Adopt a new Rule 109 to establish and collect in one place the procedures applicable to proceeding *in forma pauperis*;

1. Amend Rule 110.02 to allow (but not require) filing of transcript in electronic form;

1. Amend Rule 120 to clarify the proper avenue for seeking appellate review of denial of an extraordinary writ by the Court of Appeals and application of rule to writs directed to Tax Court and Workers' Compensation Court of Appeals;

1. Adopt a new Rule 128.03 to provide for submission of supplemental authorities;

1. Amend Rule 129 governing briefs of *amici curiae* to eliminate the automatic stay provision and to require disclosure of interest;

1. Modify Rule 132 to provide for an alternative measure of brief length based on word count;

1. Amend Rule 139 to modify taxation of costs process; and

1. Correct a minor cross-reference problem in Rule 131 and in Form 117.

Of these, only Recommendation 8 (to allow, but not require, calculation of brief length by word count) is considered to be a significant change in practice. The other changes all either clarify the existing rules or codify what the Committee understands to be the intended practice under the current rules. Recommendation 6 provides an express mechanism to submit supplemental authorities to the appellate court after briefing or argument, a subject that is not currently addressed in the appellate rules.

The Advisory Committee does not believe that any of these changes will be controversial or create difficulties in implementation or administration.

Effective Date

The Committee believes these amendments can be made effective as of January 1, 2001, and apply to appeals pending on that date and to those commenced thereafter.

Further Work of the Committee

The Committee will continue to monitor the operation of the rules and the administration of appellate practice in Minnesota, but does not anticipate making additional recommendations in the near future.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON
RULES OF CIVIL APPELLATE PROCEDURE

Recommendation 1: **Amend Rule 103.03 to Provide Explicitly for Appealability of Orders that Modify Custody, Visitation, Maintenance, and Support.**

Introduction

This amendment modifies Rule 103.03 to include express provision for appealability of orders granting or denying modification of custody, visitation, maintenance, and support provisions. This amendment is made to identify these matters in accordance with the case law on appealability of these orders.

Specific Recommendation

RULE 103. APPEALS FROM JUDGMENTS AND ORDERS

*** * ***

Rule 103.03. Appealable Judgments and Orders

An appeal may be taken to the Court of Appeals:

(a) from a final judgment, or from a partial judgment entered pursuant to Minn.R.Civ.P. 54.02;

(b) from an order which grants, refuses, dissolves or refuses to dissolve, an injunction;

(c) from an order vacating or sustaining an attachment;

(d) from an order denying a new trial, or from an order granting a new trial if the trial court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon errors of law occurring at the trial, and upon no other ground; and the trial court shall specify such errors in its order or memorandum, but upon appeal, such order granting a new trial may be sustained for errors of law prejudicial to respondent other than those specified by the trial court;

(e) from an order which, in effect, determines the action and prevents a judgment from which an appeal might be taken;

(f) from a final order or judgment made or rendered in proceedings supplementary to execution;

(g) except as otherwise provided by statute, from a final order, decision or judgment affecting a substantial right made in an administrative or other special proceeding;

(h) from orders that grant or deny modification of custody, visitation, maintenance, or child support provisions in an existing judgment or decree;

~~(h)~~(i) if the trial court certifies that the question presented is important and doubtful, from an order which denies a motion to dismiss for failure to state a claim upon which relief can be granted or from an order which denies a motion for summary judgment; and

~~(i)~~(j) from such other orders or decisions as may be appealable by statute or under the decisions of the Minnesota appellate courts.

* * *

Advisory Committee Comment—2000 Amendments

Rule 103.03 is amended to add a new subdivision (h) and renumber existing paragraphs (h) and (i) to become (i) and (j). The purpose of this amendment is to clarify that orders that grant or deny modification of custody, visitation, maintenance, and support provisions are appealable in accordance with *Angelos v. Angelos*, 367 N.W.2d 518 (Minn. 1985). These orders are appealable under paragraph (g) (final order in a special proceeding), but because of the volume of such orders, as well as the frequent involvement of *pro se* litigants, the Committee believes an explicit provision will minimize confusion. This change is not intended to expand appealability of otherwise unappealable orders, but rather, is meant to have the rule correctly identify these orders as appealable.

Recommendation 2: Amend Rule 105 to Clarify Application to Direct Appeals to Supreme Court and Revise Page Limits.

Introduction

This amendment clarifies Rule 105 and makes it explicitly apply to Supreme Court consideration of appeals from the Tax Court or Workers' Compensation Court of Appeals. The amendment also establishes page limits for a petition and response.

