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 17, 2008

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Hon. G. Barry Anderson, Liaison Justice

Richard S. Slowes, Supreme Court Commissioner
Frederick K. Grittner, Clerk of the Appellate Courts
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Advisory Committee on Rules of Civil Appellate Procedure

EXECUTIVE SUMMARY

Advisory Committee Process Summary

The Court's Advisory Committee on Rules of Civil Appellate Procedure met once in 2008 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 has reviewed all issues brought to its attention by members of the bench, bar, and public, since its last meeting in 2000.

Summary of Advisory Committee Recommendations

Recommended Rule Amendments

This report contains seven recommendations for amendments to the rules.

These amendments are briefly summarized:

1. Although Rule 104 does not require amendment to make clear the effect of a motion for reconsideration or rehearing, the committee recommends that the advisory committee comment include further direction on this recurring problem.

2. Amend Rule 106 to abolish use of the notice of review device, and to require any respondent to assert issues on appeal by separate notice of appeal. Adopt related amendments to Rule 104 to provide for additional notices of appeal after the first party appeals and Rule 131 to provide a modified briefing schedule for cases involving cross-appeals.

3. Amend Rule 110.02 to remove provision for filing on obsolescent digital media.

4. Amend Rule 120.02 to expand and conform the service requirements in extraordinary writ applications in criminal cases to provisions in the Minnesota Rules of Criminal Procedure.

5. Amend Rule 128 to require appellant to provide an addendum that includes the relevant trial court orders germane to the appeal.

6. Amend Rule 132 to permit the appendix to be submitted with two-sided printing.

7. Amend Rule 134.06 & .07 to conform the rule to the current facilities and long-standing practices of the appellate courts.

8. Amend Rule 125 to clarify that U.S. Mail is required for "mailed" service and filing, and that filing and service by facsimile are not generally allowed.

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 several subjects on which it concluded that no rule amendment is warranted at this time.

1. **Rule 129 on Amicus Curiae.** The committee considered a suggestion that Rule 129 contain further guidance on the appropriate content or focus of an amicus brief. The committee believes that this subject can be addressed in orders allowing amicus participation (as is currently being done in many cases) or in practice manuals, and is not well suited to rule amendment.
2. **Appealability of Applications to Discharge Notice of *Lis Pendens*.** The committee looked at the issue of whether Rule 103 should be amended to provide explicitly that orders refusing to discharge a notice of *lis pendens* should be appealable as of right. This question was directed to this committee by the Court in *St. Croix Dev., LLC v. Gossman*, 735 N.W. 2d 320 (Minn. 2007). The committee believes that these orders may, in appropriate cases, be reviewable under Rule 105 in the court's discretion and that making them appealable as of right is not warranted.

Recommendations for Further Study

The committee is undertaking two projects that will require further study by the committee. First, the committee believes that Rule 108, on supersedeas bonds and stays, should be revamped. The current rule is difficult to understand and apply; and the committee contemplates recommending a wholesale revision of it, including possible amendments to related provisions in the rules of civil procedure. The committee expects to have a recommendation on this subject to the Court by the end of 2009.

The committee is also monitoring developments in 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 units. (For example, five days under the current rules, not counting weekends, would normally become seven days, including weekends.) Those changes are still being considered in the federal courts; but if they are adopted in the federal courts, the committee believes they should be promptly 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. The committee does not have a planned deadline for this project.

Effective Date

The committee believes these amendments are not likely to present significant implementation issues and, accordingly, that it should be feasible to adopt them in 2008. Although the majority of the recommended amendments could be adopted with little lead time before the effective date, the changes to Rule

106 (and related changes in Recommendation 2) 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 their effective date, but this result is not particularly problematic.

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.

Style of Report

The specific recommendation is reprinted in traditional legislative format, with new wording underscored 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
RULES OF CIVIL APPELLATE
PROCEDURE

Recommendation 1: **Although Rule 104 Does Not Require Amendment to Make Clear the Effect of a Motion for Reconsideration or Rehearing, the Committee Recommends that the Advisory Committee Comment Include Further Direction on this Recurring Problem.**

Introduction

This Court invited this committee and the juvenile delinquency rules committee to look at the issues surrounding the effect of motions for reconsideration or rehearing on the time to appeal. *See In re Welfare of S.M.E.*, 725 N.W.2d 740 (Minn. 2007). The juvenile delinquency rules committee recommended, and the supreme court agreed, that rather than create a rule allowing motions for reconsideration, the better option would be to extend the prosecutor's time to appeal pretrial issues from five to 20 days to allow the prosecutor time to pursue a motion for reconsideration. MINN. R. JUV. DEL. P. 21.04, subds. 3(C)(1) & 4. This committee looked at this issue, and recommends that although the civil appellate rules should not be amended to allow a motion for reconsideration to toll the time to appeal—one of the potential ways to deal with this issue—the advisory committee comment that accompanies appellate Rule 104 should be amended to provide a clearer warning to counsel.

