STATE OF MINNESOTA

IN SUPREME COURT

C4-84-2133

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

The Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure has proposed changes to the Rules of Civil Appellate Procedure in a report filed on April 16, 2009. This Court will consider the proposed changes without a hearing after soliciting and reviewing comments on the proposed changes. A copy of the committee's report containing the proposed changes is annexed to this order.

IT IS HEREBY ORDERED that any individual wishing to provide statements in support or opposition to the proposed changes shall submit twelve copies in writing addressed to Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Boulevard, St. Paul, Minnesota 55155, no later than July 21, 2009.

DATED: May 27, 2009

BY THE COURT:

Eric J. Magnuson
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
April 15, 2009

Hon. Jill Flaskamp Halbrooks, Chair
Hon. G. Barry Anderson, Liaison Justice

Richard S. Slowes, Supreme Court Commissioner
Frederick K. Grittner, Clerk of the Appellate Courts
Ex Officio

Thomas C. Atmore, Minneapolis
Hon. Louise Dovre Bjorkman, Saint Paul
Diane B. Bratvold, Minneapolis
Scott A. Buhler, Crookston
Prof. Bradley G. Clary, Minneapolis
Gary A. Debele, Minneapolis
Bradford S. Delapena, Saint Paul
Rita Coyle DeMeules, Saint Paul
C. David Dietz, Saint Paul
Jill I. Frieders, Rochester
Erik F. Hansen, Eden Prairie
Kay Nord Hunt, Minneapolis
Hon. Kurt D. Johnson, Mankato
Bruce Jones, Minneapolis
Cynthia L. Lehr, Saint Paul
Timothy J. Pramas, Minneapolis
David T. Schultz, Minneapolis
James S. Simonson, Minneapolis
Gregory R. Solum, Edina
Roy G. Spurbeck, Minneapolis
Paula D. Vraa, Saint Paul
Charles F. Webber, Minneapolis

David F. Herr, Minneapolis
Reporter

Advisory Committee on Rules of Civil Appellate Procedure

EXECUTIVE SUMMARY

Advisory Committee Process Summary

The Court's Advisory Committee on the Rules of Civil Appellate Procedure met twice in early 2009 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 reviewed and further revised its Recommendation 2 from its October 17, 2008, Final Report, relating to notices of review, and also completed its review of Rule 108 on stays and supersedeas bonds. With this report the committee has considered all of the issues brought to its attention regarding the Rules of Civil Appellate Procedure and does not intend to meet again until there are additional issues requiring its consideration.

Summary of Advisory Committee Recommendations

Recommended Rule Amendments

This report contains five recommendations for amendments to the rules.

These amendments are briefly summarized:

1. Rule 106 should be amended to abolish use of the notice of review and to create a procedure whereby any respondent seeking to assert issues on appeal can proceed by separate "Notice of Related Appeal." (The rule does not modify the currently available appellate avenue of commencing a separate appeal by Notice of Appeal.) A new Form 103C is included in the rules. The court should also adopt related amendments to Rules 103 and 104 to provide for notices of related appeal after the first party appeals and to Rule 131 to provide a modified briefing schedule for cases involving cross-appeals. (This issue was reported to the Court in this committee's report dated October 17, 2008, as Recommendation 2, but was held in abeyance so the committee could consider it further. The proposal made in October 2008 has been revised in minor detail and is now ready for adoption.)

2. Rule 108 should be replaced with a completely revamped rule to clarify and prescribe stay and supersedeas bond procedures.

3. Rules 114 and 115 should be modified to defer briefing until after the itemization of the record has been transmitted in declaratory-judgment and certiorari cases and to modify the process for transmittal of the record itself in certiorari cases under Rule 115.

4. The Court should adopt a new Rule 112 to provide guidance on how confidential information and sealed documents are handled in appellate proceedings. The rule is intended to address recurring issues about the handling of documents filed under seal in the trial courts.

5. The Court should amend Rule 128 to require parties to address in specific detail in the statement of legal issues in a brief two new things: how the issue was raised in the trial court and how it was preserved for appeal. The rule should also be amended to make explicit what is now only a crucial expectation: that parties address the standard of appellate review for every issue in their briefs.