Specific Recommendation

RULE 105. DISCRETIONARY REVIEW

Rule 105.01. Petition for Permission to Appeal; Time

Upon the petition of a party, ~~the Court of Appeals,~~ in the interest of justice~~,~~ the Court of Appeals may allow an appeal from an order not otherwise appealable pursuant to Rule 103.03 except an order made during trial and the Supreme Court may allow an appeal from an order of the Tax Court or the Workers' Compensation Court of Appeals not otherwise appealable pursuant to Rule 116 or governing statute except an order made during trial. The petition shall be served on the adverse party and filed within 30 days of the filing of the order. The trial court should be notified that the petition has been filed and provided with a copy of the petition and any response. Four copies of the petition shall be filed with the clerk of the appellate courts, but the court may direct that additional copies be provided. A filing fee of $250 paid to the clerk of the appellate courts shall accompany the petition for permission to appeal.

Rule 105.02. Content of Petition; Response

The petition shall be entitled as in the trial court, shall not exceed ~~five~~ ten typewritten pages, and shall contain:

(a) a statement of facts necessary to an understanding of the questions of law or fact determined by the order of the trial court;

(b) a statement of the issues; and

(c) a statement why an immediate appeal is necessary and desirable.

A copy of the order from which the appeal is sought and any findings of fact, conclusions of law, or memorandum of law relating to it shall be attached to the petition. Any adverse party may, within five days after service of the petition, serve and file with the clerk of the appellate courts four copies of a response to the petition, which shall not exceed ten pages. Any reply shall be served within two days after service of the response and shall not exceed five pages. All papers may be typewritten in the form prescribed in Rule 132.02. No additional memoranda may be filed without leave of the appellate court.

The petition and any response shall be submitted without oral argument unless otherwise ordered.

Advisory Committee Comment—2000 Amendments

Rule 105.01 is changed to authorize petitions to the Supreme Court seeking discretionary review of nonappealable orders of the Tax Court and the Workers' Compensation Court of Appeals. The Court has noted the advisability of such a provision. *See Tarutis v. Commissioner of Revenue*, 393 N.W.2d 667, 668 (Minn. 1986). The amendment to Rule 105.02 clarifies that the petition should not be accompanied by a separate memorandum of law, expands the page limit for the petition to ten pages and specifies page limits for the response and reply.

Recommendation 3: Adopt a New Rule 109 to Establish and Collect in One Place the Procedures Applicable to Proceeding *In Forma Pauperis*.

Introduction

Existing provisions governing *in forma pauperis* relief are found in various statutes and rules. The proposed new Rule 109 is intended to clarify the procedure and to provide guidance to counsel and *pro se* litigants. If this rule is adopted, related provisions in Rule 103.01 (when filing fee is not required) and 107 (when cost bond not required) can be deleted. The committee did not fully address the mechanism for allowing parties to proceed *in forma pauperis* in proceedings before the Minnesota Supreme Court; it is recommended that this Court address those procedures at this time.

Specific Recommendation

Rule 103.01. Manner of Making Appeal

* * *

Subd. 3. When Filing Fee Not Required. The filing fees set out in Rule 103.01, subdivision 1, shall not be required when:

(a) the appellant has ~~previously been determined to be indigent by the trial court, and the attorney for the appellant certifies to the clerk of the appellate courts that the appellant remains indigent~~ been authorized to proceed without payment of the filing fee pursuant to Rule 109; or

(b) the appellant is represented by a public defender's office or a legal aid society; or

(c) the appellant is a party to a proceeding pursuant to Minnesota Statutes, Chapter 253B; or

~~(d) the trial judge finds that the appellant is indigent and that in the interest of that party's right to appeal, no filing fee will be required; or~~

(~~e~~d) the appellant is the state or governmental subdivision of the state or an officer, employee or agency thereof; or

(~~f~~e) the appeal has been remanded to the trial court or agency for further proceedings and, upon completion of those proceedings, the appeal is renewed; or

(~~g~~f) the appellant is a party to a public assistance appeal pursuant to Minnesota Statutes, Chapter 256; or

(~~h~~g) the appeal is taken by a claimant for unemployment compensation benefits pursuant to Minnesota Statutes, Chapter 268.