The committee believes two things militate in favor of not amending the rule. First, Rule 104.01 was revamped extensively in 1998 to provide an explicit list in Rule 104.01, subdivision 2, of the post-hearing motions that would have the effect of tolling the time to appeal. A decade of experience with that rule has resulted in judicial interpretation of it and broader understanding of it by Minnesota lawyers and judges. The committee believes it is working well. Second, the committee believes that amending the rule to allow tolling upon filing of a request for reconsideration or rehearing would introduce more problems than it might possibly solve, especially because the parties do not know if the motion

will be allowed at all or, if allowed, when it will be decided. Under MINN. GEN. R. PRAC. 115.11, a motion for reconsideration in civil matters cannot be filed without leave of court; but there are no established standards beyond the judge's broad discretion for whether the judge should entertain a motion. The timing is also uncertain; first the two-page letter-request must be served and filed, and then the court has an unspecified amount of time to act on it; but the action taken is to allow (or not) service and filing of an actual motion, for which there are no established briefing and hearing schedules. In any event, amendment to the rules would probably not have changed the result in *In re Welfare of S.M.E*. because MINN. GEN. R. PRAC. 115.11 does not apply in juvenile cases. MINN. GEN. R. PRAC. 101.

The committee also is aware that the court of appeals has issued stays of appeal coupled with a remand to allow the district court to permit consideration of a motion for reconsideration. The court of appeals has also dismissed an appeal, with leave to renew or refile it, to permit the district court to resolve the motion for reconsideration. Practitioners and pro se parties may be unaware of this practice.

Specific Recommendation

The court should publish the following advisory committee comment on Rule 104 to reflect the important considerations presented by this issue.

RULE 104. TIME FOR FILING AND SERVICE OF NOTICE OF APPEAL

* * *

Advisory Committee Comment—2008 Amendments

The absence of motions for reconsideration or rehearing in the list of motions given tolling effect in Rule 104.01, subd. 2, is intentional. Neither requesting leave to file such a motion (as contemplated by MINN. GEN. R. PRAC. 115.11), the granting of that request so the motion can be filed, nor the actual filing of the motion will toll or extend the time to appeal. A party seeking to proceed with a motion for reconsideration should pay attention to the appellate calendar and must

perfect the appeal regardless of what progress has occurred with the reconsideration motion.

Failure to file a timely appeal may be fatal to later review. If a timely appeal is filed notwithstanding the pendency of a request for reconsideration in the trial court, the court of appeals can accept the appeal as timely, but stay it to permit consideration of the reconsideration motion. *See Marzitelli v. City of Little Canada*, 582 N.W.2d 904, 907 (Minn. 1998), where the court stated:

> We note that requiring parties to file a timely appeal while a post-trial motion is pending does not deny the parties the opportunity to have the district court decide their motions. Rather, the parties may apply to the appellate court for a stay on the appeal to give the district court time to decide the pending post-trial motion. This procedure not only preserves the time limitation on appeals, but also helps to ensure that the district court hears and rules on the motion in an expedient manner. This is particularly important when the case involves a special proceeding. In such cases, the time for appeal is abbreviated to ensure "speedy and summary determination of matters passed upon by the court[.]"

(Footnotes omitted.)

Recommendation 2: 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 be filed, result in the court not considering the merits of a potential appellate claim. The committee believes the problems can best be minimized by replacing the notice of review with a separate notice of appeal procedure.

Specific Recommendation

The committee's recommendation to deal with this issue comprises amendments to Rule 106, Rule 104, and Rule 133. These amendments will create a uniform deadline for responding to a notice of appeal, whether merely by a respondent's statement of the case or the filing of a separate notice of appeal. Although they could be implemented separately, they are intended to work together and should be adopted as a group if the Court accepts the committee's recommendation on this issue.

