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A-1

Clerk of Supreme Court
230 State Capitol
St. Paul, Minnesota 55155

RE: Procedural Rule 136 of the Rules of Civil Appellate Procedure

Dear Sir or Madam:

Enclosed for your consideration, please find my comment on the majority recommendation on Procedural Rule 136 of the Rules of Civil Appellate Procedure. I do not intend to appear in person if such appearance is not required but request that the views expressed in this brief be distributed to the members of the Supreme Court.

Yours very truly,

John E. Mack

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JEM/dlg
Enclosures

6-30 -- copy to each Justice

STATE OF MINNESOTA
IN SUPREME COURT

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COMMENT ON PROPOSED RULE 136

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The majority of the committee revising the proposed Minnesota Rules of Civil Appellate Procedure recommends comparatively small changes in the current Rule 136. Depending upon how that rule is administered, it offers no substantial changes from the current practice. The statement ". . .or if the Court determines that the contents of the decision will adequately resolve the dispute presented by the facts, no written opinion need be prepared," is crucial. The reason for the decision in the "concise opinion" may be nothing more than "the appeal lacks merit," or, more familiarily "we have carefully reviewed the transcript and evidence in the above-entitled matter, and find that the appellant's arguments therein are without merit."

I rather suspect that the Appellate Court will attempt to avoid this sort of thing initially. However, as the case load increases, it is likely that this sort of option will become more and more attractive. After all, Minnesota's ten Judicial Districts, consisting of Three Judge Panels (often meeting in more than one division) now have at least 40 Judges actively involved in hearing appeals cases and writing opinions. This will be narrowed down to 12 Judges hearing the great bulk of all appellate cases in the State. Since

the Justices of the Supreme Court will not be hearing many cases other than originating from the Court of Appeals, the work load on this new Court is likely to eventually be greater than that currently on the Supreme Court. Accordingly, summary decisions (or their effective equivalent) are likely to increase substantially with time.

One of the most disturbing features of Supreme Court practice over the last five years has been the tremendous growth use of summary dismissal or affirmance rules. It has, in my judgment, not only affected the procedure of the Supreme Court, but also the substance of justice. The burden of these rules has fallen disproportionately upon the small, the weak, the economically impoverished and the minorities. While one's personal experience is, of course, all too narrow to rely upon, it is worth noting that prior to the adoption and application of Rule 135 and its companions, I had approximately a 50% success rate as appellant. Since the introduction of those rules, I have not won a case as appellant nor lost one as respondent and in all cases the Court has applied Rule 136 or its equivalent. Inevitably in the majority of these cases, the result would not have been affected; but in some important ones, I think the outcome was affected by the fact that the case could be safely ignored. Two cases in particular come to my mind: In Byron Dahl v. Lake Elizabeth Township, the Judge, in upholding DNR's denial of a permit application for a culvert or bridge issued affirmative relief unsought by the DNR in ordering the building of a dam. This action was so outre and improper that I cannot imagine an Appellate Court actually having to give a reason why this could be done coming out the way it did. And of course, one cannot avoid the suspicion that when the opportunity of

a Rule 136 decision presents itself, the Court in its functionaries simply does not read the case materials very carefully and if a lawyer entertains such suspicions, the client holds these deeply. The second such case was Bohlsen v. Chippewa County where the Court applied Rule 136 to a man who, having been shot by his delinquent child, was ordered to pay $43,000 of that child's maintenance, had his grain tied up, his farming operation ruined, and his reputation to be smurshed, all without either a hearing or notice of hearing. Again, I cannot imagine the same result if an Appellate Court had to state the facts in its opinion and rule on them thereafter.