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 one subject on which it concluded that no rule amendment is warranted at this time. The committee considered a suggestion that it is fundamentally unfair and unnecessary to exempt public parties from the taxation of costs in certiorari proceedings under Rule 115. The committee concluded that this change would likely have significant budgetary ramifications for the affected agencies, and the change should not be made at this time.

Recommendations for Further Study

The committee continues to monitor developments and potential amendments to 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 periods. (For example, five days under the current rules, not counting weekends, would normally become seven days, including weekends.) In late 2008 those changes were recommended to the United States Supreme Court for possible adoption effective on December 1, 2009; and the Supreme Court has now adopted them. *See* Orders, March 26, 2009, available for review, along with letters transmitting amendments to Congress, at http://www.uscourts.gov/rules/supct0309.html. The committee believes that the changes should be 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. Any such change should, however, be considered for several sets of Minnesota rules, so that the procedure for counting days is the same in all Minnesota courts.

Effective Date

The committee believes that the changes to Rule 106 (and related changes in Recommendation 1) 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 the effective date, but this result is not particularly problematic.

The committee discussed the question of whether a public hearing should be required for these amendments. The committee does not believe that these amendments are likely to be controversial, and a public hearing may not be necessary. This may be a set of recommended changes that would best be

evaluated by a public-comment period, with a hearing only if unexpected controversy were to arise.

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. The committee does not intend to meet again in 2009.

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 THE
RULES OF CIVIL APPELLATE
PROCEDURE

Recommendation 1: 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 have been filed, may result in the court not considering the merits of a potential appellate claim. The committee believes that the problems can best be minimized by replacing the notice of review with a separate procedure for filing a notice of related appeal.

Specific Recommendation

The committee's recommendation to deal with this issue comprises amendment of Rule 106 and related changes to Rules 103, 104, and 133. A new Form 103C is also adopted and Form 106 is deleted. In addition to creating a new procedure for an appeal by a respondent, these amendments create a single deadline for responding to a notice of appeal, regardless of whether a cross-appeal is asserted. These various amendments are intended to work together and should be viewed as a connected group.

Separate from those related amendments, the Court should amend Rule 131 to provide for an augmented briefing schedule in cases where cross-appeals are filed. The schedule for cross-appeals would allow four briefs, affording both sides an opening brief and an opportunity to respond and reply. This procedure is followed in the federal courts and appears to work well.

1. Rule 106 should be amended as follows:

RULE 106. RESPONDENT'S RIGHT TO OBTAIN REVIEW

~~A~~ After an appeal has been filed, respondent may obtain review of a judgment or order entered in the same underlying action ~~which~~ that may adversely affect respondent by filing a ~~separate~~ notice of ~~review~~ related appeal in accordance with Rule 103.02, subdivision 2, and 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—2009 Amendments

Rule 106 is amended to abolish the former notice of review, replacing it with the notice of related 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. *See, e.g.*, *Leaon v. Wash. County*, 397 N.W.2d 867, 872 (Minn. 1986)(holding that a respondent seeking appellate relief against parties other than the appellant may obtain review only by separate notice of appeal, but nonetheless considering issue raised improperly). 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 now found in Rule 103.02, subdivision 2, as to procedure, and Rule 104.01, subdivision 4, as to timing.

The amended rule is intended to create a single procedure that will allow a respondent seeking review to file a notice of related appeal. Under the amended rule a notice of related appeal should suffice to permit a respondent to obtain appellate review of any issues arising in the same trial court case but does not foreclose the right of any party to proceed by separate notice of appeal.

The new procedure is not intended to change the scope of appellate review. This notice of related appeal procedure is not meant to expand what can be reviewed on appeal or to limit that review. For example, the defendant's filing of an appeal under Minn. R. Crim. P. 28.02 does not currently create a right to file a cross-appeal or notice of review; and this amendment should not affect that result. *See State v. Schanus*, 431 N.W.2d 151, 152 (Minn. Ct. App. 1988). 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. Am. Family Ins. Co.*, 394 N.W.2d 791, 794 (Minn. 1986)(citing *Kostelnik* with apparent approval). The committee intends that the notice of related appeal be treated similarly and that an independent basis for jurisdiction not be required.

[Reporter's Note: As part of this amendment, Form 106 should also be deleted in its entirety.]