* * *

RULE 107. BOND OR DEPOSIT FOR COSTS

~~**Subdivision 1.**~~

Rule 107.01. When Bond Required

Unless the appellant is exempt by law, a bond shall be executed by, or on behalf of, the appellant. The bond shall be conditioned upon the payment of all costs and disbursements awarded against the appellant on the appeal, not exceeding the penalty of the bond which shall be $500. In lieu of the bond, the appellant may deposit $500 with the trial court administrator as security for the payment.

Prior to filing the notice of appeal, the appellant may move the trial court for an order waiving the bond or setting a lesser amount or deposit. Upon the appellant's filing of the required cost bond or deposit, the respondent may move the trial court for an order requiring a supplemental bond or deposit.

The bond or deposit may be waived by written consent of the respondent, which consent shall be filed with the trial court administrator.

~~**Subd. 2**~~

Rule 107.02. When Bond Not Required

No cost bond is required:

(a) in a criminal case; or

(b) in a case arising in juvenile court; or

(c) in a proceeding pursuant to Minnesota Statutes, Chapter 253B; or

(d) when the ~~trial judge finds:~~

~~(i) that the party is indigent, and~~

~~(ii) that in the interest of that party's right to appeal, no cost bond shall be required~~ appellant has been authorized to proceed without a cost bond pursuant to Rule 109; or

(e) when the appellant is the state or a governmental subdivision of the state or an officer, employee or agency thereof; or

(f) when the appellant is a party to a public assistance appeal pursuant to Minnesota Statutes, Chapter 256; or

(g) when the appellant is reemployment insurance benefits claimant pursuant to Minnesota Statutes, Chapter 268.

* * *

RULE 109. LEAVE TO PROCEED *IN FORMA PAUPERIS*

Rule 109.01. Authorized Relief

A party who is unable to pay the expenses of appeal may apply for leave to proceed *in forma pauperis*. The trial court may authorize waiver of the filing fee and cost bond, and payment of transcript and briefing expenses.

Rule 109.02. Motion for Leave to Proceed on Appeal *In Forma Pauperis*

A party who desires to proceed *in forma pauperis* on appeal shall file in the trial court a motion for leave so to proceed, together with an affidavit showing the party's inability to pay fees and costs and a copy of the party's statement of the case as prescribed by Rule 133.03, showing the proposed issues on appeal. The trial court shall rule on the motion within 15 days after it is filed, unless the appellate court grants additional time. The party shall file a copy of the motion with the clerk of the appellate courts simultaneously with the notice of appeal.

The trial court shall grant the motion if the court finds that the party is indigent and that the action is not frivolous. If the motion is denied, the trial court shall state in writing the reasons for the denial. The party shall promptly file a copy of the trial court's order disposing of the motion with the clerk of the appellate courts.

If the trial court grants the motion, the party may proceed *in forma pauperis* without further application to the appellate court. If the trial court denies the motion, the party shall, within 10 days from the date of the trial court administrator's filing of the order, either:

(a) pay the filing fee, post the cost bond, and file a completed transcript certificate, if a transcript is required; or

(b) serve and file a motion in the appellate court for review of the trial court's order denying *in forma pauperis* status. The record on the motion shall be limited to the matters presented to the trial court.

Rule 109.03. Civil Commitment and Juvenile Proceedings

A motion to proceed *in forma pauperis* on appeal from a civil commitment or juvenile proceeding may be granted based on the party's financial inability to pay appeal expenses alone. A finding that the action is not of a frivolous nature is not required.

Rule 109.04. Suspension of Time Periods

The time periods to pay the filing fee, post a cost bond, and file a transcript certificate are suspended during the pendency of a timely motion to proceed *in forma pauperis*.

Advisory Committee Comment—2000 Amendments

Rule 109 is a new rule, adopted in 2000. It is intended to collect and harmonize various provisions that apply to the procedure for *in forma pauperis* appeals. It is not intended to establish or modify any substantive rights to proceed *in forma pauperis*.

The rule requires that the application to proceed *in forma pauperis* be submitted to the trial court for appropriate factual determinations. This requirement is consistent with the long-standing practice of the appellate courts. *See*, *e.g.*, *Maddox v. Department of Human Servs.*, 400 N.W.2d 136, 139 n. 1 (Minn. App. 1987). This requirement is consistent with the general preference of having trial courts, rather than appellate courts, make factual findings, and also obviates any appearance that the appellate court has prejudged the merits of the appeal before the transcript, record and briefs have been prepared. Even without a transcript or briefs, the trial court will be familiar with the issues raised by the parties and may be familiar with their financial resources, and is, therefore, better able to make the required findings early in the appellate process. MINN. STAT. § 563.01, subd. 3 defines "indigence" to include those receiving public assistance, being represented by a legal services attorney or volunteer attorney program on the basis of indigence, or having an annual income not greater than 125% of the poverty level. *See* 42 U.S.C. § 9902(2).