Of course, a lawyer invariably becomes somewhat partisan to his case, so my conclusions on these cases may be wrong. But they are very plausible. And my opinions are mild compared to those of a client who has been gravely injured and then finds the Supreme Court renders nothing more than a Rule 136 summary affirmance. While I would not go so far as to charge that the use of Rule 136 encourages a star-chamber mentality, there is no doubt that it has the following pernicious affects:

a. It encourages cursory review and hurried examination.

b. It makes it possible to sweep politically and socially sensitive issues "under the rug."

c. It increases the proportion of affirmances to reversals.

d. It insulates the Court from the light of publicity, thereby encouraging lackadaisical reasoning.

e. It encourages the selection of cases for serious attention on the basis of monetary amount involved or public impact rather than justice.

f. It operates in favor of the State, large corporations, and clients represented by large law firms, who have the opportunity to put an attractive "face" on their product.

g. It discourages independent research by the Court upon cases, making the Court almost wholly dependent upon the framing and presentation of issues by the attorneys.

h. It angers and outrages clients who are the victims of summary affirmance or summary reversal.

i. It places a significant layer of insulation between the people and higher reaches of justice.

j. It allows more arbitrary power to local courts, significantly increasing the risk of being "home-towned" outside a lawyer's community.

While the committee attempted to make some concession to these feelings by requiring something in writing, it did not do either of the two things which would be necessary to significantly obviate these problems: Either (a)requiring a written opinion which will dispose of the issues presented by the parties; or (b)requiring that opinions rendered have stare decisis affect. Absent at least one of these, the new rule will probably not be much of an improvement over the present one in the long run. Instead, we will have two layers of courts refusing to hear the pleas of the common people, rather than only one. At least under the current system, litigants in County Court are assured of one appellate review.

I think that in the long run the administration of justice must be a dialogue between the courts and the people. Too great a separation between the two not only leaves the feeling that justice

is only for the rich and the powerful; it also widens the gap between law and morality. With the increased growth of agency law, and with the increased complexity of regulations having the force and affect of law, the number of governmental directives which citizens are expected to obey has increased explosively in recent years. At the same time, most of these directives do not prohibit conduct felt to be malum in se, and many of them are felt to be surely technical. As a consequence, more citizens are consistently in violation of law than at any time in our history, and the proportion of citizens punished for violation of some law necessarily goes down. The affect of a dramatic increase in law coupled with a decrease in understanding of the law and relative decrease in enforcement of the law is a "distancing" between the governors and the governed. Necessarily, there is a concomitant decrease in respect for the law.

To some extent, this trend is inevitable. We cannot govern a modern complex society without complex and arcane rules governing air and water pollution, conservation, job safety and the like. But at the same time we must realize that the price we are likely to pay for this type of government is increasingly sporatic and arbitrary enforcement, vastly increased discretionary power in the hands of unelected officials, vast differences in outcomes and results among people committing similar acts, and vast differences in attitudes toward those acts by persons (often local courts) expected to administer justice.

Courts perform two functions which prevent these centrifical tendencies from causing a total breakdown in respect for law: First, they can be an instrument of standardization for penalties and

requirements, but this they can only be if the central authority keeps a tight watch over the results of their actions. Since almost invariably enforcement in these cases is in County Court, and, where criminal proceedings are involved, misdemeanor jurisdiction courts, the Court that does not keep in touch will soon find that the common law of, say, the Sixth Judicial District varies wildly from the common law of the Ninth. Second, the Courts constitute one of the best and most effective barriers against arbitrary executive and bureaucratic action. But to so function, Courts need effective assistance and backup from the Appellate Courts. If they do not receive it, the natural conservatism of the local community, dominated as it is by local power relationships, will insure that reaction to the modern legal system will vary more than it should with the wealth and power of tne litigant.

In sum, a legal system which has a highly centralized executive department but a diffuse and localized judiciary will result in disrespect for the law. One of the advantages of the new Appellate Court's structure was to be its attempt to meet this issue. Indeed, the possibility of being rid of the summary opinion was the principal reason I and many other lawyers supported the new Court's creation. But all of this benefit can be washed away if that Appellate Court is allowed to direct the judicial system by the sort of "random sampling" methods that the Supreme Court has used for the last several years. The whole point of an appellate judicial system is justice; and the perception of justice is as important as reality. Each litigant needs to know, or at least to think, that matters affecting his life and property are being taken seriously. Rule 136 as it now stands

does not insure this; and circumstances insure that if it continues as it now exists, all trends will be away from individualized justice. If Appellate Courts are increasingly seen as simply a part of an invisible and distant machine, Rule 136 will be a principal reason for it. The minority report on this rule should be accepted.

Respectfully submitted,

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