Separate from those three related amendments, the Court should amend Rule 131 to provide for an augmented briefing schedule in cases where cross-appeals are filed.

1. Rule 106 should be amended as follows:

RULE 106. RESPONDENT'S RIGHT TO OBTAIN REVIEW

A respondent may obtain review of a judgment or order entered in the same action ~~which~~ that may adversely affect respondent by filing a separate notice of ~~review~~ appeal in accordance with Rule 104.01, subdivision 4. ~~with the clerk of the~~

~~appellate courts. The notice of review shall specify the judgment or order to be reviewed, shall be served and filed within 15 days after service of the notice of appeal, and shall contain proof of service. A filing fee of $100 shall accompany the notice of review.~~

Advisory Committee Comment—2008 Amendments

Rule 106 is amended to abolish the former notice of review, replacing it with the notice of appeal for all situations where a respondent seeks appellate review of a trial court decision. The amendment avoids the limitations of the former notice of review that could be fatal to an attempt by a respondent to seek review. For example, in *Leaon v. Washington County*, 397 N.W.2d 867, 872 (Minn. 1986), the supreme court held that a respondent seeking appellate relief against parties other than the appellant must proceed by separate notice of appeal. As a practical matter, the amended rule serves only to give notice to a respondent that the proper procedure is no longer contained in this rule, but is found in Rule 104.01, subdivision 4.

The amended rule is intended to require a respondent seeking review to file a separate notice of appeal, but is not intended to change the scope of appellate review. This notice-of-appeal procedure is not meant to expand what can be reviewed on appeal, nor to limit that review. The court of appeals has recognized that the former notice of review could be used to seek review of an otherwise non-appealable order. *See Kostelnik v. Kostelnik,* 367 N.W.2d 665, 669 (Minn. Ct. App.1985); *see also Arndt v. American Family Ins. Co.*, 394 N.W.2d 791, 794 (Minn. 1986) (supreme court notes it has not decided this issue, but cites *Kostelnik* with apparent approval). The second (or later) notice of appeal under this rule should not require independent appealability not required under the former rule for notices of review.

2. Rule 104 should be amended as follows:

RULE 104. TIME FOR FILING AND SERVICE OF NOTICE OF APPEAL

Rule 104.01. Time for Filing and Service

* **

Subd. 4. Multiple-appeals. If one party timely files a notice of appeal, any other party may serve and file a notice of appeal accompanied by a filing fee of $100, a certified copy of the judgment or order from which the appeal is taken if different than the judgment or order previously appealed, and two copies of a

statement of the case within 14 days after the date the first notice of appeal was served, or within the time otherwise prescribed by subdivisions 1 and 2 of this rule, whichever period ends later. A separate cost bond is not required unless ordered by the court.

Advisory Committee Comment—2008 Amendments

Subdivision 4 of Rule 104.01 is a new provision. It is modeled on Fed. R. App. P. 4(a)(3) and, for respondents, replaces the notice of review under former Rule 106 of these rules. The amended rule explicitly recognizes that a party may either want or be required to proceed by notice of appeal only after seeing that another party has appealed. The rule permits this subsequent notice of appeal to be served and filed within 14 days of the service of a notice of appeal by another party, even if that occurs on the last day to appeal; it does not shorten the normal appeal period even if a party serves and files an appeal on the first possible day.

3. 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.

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

Rule 131.01. Time for Filing and Service

* * *

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

(a) Cross-Appeal Defined. A cross-appeal, for the purpose of this rule, exists when more than one notice of appeal is filed by parties adverse to each other on appeal. Multiple notices of appeal filed by parties who are not adverse do not create a cross-appeal.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant.

These designations may be modified by the parties' agreement or by court order.

(c) Schedule for Filing. In a case involving a cross-appeal, the appellant's opening brief must be filed in accordance with Rule 131.01, subdivision 1, and the respondent/cross-appellant's opening brief must be filed as one brief within 30 days after service of appellant's brief. Appellant's reply/cross-respondent brief must be filed as one brief within 30 days after service of cross-appellant's brief. Respondent/cross-appellant's reply brief must be filed within 10 days after service of appellant/cross-respondent's brief.