The requirement that a party seeking *in forma pauperis* relief establish that his or her appeal (or position on appeal, if such relief is being sought by a respondent) is "not frivolous" does not require a showing that the party is likely to prevail on appeal and does not require the trial court to evaluate the likelihood of success on appeal. *In forma pauperis* status in civil commitment and juvenile proceedings is based solely on indigency, and in indigent party is not required to establish that the position to be taken in the appellate court is not frivolous.

Rule 109.04 provides for the suspension of the time periods to pay the filing fee, post a bond and file the transcript certificate while the trial court considers a motion to proceed *in forma pauperis*. A party who has made a timely motion to proceed *in forma*

pauperis must file a copy of that motion with the appeal papers. The trial court must rule on the motion promptly and the party must inform the appellate court of the ruling, so that the appeal can proceed without delay.

Recommendation 4: Amend Rule 110.02 to Allow Filing of Transcript in Electronic Form

Introduction

There was general agreement that the Rules should make some provision for filing transcripts in electronic format. The Committee recognized, however, that the technology continues to change, and that electronic transcripts may be generated in a variety of formats. The Committee recommends an amendment to make filing of an electronic version permissive, so that the appellate courts can gain the experience necessary to establish standardized requirements.

As an alternative to adopting the amendments to Rule 110.02 proposed in this report, this court could experiment with selectively requesting submission of transcripts in electronic format on a case-by-case basis. The Committee believes, however, that it is probably preferable to allow a party, or the parties, to submit transcripts in electronic format and to have a rule that explicitly provides for how this should be accomplished.

Specific Recommendation

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 or printed on 8½ by 11 inch or 8½ by 10½ 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.

In any matter, the parties may stipulate to file with the clerk of the appellate courts, in addition to the typewritten or printed transcripts, all transcripts prepared for an appeal in electronic form. The electronic form shall be on three and one-half inch diskettes or compact discs formatted for IBM-compatible computers and shall contain the transcript in ASCII or other self-contained format accessible by Windows-compatible operating systems with no additional software. The label on the diskette or disc must include the case name and the case file number. One copy of the diskette or disc must be served on each party separately represented by counsel. The filing party must certify that the diskette or disc has been scanned for viruses and that it is virus-free.

Advisory Committee Comment—2000 Amendments

Rule 110.02, subd. 4 is amended to allow parties to file transcripts in electronic form. With increasing frequency, transcripts of trials and other proceedings are available to counsel and the courts in electronic format, in addition to the traditional typed or printed format. Electronic format offers some significant advantages in the areas of handling, storage, and use. There is no currently accepted standard for preparation of electronic transcripts, which are available in a variety of formats and software contexts. This amendment allows parties the opportunity to file an electronic version of transcripts in addition to the paper transcripts required under the rules; it does not permit this format to replace the traditional paper transcript. As technology advances, additional forms of media may become acceptable.

Recommendation 5: Clarify Proper Avenue to Seek Appellate Review of Denial of an Extraordinary Writ by the Court of Appeals and Application of Rule to Writs Directed to Tax Court and Workers' Compensation Court of Appeals.

Introduction

This amendment is intended to deal with the infrequent but occasionally disastrous confusion over the proper means of obtaining further review in the Supreme Court of a Court of Appeals decision denying a petition for a writ of mandamus or prohibition. Although the clearly intended current practice is for a petition for further review to be filed under Rule 117, parties occasionally seek review of a writ decision by a new application for a writ in the Supreme Court. This amendment clarifies the intended practice, and also retains the possibility that, in the extremely unlikely circumstance that a Court of Appeals denial of a writ would, in its own right, justify issuance of a writ by the Supreme Court. The rule also expressly provides for application for a writ directed to the Tax Court or the Workers' Compensation Court of Appeals.

Specific Recommendation

RULE 120. WRITS OF MANDAMUS AND PROHIBITION DIRECTED TO A JUDGE OR JUDGES AND OTHER WRITS

Rule 120.01. Petition for Writ

Application for a writ of mandamus or of prohibition or for any other extraordinary writ in the Supreme Court directed to the Court of Appeals, the Tax Court, or the Workers' Compensation Court of Appeals or in the Court of Appeals directed to a trial court shall be made by petition. The petition shall specify the lower court decision and the name of the judge and shall contain:

(a) a statement of the facts necessary to an understanding of the issues presented by the application;

(b) a statement of the issues presented and the precise relief sought; and

(c) a statement of the reasons why the extraordinary writ should issue.

