STATE OF MINNESOTA

IN SUPREME COURT

C4-84-2133

Order Promulgating Amendments to
Rules of Civil Appellate Procedure

O R D E R

The Supreme Court Advisory Committee on Rules of Civil Appellate Procedure has recommended amendments to the Rules of Civil Appellate Procedure. By order filed October 23, 2008, the court solicited comments on the proposed amendments to be filed no later than November 26, 2008.

The court has reviewed the comments received and the proposed amendments and is fully advised in the premises.

IT IS HEREBY ORDERED THAT:

1. The attached amendments to the Rules of Civil Appellate Procedure be, and the same are, prescribed and promulgated to be effective on January 1, 2009.

2. These amendments shall apply to all actions or proceedings pending on or commenced on or after the effective date.

3. The inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the statements made therein.

Dated: December 11, 2008

BY THE COURT:

/s/

Eric J. Magnuson
Chief Justice

AMENDMENTS TO THE RULES OF CIVIL APPELLATE PROCEDURE

[Note: new material is indicated by underscoring, except committee comments, which are all new; deleted material is indicated by strikethrough.]

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

Rule 104.01 Time for Filing and Service

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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.)

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RULE 110. THE RECORD ON APPEAL

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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

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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 obsolescent, and CD-ROM is the format best suited to this use and most convenient for the courts and the parties.

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

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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 for the State of Minnesota 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, e.g.*, 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. 28.02, 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).

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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. 4.05 (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.

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RULE 128. BRIEFS

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Rule 128.02. Formal Brief

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Subd. 3. Addendum.

(a) Contents. Appellant must prepare an addendum and file it with the opening brief. The addendum must include:

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

(2) 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.

(b) Length. The addendum must not exceed 15 pages excluding the orders and judgments required by subdivision (1)(a) of this rule and any material reproduced in the addendum under Rule 128.04. 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.

(c) 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.

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

Subd. 4~~3~~. Reply Brief. The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent.

Subd. 5~~4~~. Additional Briefs. No further briefs may be filed except with leave of the appellate court.

Advisory Committee Comment—2008 Amendments

Rule 128.02, subdivision 3, as amended, is a new rule, containing a new requirement for submission of an addendum. The rule requires the key trial court rulings, and permits 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 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. The current subdivisions 3 and 4 of Rule 128.02 are re-numbered as subdivisions 4 and 5.

Rule 128.03. References in Briefs to Record

Whenever a reference is made in the briefs to any part of the record which is reproduced in the addendum or appendix or in a supplemental record, the reference shall be made to the specific pages of the addendum or appendix or the supplemental record where the particular part of the record is reproduced. Whenever a reference is made to a part of the record which is not reproduced in the addendum or appendix or in a supplemental record, the reference shall be made to the particular part of the record, suitably designated, and to the specific pages of it, e.g., Motion for Summary Judgment, p. 1; Transcript, p. 135; Plaintiff's Exhibit D, p. 3. Intelligible abbreviations may be used.

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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.

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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.

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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.

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RULE 134. ORAL ARGUMENT

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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.

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. 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:

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

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

(c) 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

(d) 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 134.07 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.

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