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

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

(2) Respondent/Cross-Appellant's Principal and Response Brief. The respondent/cross-appellant must file a principal brief on the cross-appeal and must, in the same brief, respond to the appellant's principal brief. That respondent/cross-appellant's brief must comply with Rule 128.01 or 128.02, subdivision 1, as to the cross-appeal and Rule 128.02, subdivision 2, as to the appeal, except that the brief need not include a statement of the case or a statement of the facts unless the respondent/cross-appellant is dissatisfied with the appellant's statement.

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

(4) Respondent/Cross-Appellant's Reply Brief. The respondent/cross-appellant may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 128.02, subdivision 3, and must be limited to the issues presented by the cross-appeal.

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

(6) Cover. If briefs are formally bound, the cover of the appellant's principal brief must be blue; the respondent/cross-appellant's principal and response brief, red; the appellant's response and reply brief, yellow; the respondent's reply brief, gray; and intervenor's or amicus curiae's brief, green.

(7) Length limit. The length limits of Rule 132, subdivision 3, are modified for cross-appeals as follows:

(A) The limits for appellant's principal brief and for respondent/cross-appellant's reply brief are not modified.

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

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced font and contains no more than 1,500 lines of text.

(C) The appellant's response and reply brief is acceptable if

(i) it contains no more than 10,000 words; or

(ii) it uses a monospaced font and contains no more than 750 lines of text.

Advisory Committee Comment--2008 Amendments

Rule 131.01, subd. 5, is a new rule to establish an alternate set of rules for briefing in cases where a cross-appeal is filed. The provisions are drawn from Fed. R. App. P. 28.1. The amended Minnesota rule operates as a default timing and brief-length rule; in any case the parties may seek alternate limits by motion.

4. Rules 115.03, 116.03, and 133.03 should be amended to create a uniform 14-day deadline for a respondent to file a statement of the case.

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

* * *

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

Subdivision 1. Contents and Form of Petition, Writ and Response. The petition shall definitely and briefly state the decision, judgment, order or proceeding which is sought to be reviewed and the errors which the petitioner claims. A copy of the decision and an original and one copy of a completed statement of the case pursuant to Rule 133.03 shall be attached to the petition. The title and form of the petition and writ should be as shown in the appendix to these rules. The respondent's statement of the case, if any, shall be filed and served within ~~10~~ 14 days after service of the petitioner's statement.

* * *

Advisory Committee Comment—2008 Amendments

Rule 115.03, subd. 1, is amended to change the timing for filing a statement of the case by a respondent to 14, rather than 10, days after service of the statement of the case.

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

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

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

The petition shall definitely and briefly state the decision, judgment, order or proceeding which is sought to be reviewed and the errors which the petitioner claims. A copy of the decision and two copies of a completed statement of the case pursuant to Rule 133.03 shall be attached to the petition. The title and form of the petition and writ should be as shown in the appendix to these rules. The respondent's statement of the case, if any, shall be filed and served within ~~10~~ 14 days after ~~receiving~~ service of the petitioner's statement.

* * *

Advisory Committee Comment—2008 Amendments

Rule 116.03, subd. 1, is amended to change the timing for filing a statement of the case by a respondent to 14, rather than 10, days after service of the petitioner's statement of the case.

RULE 133. PREHEARING CONFERENCE; CALENDAR; STATEMENT OF THE CASE

* * *

Rule 133.03. Statement of the Case

Two copies of a statement of the case in the form prescribed by the appellate court shall be filed with the notice of appeal pursuant to Rules 103.01 or 104.01, subdivision 4, with a petition for declaratory relief pursuant to Rule 114.02, or with the petition for the writ of certiorari and proposed writ ~~or notice of appeal~~ pursuant to Rules 115 and 116. The appellant shall serve the attorney for

each party separately represented and each party appearing pro se and shall file proof of service with the clerk of the appellate courts.

Within ~~ten~~ 14 days after ~~receiving~~ service of ~~the~~ the appellant's statement, the respondent may serve on all parties and file with proof of service two copies of its statement clarifying or supplementing the appellant's statement. If the respondent agrees with the particulars set forth in the appellant's statement, no additional statement need be filed. If a party desires oral argument, a request must be included in the statement of the case. If a party desires oral argument at a location other than that provided by Rule 134.09, subdivision 2(a) to (e), the location requested shall be included in the statement of the case.

Advisory Committee Comment—2008 Amendments

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

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

Recommendation 3: The Court Should Amend Rule 110.02 to Remove Provision for Filing on Obsolescent Digital Media.