Petitioner shall attach a copy of the trial court decision challenged in the petition, and if necessary to an understanding of the issues, additional pertinent lower court documents.

The petition shall be titled "In re [name of petitioner], Petitioner," followed by the trial court caption, and shall be captioned in the court in which the application is made, in the manner specified in Rule 120.04.

Rule 120.02. Submission of Petition; Response to the Petition

The petition shall be served on all parties and filed with the clerk of the appellate courts, If the lower court is a party, it shall be served; in all other cases, it should be notified of the filing of the petition and provided with a copy of the petition and any response. All parties other than the petitioner shall be deemed respondents and may answer jointly or separately within five days after the service of the petition. If a respondent does not desire to respond, the clerk of the appellate courts and all parties shall be advised by letter within the five-day period, but the petition shall not thereby be taken as admitted.

Rule 120.03. Procedure Following Submission

If the reviewing court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it may:

(a) issue a peremptory writ, or

(b) grant temporary relief and direct the filing of briefs.

There shall be no oral argument unless the reviewing court otherwise directs.

Rule 120.04. Review in Supreme Court

Denial of a writ under this rule or Rule 121 by the Court of Appeals is subject to review by the Supreme Court through petition for review under Rule 117. Review of an order denying an extraordinary writ should not be sought by filing a petition for a writ under this rule with the Supreme Court unless the criteria for issuance of the writ are applicable to the Court of Appeals order for which review is sought.

Advisory Committee Comment— 2000 Amendments

Rule 120 is amended to make explicit two aspects of extraordinary writ practice that some practitioners have overlooked. First, an extraordinary writ directed to the Tax Court or the Workers Compensation Court of Appeals may be sought in the Supreme Court. *See* MINN. STAT. § 480.04 (1998). Second, the normal method of seeking review in the Supreme Court of a denial of an extraordinary writ by the Court of Appeals is by petition for review under Rule 117, not by petition for a writ under this rule. The same is true for review of denial of an emergency writ under Rule 121.

Recommendation 6: Provide for Submission of Supplemental Authorities

Introduction

The Committee discussed the advisability of including in the rules a formal mechanism to provide citation of authority that comes to the attention of one of the parties after an appellate case is briefed or argued. The Committee is aware of a provision in the Federal Rules of Appellate Procedure that both permits the citation of such authority and strictly limits the submission to providing information, and not re-arguing the role of that authority. The Committee believes this provision would be a useful addition to the Minnesota rules.

Specific Recommendation

RULE 128. BRIEFS

* * *

Rule 128.03. Citation of Supplemental Authorities

If pertinent and significant authorities come to a party's attention after the party's brief has been filed, or after oral argument, but before decision, a party may promptly advise the clerk of the appellate courts by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the

supplemental citations, referring either to the page of the brief or to the point argued orally. Any response must be made promptly and must be similarly limited.

Advisory Committee Comment—2000 Amendments

Rule 128.03 is a new provision in the Minnesota Rules. It is patterned after FED. R. APP. P. 28(j), and is intended to allow a party to submit additional authorities to the court without requiring a motion and without providing an opportunity for argument. The rule contemplates a very short submission, simply providing the citation of the new authority and enough information so the court can determine what previously-made argument it relates to. The submission itself is not to contain argument, and a response, if any, is similarly constrained. Because a response is limited to the citation of authority and cannot provide argument, a response most frequently will not be necessary or proper. A submission or reply that does not conform to the rule is subject to being stricken. *See, e.g.*, *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.3d 966, 972 (8th Cir. 1999) (granting motion to strike argumentative submission); *Anderson v. General Motors Corp.*, 176 F.3d 488 (10th Cir. 1999) (unpublished) (same).

Recommendation 7: Amend Rules on Briefs of *Amici Curiae* to Eliminate Automatic Stay Provision and Require Disclosure of Interest

Introduction

Rule 129 was amended in 1998 to provide a stay of briefing periods when a request for leave to participate as *amicus curiae* is filed. In practice this has resulted in significant confusion concerning subsequent deadlines and has required formal scheduling orders in cases where *amici* are involved. The Committee believes that deletion of the stay requirement will expedite the processing of appeals.

The Committee also proposes that the rule be amended to provide for the disclosure of certain information regarding authorship of the amicus brief and financial support for the brief's preparation. This amendment is patterned on a similar provision in the United States Supreme Court rules.