2. Rule 103 should be amended as follows:

RULE 103. APPEAL—HOW TAKEN

Rule 103.02. Joint Appeals; Related Appeals; Consolidated Appeals

* * *

Subd. 2. Related Appeals. After one party timely files a notice of appeal, any other party may seek review of a judgment or order in the same action by serving and filing a notice of related appeal. The notice of related appeal shall specify the judgment or order to be reviewed. The notice of related appeal shall be accompanied by:

(1) a filing fee of $100,

(2) a certified copy of the judgment or order from which the related appeal is taken if different than the judgment or order being challenged in the original appeal, and

(3) two copies of a statement of the case.

A separate cost bond is not required unless ordered by the court.

Subd. ~~2~~3. Consolidated Appeals. Related appeals from a single trial court action or ~~A~~appeals in separate actions may be consolidated by order of the appellate court on its own motion or upon motion of a party.

Advisory Committee Comment—2009 Amendments

Rule 103.02 is amended to add a new subdivision 2 to establish a new procedure for filing of a cross-appeal or another related appeal after any party has filed a notice of appeal. This rule applies in civil cases, as the Minnesota Rules of Criminal Procedure address the right to file a cross-appeal in criminal cases. See MINN. R. CRIM. P. 28.04, subd. 3. The new notice is denominated a "Notice of Related Appeal." *See* Appendix for form of Notice of Related Appeal (Form 103C). This procedure replaces the notice-of-review procedure formerly established by Rule 106. Existing subdivision 2 is renumbered as subdivision 3 and

is amended to provide for consolidation of related appeals from a single trial court proceeding. This consolidation may be ordered by the court based on information in the statement of the case or may be ordered upon motion of any party to any related appeal.

3. A new Form 103C should be adopted in the Appendix as follows:

FORM 103C. NOTICE OF RELATED APPEAL (COURT OF APPEALS)

STATE OF MINNESOTA _____ DISTRICT COURT
COUNTY OF _____ _____ JUDICIAL DISTRICT

CASE TITLE:

Plaintiff,

vs.

Defendant.

NOTICE OF RELATED APPEAL
TO COURT OF APPEALS

TRIAL COURT CASE NUMBER:

DATE OF ORDER OR JUDGMENT
BEING CHALLENGED:
_____

APPELLATE COURT
FILE NUMBER: _____

TO: Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Please take notice that the above-named [plaintiff/defendant] (state full name) appeals to the Minnesota Court of Appeals and seeks review of the (specify order or judgment by title) of the _____ court, which was [filed/entered] on the date noted above and [granting/denying (describe nature of ruling, such as plaintiff's motion for a new trial on liability)].

DATED:

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

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

_____

SIGNATURE

(The trial court caption is used on the notice of appeal and any notice of related appeal. Subsequent documents shall bear the appropriate appellate court caption. RCAP 103.02, subd. 1, specifies the contents of the notice of related appeal and filings required to perfect an appeal, including filing fees. RCAP 104.01, subd. 4, specifies time limits for filing and service of the notice of related appeal. This document must be accompanied by 2 copies of a completed statement of the case. RCAP 133.03.)

Advisory Committee Comment—2009 Amendments

This form is new as part of the amendments deleting Rule 106 and abolishing the notice of review and substituting the notice of related appeal. The caption provides information about the earlier appeal to which the later appeal related, including identification of the date of the order or judgment to be reviewed and the appellate court file number of that action, if known.

4. Existing Form 106 should be deleted.

5. Rule 104 should be amended as follows:

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

Rule 104.01. Time for Filing and Service

* * *

Subd. 3. Premature Appeal. A notice of appeal filed before the disposition of any of the above motions is premature and of no effect, and does not divest the trial court of jurisdiction to dispose of the motion. A new notice of

appeal must be filed within the time prescribed to appeal the underlying order or judgment, measured from the service of notice of filing of the order disposing of the outstanding motion. If a party has already paid a filing fee in connection with a premature appeal, no additional fee shall be required from that party for the filing of a new notice of appeal or notice of related appeal pursuant to Rule ~~106~~ 103.02, subdivision 2.

Subd. 4. Multiple Appeals. After one party timely files a notice of appeal, any other party may serve and file a notice of related appeal within 14 days after the filing of the first notice of appeal, or within the time otherwise prescribed by subdivisions 1 and 2 of this rule, whichever period ends later.