Introduction

Rule 110.02, subdivision 4, permits the parties to stipulate to file an additional transcript in electronic form. The rule specifies filing that transcript either on 3½-inch diskette or compact disc (CD-ROM). Because the 3½-inch diskette format is rarely used, and becoming rarer, the rule should be changed to delete the option of using it. Compact disc technology appears likely to be in use for several more years and is a generally available format.

Specific Recommendation

Rule 110.02 should be amended as follows:

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 first 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--2008 Amendments

Rule 110.02 subd. 4, is amended to delete provision for filing a transcript in electronic form on 3½" diskettes. That format is obsolete, and CD-ROM is the format best suited to this use and most convenient for the courts and the parties.

Recommendation 4: **Amend Rule 120.02 to Expand and to Conform the Service Requirements in Extraordinary Writ Applications in Criminal Cases to Provisions in the Minnesota Rules of Criminal Procedure.**

Introduction

The rules of criminal procedure require that the notice of appeal be served on the attorney general in all criminal cases. Where appeals are taken by the prosecution, the state pubic defender must also be served. *See* Minn. R. Crim. P. 28.04, subdivisions 2(2)(appeal by prosecutor of pretrial order), 6(1)(appeal of postconviction order), 8(1)(appeal from judgment of acquittal, vacation of judgment after guilty verdict, or from order granting a new trial). This Court asked that this committee and the advisory committee on the criminal rules to address the question of whether the notice provisions in the existing rule are sufficient for writ practice in criminal cases. *See State v. Hart*, 723 N.W.2d 254 (Minn. 2006). At its December 2007 meeting the criminal rules advisory committee decided that the requirement of service on the state public defender is appropriate and should be added to the civil appellate rules, and this committee concurs. This committee has drafted a rule that imposes a notice requirement for service on both the state public defender and the attorney general, using language similar to that used in the criminal rules for other appellate proceedings.

Specific Recommendation

Rule 120.02 should be amended as follows:

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

* * *

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. In criminal cases, the State Public Defender and the Attorney General shall also be served. 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.

Advisory Committee Comment--2008 Amendments

Rule 120.02 is amended to add a single requirement for writ practice in criminal cases. The additional requirement of service on the public defender and attorney general is patterned on similar service requirements in the rules of criminal procedure. *See* MINN. R. CRIM. P. 28.04, subd. 2(2)(appeal by prosecutor of pretrial order), subd. 6(1)(appeal of postconviction order), subd. 8(1)(appeal from judgment of acquittal, vacation of judgment after guilty verdict, or from order granting a new trial; MINN. R. CRIM P. 128.02, subd. 4. The requirement for notice in petitions for extraordinary writs is especially appropriate given the short time periods for writ practice. *See generally State v. Barrett*, 694 N.W.2d 783 (Minn. 2005)(discussing importance of service requirements).

Recommendation 5: Amend Rule 128 to Require Appellant to Provide an Addendum Including the Relevant Decisions Germane to the Appeal.

Introduction

The current rules require that the appellant provide relevant trial court decisions in the Appendix, which in many cases relegates it to a separate bound volume, along with voluminous, and often extraneous, material.

The federal courts, at least in some circuits, have long provided for preparation of an "Addendum" to the briefs, mandatory for the appellant and optional for appellees, containing the relevant trial court decisions. *See, e.g.*, 8th Cir. R. App. P. 28A(b), *reprinted in* MINNESOTA RULES OF COURT: FEDERAL 201 (West 2008 ed.). The committee believes a similar requirement for Minnesota appeals will serve the interests of the parties and the court, and should be adopted.

Specific Recommendations

1. Rule 128 should be amended as follows:

RULE 128. BRIEFS

Rule 128.06. Addendum

Subdivision 1. Contents. Appellant must prepare an addendum and file it with the opening brief. The addendum must include:

(a) a copy of any order, judgment, findings, or trial court memorandum in the action, and, if applicable, a copy of any order or opinion of the court of appeals, directly relating to or affecting issues on appeal; and

(b) short excerpts from the record, other than from the transcript of testimony, that would be helpful in reading the brief without immediate reference to the appendix.

Subd. 2. Length. The addendum must not exceed 15 pages excluding the orders, judgments, and opinions required by subdivision (1)(a) of this rule. The addendum must be incorporated into the back of the brief, unless it includes a long district court decision, in which event it may be bound separately. If bound separately, the appellant must file the same number of addenda as briefs.