Specific Recommendation

RULE 129. BRIEF OF AN AMICUS CURIAE

Rule 129.01 ~~Subdivision 1~~. Request for Leave to Participate~~.~~

Upon prior notice to the parties, a brief of an amicus curiae may be filed with leave of the appellate court. The applicant shall serve and file a request for leave no later than 15 days after the filing of the notice of appeal, the petition which initiates the appeal, the appellate petition for declaratory judgment, or the appellate court order granting review. A request for leave shall identify whether the applicant's interest is public or private in nature, identify the party supported or indicate whether the amicus brief will suggest affirmance or reversal, and shall state the reason why a brief of an amicus curiae

is desirable. ~~A timely request for leave shall stay all briefing periods until the request is granted or denied.~~

Rule 129.02 ~~Subd. 2~~. Time for Filing and Service~~.~~

Copies of an amicus curiae brief shall be served on all parties and filed with the clerk of the appellate courts with proof of service no later than seven days after the time allowed for filing the brief of the party supported, or if in support of neither party, no later than the time allowed for filing the petitioner's or appellant's brief.

Rule 129.03. Certification in Brief.

A brief filed under this rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

Rule 129.04 ~~Subd. 3.~~ Oral Argument.

An amicus curiae shall not participate in oral argument except with leave of the appellate court.

Advisory Committee Comment—2000 Amendments

Rule 129.01 is amended to delete a provision that provided for an automatic stay of a briefing period until a request for leave to participate as *amicus curiae* was decided. Under the revised rule, the parties proceed with the normal briefing schedule without regard to whether *amici* will participate. A party or a potential *amicus curiae* who believes a delay in the briefing schedule is necessary may move for a stay. Rule 129.03 is a new provision requiring disclosure, in the brief, of whether any counsel for a party authored the brief in whole or in part and shall identify persons other than the *amicus curiae* who provided monetary contribution to its preparation or submission. This rule is patterned on Rule 37.6 of the Rules of the Supreme Court of the United States. This rule is intended to encourage participation of independent *amici*, and to prevent the courts from being misled about the independence of *amici* or being exposed to "a mirage of *amicus* support that really emanates from the petitioner's word processor." *See* Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, *reprinted at* 24 LITIGATION, Spr. 1998, at 25. The rule is not intended to discourage the normal cooperation between the parties to an action and the *amici*, including the providing of access to the record, the exchange of briefs in advance of submission, and other such activities that do not result in someone other than the *amicus* preparing the *amicus* brief.

The numbering of the rule is changed to conform it to the style predominantly used in the other rules. This change is not intended to modify the meaning or interpretation of the rule.

Recommendation 8: Modify Rule 132 to Provide for an Alternative Measure of Brief Length Based on Word Count

Introduction

The Committee has previously considered modification of the rules on brief length to adopt a word-count based measuring system. This approach has been adopted in the federal courts, and works well to encourage parties to use a larger, more readable typeface for their briefs without expanding the overall length. The Committee has adapted this rule directly from Rule 32 of the Federal Rules of Appellate Procedure, and believes it will serve Minnesota courts and practitioners as well. The rule also increases the minimum permissible font size for briefs and shortens the maximum permissible length of principal briefs that are not measured on a word or line count basis.

Specific Recommendation

RULE 132. FORM OF BRIEFS, APPENDICES, SUPPLEMENTAL RECORDS, MOTIONS AND OTHER PAPERS

Rule 132.01. Form of Briefs, Appendices, and Supplemental Records

Subdivision 1. Form Requirements. Any process capable of producing a clear black image on white paper may be used. ~~All material other than footnotes must appear in at least 11 point type, or its equivalent of not more than 16 characters per inch, on unglazed opaque paper.~~ Briefs shall be printed or typed on unglazed opaque paper. If a monospaced font is used, printed or typed material (including headings and footnotes) must appear in a font that produces a maximum of 10½ characters per inch; if a proportional font is used, printed or typed material (including headings and footnotes) must appear in at least 13-point font. Formal briefs and accompanying appendices shall be bound together by a method that securely affixes the contents, and that is substantially equivalent to the list of approved binding methods maintained by the clerk of the appellate courts. Methods of binding that are not approved include stapling, continuous coil spiral binding, spiral comb bindings and similar bindings. Pages shall be 8½ by 11 inches in size with written matter not exceeding 6½ x 9 ½ inches. Written matter shall appear on only one side of the paper. The pages of the appendix shall be separately and consecutively numbered. Briefs ~~and appendices submitted in typewritten form~~ shall be double-spaced, except for tables of contents, tables of authorities, statements of issues, headings and footnotes, which may be single-spaced. Carbon copies shall not be submitted.