Advisory Committee Comment—2009 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 elect to appeal an issue only after learning that another party has appealed. Where a prior appeal has been filed and remains pending, a subsequent notice of appeal should be denominated "Notice of Related Appeal" and will suffice to raise any issue arising from the same trial court action. *See* Appendix for form of Notice of Related Appeal (Form 103C). The rule permits a party to serve and file a subsequent notice of related appeal 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.

6. Rule 128 should be amended as follows:

RULE 128. BRIEFS

Rule 128.02. Formal Brief

* * *

Subd. 2. Brief of Respondent. The formal brief of the respondent shall conform to the requirements of Rule 128.02, subdivision 1, except that a statement of the issues or of the facts need not be made unless the respondent is dissatisfied with the statement of the appellant. If a notice of ~~review~~ related appeal is filed pursuant to Rule ~~106~~ 103.02, subdivision 2, the respondent's brief shall present the

issues specified in the notice of ~~review~~ related appeal. A respondent who fails to file a brief either when originally due or upon expiration of an extension of time shall not be entitled to oral argument without leave of the appellate court.

7. 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 a notice of appeal and at least one notice of related appeal or separate notice of appeal are filed by parties adverse to each other on appeal. Multiple notices of appeal or related appeal filed by parties who are not adverse to each other do not create cross-appeals.

(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 principal brief shall be filed in accordance with Rule 131.01, subdivision 1, and the respondent/cross-appellant's principal brief shall be filed as one brief within 30 days after service of appellant's brief. Appellant's reply/cross-respondent brief shall be filed as one brief within 30 days after service of cross-appellant's brief.

Respondent/cross-appellant's reply brief may 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 may, in the same brief, respond to the appellant's principal brief. The 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 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 may 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. The brief must comply with Rule 128.02, subdivision 4, 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.

(A) The appellant's principal brief is acceptable if it complies with the length limits of Rule 132.01, subdivision 3(a).

(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.

(D) The respondent/cross-appellant's reply brief is acceptable if they comply with the length limits of Rule 132.01, subdivision 3(b).

Advisory Committee Comment—2009 Amendments

Rule 131.01, subdivision 5, is a new rule to establish alternative 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, and the court may impose them on its own initiative.

The briefing process for cross-appeals under the amended rule is summarized as follows:

	Brief (in order of filing)	Cover Color	Length limit (word count method)
1	Appellant's principal brief	Blue	14,000 words (unchanged)
2	Respondent/cross-appellant's principal and response brief	Red	16,500 words
3	Appellant's response and reply brief	Yellow	10,000 words
4	Respondent/cross-appellant's reply brief	Gray	7,000 words (unchanged)

Subdivision 5(a) makes it clear that only multiple appeals by adverse parties create cross-appeals. If several parties on the same side of a case file separate appeals that are not adverse to each other, the normal three-brief schedule of Rule 131.01applies.

8. Rules 115.03, 116.03, and 133.03 should be amended to create a uniform 14-day deadline for a respondent to serve and file a statement of the case and to make the due date coincide with the date for filing a notice of related appeal.

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

Rule 115.01. How Obtained; Time for Securing Writ

Review by the Court of Appeals of decisions of the ~~Commissioner of Economic Security~~ Department of Employment and Economic Development and other decisions reviewable by certiorari and review of decisions appealable pursuant to the Administrative Procedure Act may be had by securing issuance of a writ of certiorari. The appeal period and the acts required to invoke appellate jurisdiction are governed by the applicable statute.

Advisory Committee Comment—2009 Amendments

Rule 115.01 is amended to change the reference, in both the title and body of the rule, to the Department of Employment and Economic Development, the current name of this agency. *See* MINN. STAT. § 15.01 (2008).

*** * ***

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~~ shall 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~~ not later than 14 days after service of the petitioner's statement.

*** * ***

Advisory Committee Comment—2009 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 petitioner's statement of the case. This change makes the respondent's statement of the case due on the same day a notice of related appeal would be due. *See* Rule 104.01, subdivision 4, as amended.

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—2009 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. This change makes the respondent's statement of the case due on the same day a notice of related appeal would be due. *See* Rule 104.01, subdivision 4, as amended.