Subd. 3. Respondent's Addendum. The respondent's brief may include an addendum not to exceed 15 pages, which must be incorporated into the back of the brief.

Subd. 4. Non-Duplication. A document or other material included in any party's addendum need not be included in any appendix.

Advisory Committee Comment—2008 Amendments

Rule 128.06 is a new rule, containing a new requirement for submission of an addendum. The rule permits the key trial court rulings, and up to 15 additional pages that would be helpful to reading the brief, to be bound with the brief. Presumably, the materials in the addendum would otherwise be contained in the appendix, so this rule really just reorganizes the location of the materials for the benefit of the parties and the appellate judges. The rule explicitly provides for inclusion of the relevant trial court orders or judgment and decisions of the court of appeals in the addendum; it does not contemplate attachment of briefs of the parties. In the rare cases where memoranda of the parties are relevant to the appeal, they should be included in the appendix.

2. Rule 130.01 should be amended as follows:

RULE 130. THE APPENDIX TO THE BRIEFS; SUPPLEMENTAL RECORD

Rule 130.01 Record Not to be Printed; Appellant to File Appendix

Subdivision 1. Record; Portions. The record shall not be printed. The appellant shall prepare and file an appendix to its brief. The appendix shall be separately and consecutively numbered and shall contain the following portions of the record:

(a) the relevant pleadings;
(b) the relevant written motions and orders;
(c) the verdict or the findings of fact, conclusions of law and order for judgment;
(d) the relevant post trial motions and orders;
(e) any memorandum opinions;
(f) if the trial court's instructions are challenged on appeal, the instructions, any portion of the transcript containing a discussion of the instructions and any relevant requests for instructions;
(g) any judgments;
(h) the notice of appeal;
(i) if the constitutionality of a statute is challenged, proof of compliance with Rule 144; and
(j) the index to the documents contained in the appendix.

The parties shall have regard for the fact that the entire record is always available to the appellate court for reference or examination and shall not engage in unnecessary reproduction. Any documents included in an addendum to a party's brief need not be included in the appendix.

Recommendation 6: Rule 132 Should Be Amended to Permit the Appendix to be Submitted with Two-Sided Printing.

Introduction

Rule 132.01, subdivision 1, requires briefs and appendices to be submitted with printing on one side of the page. The committee believes the rule should be amended to permit, but not require, the appendix to be submitted with two-sided copying. The benefits of this are reduced size and weight, as well as reduced expense.

Specific Recommendation

Rule 132 should be amended as follows:

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. 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 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 by 9½ inches. Written matter in briefs and addenda shall appear on only one side of the paper; appendices and supplemental records may be produced in the same manner or using two-sided printing. The pages of the appendix shall be separately and consecutively numbered. Briefs 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.

* * *

Advisory Committee Comment—2008 Amendments

Rule 132.01 is amended to permit, but not require, the preparation of appendices and supplemental records using two-sided copies. The rule's requirement for use of opaque paper is particularly important if a party elects to submit a two-sided appendix.

Recommendation 7: Amend Rule 134.06 & .07 to Conform the Rule to the Current Facilities and Long-Standing Practices of the Appellate Courts.

Introduction

Rule 134 contains several provisions that are either incomplete or outdated, and the rule should therefore be updated. First, Rule 134.06, subdivision 1, provides that the date of submission of cases where there will be no argument is generally ten days after the completion of briefing (or on the date the court consents to waiver of argument after argument is set). Because the court of appeals has followed a different practice since the early days of the court, placing nonoral cases on a calendar before a panel with other cases and deeming them submitted at that time, the rule should be conformed to the reality of court practice. (Both the court of appeals and supreme court follow the practice of placing cases on a nonoral calendar for consideration on the briefs; the significance of the rule is greater for the court of appeals because of the statutory mandate that it decide cases within 90 days of submission.)

Similarly, Rule 134.07 contains provisions relating to exhibits, plats, and courtroom blackboards that are unclear or misleading. (In the case of courtroom blackboards, the rule is both fanciful and irrelevant, given the absence of blackboards in any of the appellate courtrooms and the dearth of requests or need for a blackboard.) The committee recommends that this rule also be amended to provide useful guidance to litigants. The proposed rule provides explicitly for what is probably the preferred practice—providing clear individual copies of any demonstrative exhibits to the court, either in the addendum or appendix or before the commencement of argument.