* * *

Subd. 3. ~~Page~~ Length Limit. Except for good cause shown and with permission of the appellate court, ~~principal~~ briefs, whether printed or typewritten, ~~shall not exceed 50 pages, and reply briefs shall not exceed 25~~

~~pages, exclusive of pages containing the table of contents; tables of citations; any addendum containing statutes, rules, regulations, etc.; and any appendix. Application for filing an enlarged brief shall be filed at least 10 days prior to the date the brief is due. All briefs of amicus curiae shall be limited to 20 pages.~~ exclusive of pages containing the table of contents, tables of citations, any addendum containing statutes, rules, regulations, etc., and any appendix, shall not exceed 40 pages for principal briefs, 20 pages for reply briefs, and 20 pages for amicus briefs, unless the brief complies with one of these alternative measures:

(a) A principal brief is acceptable if:

(1) it contains no more than 14,000 words; or

(2) it uses a monospaced font and contains no more than 1,300 lines of text.

(b) A reply brief is acceptable if:

(1) it contains no more than 7,000 words; or

(2) it uses a monospaced font and contains no more than 650 lines of text.

(c) An amicus brief is acceptable if:

(1) it contains no more than 7,000 words; or

(2) it uses a monospaced font and contains no more than 650 lines of text.

A brief submitted under Rule 132.01, subd. 3(a), (b), or (c) must include a certificate that the brief complies with the word count or line count limitation. The person preparing the certificate may rely on the word or line count of the word-processing software used to prepare the brief. The certificate must state the name and version of the word processing software used to prepare the brief, state that the brief complies with the typeface requirements of this rule, and state either:

(1) the number of words in the brief; or

(2) the number of lines of monospaced font in the brief.

Application for filing an enlarged brief shall be filed at least 10 days prior to the date the brief is due.

* * *

Advisory Committee Comment—2000 Amendments

The rule has been amended to provide for an alternative measure of length of appellate briefs, based on word volume and not page count. This alternative allows parties to choose type size that is more readable than they might choose if endeavoring to satisfy the page limit requirement. The word volume measure has been derived from the analogous provisions of the Federal Rules of Appellate Procedure, and in general will not significantly alter the amount of text that a party may submit, regardless of the method chosen to determine brief length. The amended rule provides for a certification of brief length that will enable the appellate courts to verify that the brief complies with the rule. The rule also increases the minimum permissible font size for briefs and shortens the

maximum permissible length of principal briefs that are not measured on a word or line count basis. These amendments only apply to formal briefs, not to motions, petitions for further review, or other pleadings.

FORM 132. CERTIFICATION OF BRIEF LENGTH

STATE OF MINNESOTA

(IN SUPREME COURT
OR
IN COURT OF APPEALS)

CASE TITLE:

Appellant,

vs.

Respondent.

CERTIFICATION OF BRIEF LENGTH

APPELLATE COURT CASE NUMBER:

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a [monospaced] [proportional] font. The length of this brief is . . . . [lines][words]. This brief was prepared using [name and version of word processing software].

Recommendation 9: Modify Taxation of Costs Process

Introduction

The current rules provide for a single judgment on appeal and judgment is not entered on the Court of Appeals opinion or any award of costs and disbursements until any proceedings before the Supreme Court are concluded. A party who did not prevail in the Court of Appeals cannot tax costs after that decision is filed; and if the same party ultimately prevails in the Supreme Court, the current rules do not authorize the taxation at that time of costs attributable to the earlier proceedings. The purpose of the amendment is to remedy that perceived inequity.

Specific Recommendation

RULE 139. COSTS AND DISBURSEMENTS

Rule 139.01. Costs

Unless otherwise ordered by the appellate court, the prevailing party shall recover costs as follows:

(1) upon a judgment ~~in his favor~~ on the merits, ~~statutory~~ costs in the amount of $300~~;~~ ~~MINN. STAT. § 549.02, subd. 2 (1993).~~

(2) upon a dismissal, $10.

Rule 139.02. Disbursements

Unless otherwise ordered by the appellate court, the prevailing party shall be allowed that party's disbursements necessarily paid or incurred. The prevailing party will not be allowed to tax as a disbursement the cost of preparing briefs described in Rule 132.01.