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~~ any of the following:

a. a notice of appeal pursuant to Rule~~s~~ 103.01,

b. a notice of related appeal pursuant to 103.02, subdivision 2,

c. a petition for declaratory relief pursuant to Rule 114.02, or ~~with~~

d. ~~the~~ a petition for the writ of certiorari ~~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 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—2009 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 notice of related appeal and respondent's statement of the case are 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 to 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.

RULE 142. DISMISSAL; DEFAULT

Rule 142.03. Default of Respondent

If the respondent fails or neglects to serve and file its brief, the case shall be determined on the merits. If a defaulting respondent has filed a notice of ~~review~~ related appeal pursuant to Rule ~~106~~ 103.02, subdivision 2, the ~~appellant~~ party opposing the related appeal may serve and file a motion for affirmance of the judgment or order specified in the notice of review or for a dismissal of the respondent's review proceedings, subject to a motion to reinstate the review proceedings in accordance with the criteria specified in Rule 142.02.

If the appellant fails or neglects to serve and file its brief in response to a respondent's brief in support of a cross-appeal, the case shall be determined on the merits as to those issues raised by the cross-appeal.

Recommendation 2: Rule 108 Should Be Replaced with a Completely Revamped Rule.

Introduction

Rule 108 has historically been one of the more cumbersome, and sometimes opaque, rules in the rulebook. It does not provide sufficient guidance on some of the following questions litigants and judges repeatedly have relating to stays and superseding judgments and orders:

- Does filing an appeal suspend the trial court's order or judgment?
- If not, can I obtain a stay of the order or judgment?
- What procedure is followed?
- Can I post something other than a supersedeas bond as security?
- What amount of security is required?

Existing Rule 108 answers some of these questions, but in many cases the answer is either hard to find or simply not contained in the rule. For this reason, the committee undertook a complete revamping of Rule 108 and believes it is a vast improvement, primarily as a matter of form. The new rule is intended to address these issues, and to do so in a manner that preserves important aspects of existing law, including judicial discretion in matters of stays, supersedeas bonds, and alternative forms of security.

Specific Recommendation

Existing Rule 108 should be deleted and replaced in its entirety as follows:

~~RULE 108. SUPERSEDEAS BOND; STAYS~~

~~Rule 108.01 Supersedeas Bond~~

~~Subdivision 1. Effect of Appeal; Stay.~~ ~~Except in appeals under Rule 103.03 (b), or as otherwise provided by law, the filing of a proper and timely~~

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

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

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

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

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

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

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

Subd. 5. If the appeal is from a judgment directing the sale or delivery of possession of real property, the condition of the bond shall be the payment of the value of the use and occupation of the property from the time of the appeal until the delivery of possession of the property if the judgment is affirmed and the undertaking that the appellant shall not commit or suffer the commission of any waste on the property while it remains in the appellant's possession during the pendency of the appeal.

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

Subd. 7. In cases not specified in subdivisions 2 to 6, filing the bond specified in Rule 107 shall stay proceedings in the trial court.

Subd. 8. Upon motion, the trial court may require the appellant to file a supersedeas bond if it determines that the provisions of Rule 108 do not provide adequate security to the respondent.

Rule 108.02 Judgments Directing Conveyances

If the appeal is from a judgment directing the execution of a conveyance or other instrument, its execution shall not be stayed by an appeal until the instrument is executed and deposited with the trial court administrator to abide the judgment of the appellate court.

Rule 108.03 Extent of Stay

When a bond is filed as provided by Rule 108.01, it shall stay all further proceedings in the trial court upon the judgment or order appealed from or the matter embraced in it; but the trial court may proceed upon any other matter included in the action and not affected by the judgment or order from which the appeal is taken.