Specific Recommendation

Rule 134 should be amended as follows:

RULE 134. ORAL ARGUMENT

* * *

Rule 134.06. Submission on Briefs

~~**Subdivision 1. Waiver by Agreement.** Oral argument once allowed may be waived by agreement of the parties and consent of the court, and the matter shall be deemed submitted on the briefs ten days after the completion of the briefing or on the date the appellate court consents to the waiver of oral argument, whichever is later.~~

~~**Subd. 2. Case Submitted.** When no oral argument has been requested, the case shall be considered submitted ten days after the completion of the briefing.~~

~~**Subd. 3. Oral Argument Disallowed.** If, pursuant to Rule 134.01(d), oral argument is not allowed, the case shall be deemed submitted to the court at the time of notification of the denial of oral argument.~~

An appeal will be placed on a nonoral calendar and deemed submitted on the briefs on that calendar date in the following circumstances:

a) When oral argument has not been requested;

b) When oral argument once allowed has been waived by agreement of the parties and consent of the court; or

c) If, pursuant to Rule 134.01(d), oral argument is not allowed.

Rule 134.07. Trial Court Exhibits; ~~Plats~~ Diagrams and Demonstrative Aids

Subdivision 1. Trial Court Exhibits. ~~If any exhibits are to be used at the hearing, c~~Counsel planning to use any trial court exhibits during oral argument ~~shall~~ must arrange before the day of argument with the clerk of the appellate courts to have them placed in the courtroom before the court convenes on the date of the hearing. ~~Counsel will also see that all photographic exhibits are in court for the oral argument.~~

Subd. 2. ~~Plats~~Diagrams and Demonstrative Aids. In cases where a plat, ~~or~~ diagram , or demonstrative aid will facilitate an understanding of the facts or of the issues involved, counsel shall either:

(1) Provide a copy in the addendum to the brief or in the appendix;

(2) Provide individual copies to opposing counsel and the court before the argument;

(3) If necessary, have in court a plat, ~~or~~ diagram, or demonstrative aid of sufficient size and distinctness to be visible to the court and opposing counsel; ~~The plat or diagram may be drawn on the courtroom blackboard.~~ or

(4) In advance of oral argument make arrangements with the court for the set up and removal of any video projection or audio playback equipment needed for presentation of trial electronic exhibits or demonstrative aids.

Advisory Committee Comment—2008 Amendments

Rule 134.06 is amended to conform the rule to the uniform practice of the both the court of appeals and supreme court for cases to be submitted without argument. In all cases it is the practice of the courts to place these cases on an argument calendar for a specific date, noting that nonoral cases will be submitted without argument. The rule is simply amended to conform to this practice.

Rule 134.07 is amended to broaden the rule and also to conform it to current court practices. Prior to amendment, Rule 134.07 spoke generally of "exhibits," referring either to trial court exhibits or possibly to demonstrative aids. As amended, subdivision 1 addresses trial court exhibits, and states the requirement that counsel seeking to use them in some way in argument must make arrangements for them to be in the courtroom. This is rarely necessary, as exhibits are available to the court and important exhibits are usually reproduced in a party's addendum or appendix. Subdivision 2 is revamped more extensively, to reflect the wider array of materials that might have a role at oral argument. Most importantly, the revised rule provides for what is probably the best way to provide demonstrative exhibits to the court: include them in the addendum or appendix, which makes them available to all judges both before and at argument or, if they are not included in the addendum or appendix, provide copies to the marshal for distribution to the judges or justices and to opposing counsel before the beginning of oral argument. "Blow-ups" of documents are notoriously ineffective at argument, as most typed documents—even if enlarged many times—are still difficult or impossible to read across a courtroom. The rule also makes it clear that in order to present video

images or audio recordings at argument, whether for parts of the record or for demonstrative aids, counsel must arrange for the presence and operation of playback equipment. The inclusion of this provision is not to encourage the use of audio or video equipment at argument—it is often more distracting than useful—but there are circumstances where its use may be appropriate. The revised rule makes it clear how it may be used. The court will likely require that any equipment be set up before the first argument of the day or during a break, and removed at the end of the day or during a formal break.