Rule 139.03. Taxation of Costs and Disbursements; Time

Costs and disbursements shall be taxed by the clerk of the appellate courts upon 5 days' written notice served and filed by the prevailing party. The costs and disbursements so taxed shall be inserted in the judgment. Failure to file and serve a notice of taxation of ~~tax~~ costs and disbursements within 15 days after the filing of the decision or order shall constitute a waiver of taxation, provided that upon reversal in the Supreme Court, a prevailing party in that Court who did not prevail in the Court of Appeals may file and serve a notice for costs and disbursements incurred in both appellate courts within 15 days after the filing of the decision of the Supreme Court.

Rule 139.04. Objections

Written objections to the taxation of costs and disbursements shall be served and filed with the clerk of the appellate courts within 5 days after service of the notice of taxation. Failure to serve and file timely written

objections shall constitute a waiver. If no objections are filed, the clerk may tax costs and disbursements in accordance with these rules. If objections are filed, a person designated by the appellate courts, after conferring with the appropriate appellate court, shall determine the amount of costs and disbursements to be taxed. There shall be no appeal from the taxation of costs and disbursements.

Rule 139.05. Disallowance of Costs and Disbursements

The appellate court upon its own motion may disallow the prevailing party's costs or disbursements or both, in whole or in part, for a violation of these rules or for other good cause. The prevailing party will not be allowed to tax as a disbursement the cost of reproducing parts of the record in the appendix which are not relevant to the issues on appeal.

Advisory Committee Comment—2000 Amendments

The amendment to Rule 139.01 clarifies the rule and, by deleting the statutory reference, makes an award of costs available in a greater variety of appellate proceedings. The amendment to Rule 139.03 allows a party who did not prevail in the Court of Appeals but obtains a reversal in the Supreme Court to seek costs and disbursements related to proceedings in both appellate courts. The notice must be served and filed within 15 days after the Supreme Court's decision. This allows the party who ultimately prevails in the Supreme Court to receive an award of costs and disbursements related to both appellate proceedings, whether or not the party initially prevailed in the Court of Appeals.

Recommendation 10: Correct Minor Errors in Rule 131 and in Form 117

Introduction

The Committee identified a number of minor errors or oversights in the prior amendments to the rules, and recommends that they be corrected at this time. None of these changes is intended to change the operation of the rule.

Specific Recommendation

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

* * *

Rule 131.02. Application for Extension of Time

Subdivision 1. Motion for Extension. No extension of the time ~~fixed by Rule 131.01~~ for the filing of a brief will be granted except upon a motion pursuant to Rule 127 made within the time specified for the filing of the brief. The motion shall be considered by a justice, judge, or a person designated by the appellate court, acting as a referee, and shall be granted only for good cause shown. Only an original of the motion shall be filed.

* * *

Advisory Committee Comment—2000 Amendments

Subdivision 1 of Rule 131.02 is amended to delete the reference to periods of time fixed by Rule 131.01. The requirement for a motion to extend time applies to any time requirement, whether established by rule or scheduling order. The purpose of the amendment is to clarify the existing practice rather than to effect a significant change in practice.

FORM 117. PETITION FOR REVIEW OF DECISION OF COURTS OF APPEALS ~~OR CONDITIONAL PETITION FOR REVIEW~~

STATE OF MINNESOTA

IN SUPREME COURT

CASE TITLE:

Petitioner,	PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS
vs.	APPELLATE COURT CASE NUMBER:
Respondent.	DATE OF FILING OF COURT OF APPEALS DECISION:

TO: The Supreme Court of the Sate of Minnesota:

The petitioner (name) requests Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

1. Statement of legal issues and their resolution by the Court of Appeals.

2. Statement of the criteria of the rule relied upon to support the petition.

3. Statement of the case (facts and procedural history).

4. A brief argument in support of petition.

(The petitioner shall identify and address the critical portion of the Court of Appeals decision and discuss the likelihood of success on the merits.)

For these reasons, the petitioner seeks an order granting review of the decision of the Court of Appeals.

DATED:

NAME, ADDRESS, ZIP CODE, TELEPHONE NUMBER, AND ATTORNEY REGISTRATION LICENSE NUMBER OF ATTORNEY(S) FOR PETITIONER

_____

SIGNATURE

Appendix

(The content requirements of the petition are found in RCAP 117. The rule emphasizes that Supreme Court review is discretionary. The decisions of the Court of Appeals and trial court or agency must be attached as an appendix. The petition should not exceed 5 typewritten pages, exclusive of appendix. A conditional petition shall follow this same form.)