Recommendation 8: **Amend Rule 125 to Clarify that U.S. Mail Is Required for "Mailed" Service and Filing, and that Filing and Service by Facsimile Are Not Generally Allowed.**

Introduction

Questions have repeatedly arisen regarding the effect of service by Federal Express, UPS, DHL, or other similar commercial courier. The rule permits both service and filing "by mail," which remains ambiguous to some appellate litigants. The committee believes that it would be worthwhile to amend Rule 125 to make it clear that service and filing "by mail" requires use of the United States Mail. A party may use one of the commercial couriers, but the effect of filing or service by courier is the same as hand delivery. This clarification removes three areas of ambiguity under the current rule. First, it removes any argument that service or filing by this often-useful means is not permitted. Second, it establishes that service and filing by courier are effective upon receipt, just as personal service would be. Consequently, the rule also clarifies the effect of service by courier: additional time is not allowed following service by courier, as it is not needed for any reason. These changes mirror changes made to MINN. R. CIV. P. 6.05, by amendment effective January 1, 2007.

Finally, the rules should be amended to make it clear that facsimile filing is not permitted and service by facsimile is permitted only with consent of the party being served.

Specific Recommendation

Rule 125.01 & .03 should be amended as follows:

RULE 125. FILING AND SERVICE

Rule 125.01. Filing

Papers required or authorized by these rules shall be filed with the clerk of the appellate courts within the time limitations contained in the applicable rule. Filing may be accomplished by ~~mail~~ United States Mail addressed to the clerk of the appellate courts, but filing shall not be timely unless the papers are deposited in the mail within the time fixed for filing. Filing may be accomplished by use of a commercial courier service, and shall be effective upon receipt by the clerk of the appellate courts. Filing by facsimile or other electronic means is not allowed in the appellate courts, except with express leave of the court.

If a motion or petition requests relief ~~which~~ that may be granted by a single judge, the judge may accept the document for filing, in which event the date of filing shall be noted on it and it shall be thereafter transmitted to the clerk. All papers filed shall include the attorney registration license number of counsel filing the paper and, if filed subsequent to the notice of appeal, shall specify the appellate court docket number.

Rule 125.02. Service and Filing of All Papers Required

Copies of all papers filed by any party shall be served by that party, at or before the time of filing, on all other parties to the appeal or review. Papers shall be filed with the clerk of the appellate courts at the time of service or immediately thereafter. Service on a party represented by counsel shall be made on the attorney.

Rule 125.03. Manner of Service

Service may be personal or by ~~mail~~ United States Mail. Personal service includes delivery of a copy of the document to the attorney or other responsible person in the office of the attorney, or to the party, if not represented by counsel, in any manner provided by Rule 4, Minnesota Rules of Civil Procedure. Service by ~~mail~~ United States Mail is complete on mailing; however, whenever a party is required or permitted to do an act within a prescribed period after service and the

paper is served by ~~mail~~ United States Mail, 3 days shall be added to the prescribed period. Personal service may be effected by use of a commercial courier service, and it shall be effective upon receipt. Service by facsimile or other electronic means is allowed only with the consent of the party to be served, and is effective upon receipt.

* * *

Advisory Committee Comment—2008 Amendment

Rules 125.01 and .03 are amended to make clear the intent of the existing rule: that service and filing "by mail" under the rules requires use of the United States Mail. This clarification parallels a similar set of amendments to the Minnesota Rules of Civil Procedure. *Compare* Minn. R. Civ. P. 6.05 (amended in 2007 to specify U.S. Mail) *with* Minn. R. Civ. P. 5.05 (historically requiring use of first-class mail). The rule also makes it clear that it is permissible to use Federal Express, UPS, or other commercial courier for both filing and service, but delivery by that means is treated as any other hand delivery, and effective only upon receipt. Additional time for response to service by these services is thus neither required nor provided for, because the response period begins to run at the time of receipt.

These rules are also amended to make it clear that neither service nor filing by facsimile are ordinarily allowed in the appellate courts. In exigent circumstances the courts may request that courtesy copies of papers be provided by facsimile, but originals must be filed as provided in Rule 125.01. Service by facsimile is not generally permitted by rule, but if a party agrees to be served by facsimile it is permissible under the amended rule and is effective upon receipt. This provision recognizes that service by facsimile may be cost-effective and convenient for motions, notices, and other papers; it is unlikely to be used for briefs and appendices. The scope of any agreement to consent to service by facsimile should be carefully defined; it will be the unusual appeal where the parties really want their agreement to extend to the briefs and any appendices. The extension of this provision to service "by other electronic means" is intended to permit service by electronic mail, again only where the party to be served has agreed to it for the type of document involved.