~~Rule 108.04. Respondent's Bond to Enforce Judgment~~

~~Notwithstanding an appeal from a money judgment and security given for a stay of proceedings thereon, the trial court, on motion and notice to the adverse party, may grant leave to the respondent to enforce the judgment upon his filing the bond herein provided, if it be made to appear to the satisfaction of the trial court that the appeal was taken for the purpose of delay. The bond shall be executed by, or on behalf of, the respondent and shall be conditioned that, if the judgment is reversed or modified, the respondent will make any restitution the appellate court directs.~~

~~Rule 108.05. Joinder of Bond Provisions; Service on Adverse Party~~

~~The bonds provided for in Rule 107 and Rule 108.01 may be in one instrument or several, at the option of the appellant, and shall be served on the adverse party.~~

~~Rule 108.06. Perishable Property~~

~~If the appeal is from a judgment directing the sale of perishable property, the trial court may order the property to be sold and the proceeds deposited or invested to abide the judgment of the appellate court.~~

~~Rule 108.07. Effect of Proceedings in Supreme Court~~

~~Where a petition to the Supreme Court for review of a decision of the Court of Appeals is filed or a case is transferred to the Supreme Court pursuant to these rules, and a supersedeas bond has previously been filed to stay the trial court proceedings, the bond shall remain in full force and effect during the pendency of the review unless otherwise ordered by the Supreme Court. The Supreme Court may make any other order appropriate to preserve the status quo or to promote the effectiveness of any judgment which may subsequently be entered.~~

[Reporter's Note: Because this rule is entirely new, underscoring is omitted for clarity.]

RULE 108. STAYS PENDING APPEAL; SECURITY

Rule 108.01. Effect of Appeal on Proceedings in Trial Court

Subdivision 1. Generally No Stay of Enforcement of Judgment or Order on Appeal. Except as otherwise provided by rule or statute, an appeal from a judgment or order does not stay enforcement of the judgment or order in the trial court unless that court orders relief in accordance with Rule 108.02.

Subd. 2. Suspension of Trial Court's Authority to Make Orders Affecting Judgment or Order on Appeal. Except in appeals under Rule 103.03(b), the filing of a timely and proper appeal suspends the trial court's authority to make any order that affects the order or judgment appealed from, although the trial court retains jurisdiction as to matters independent of, supplemental to, or collateral to the order or judgment appealed from.

Advisory Committee Comment—2009 Amendments

Rule 108.01 is a new rule, but it is not intended to create new law. Its provisions are drawn from existing Rule 108.01, subdivision 1, and codify long-standing common law. Neither the filing of an appeal nor the posting of a cost bond required by Rule 107 stays the order or judgment appealed from. *See Spaeth v. City of Plymouth*, 344 N.W.2d 815, 824 (Minn. 1984); *Bock v. Sauk Ctr. Grocery*, 100 Minn. 71, 110 N.W. 257 (1907*); Floberg v. Joslin*, 75 Minn. 75, 77 N.W. 557 (1898). An appeal divests the trial court of jurisdiction over the matters appealed but only over matters necessarily involved in the order or judgment appealed from. *See Spaeth*, 344 N.W.2d at 824; *State v. Barnes*, 249 Minn. 301, 302–03, 81 N.W.2d 864, 866 (1957). The trial court retains jurisdiction over matters collateral to or supplemental to the order or judgment. *See, e.g., Kellar v. Von Holtum*, 605 N.W.2d 696, 700 (Minn. 2000)(trial court retained jurisdiction over motions for attorney fees and costs after appeal was perfected); *Phillips–Klein Cos. v. Tiffany P'ship*, 474 N.W.2d 370 (Minn. Ct. App. 1991).

Rule 108.02. Motion for Stay or Injunction in Trial Court; Security.

Subdivision 1. Motion in Trial Court. A party seeking any of the following relief must move first in the trial court:

(a) a stay of enforcement of the judgment or order of a trial court pending appeal;

(b) approval of the form and amount of security, if any, to be provided in connection with such a stay; or

(c) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending pursuant to Minn. R. Civ. P. 62.02.

Subd. 2. Security Required. Except as to cases in which a governmental body is the appellant or as otherwise provided by rule or statute, a trial court may grant the relief described in subdivision 1 of this rule if the appellant provides security in a form and amount that the trial court approves. The security provided for in this rule may be in one instrument or several. The appellant must serve proof of the security in accordance with Rule 125.02.

Subd. 3. Form of Security. The form of the security may be a supersedeas bond, a letter of credit, a deposit of cash or property with the trial court administrator, or any other form of security that the trial court approves as adequate under the circumstances. The appellant bears the burden of demonstrating the adequacy of any security to be given. Unless the trial court orders otherwise, a stay of an order or judgment does not take effect until any security ordered is filed and notice of filing is provided to all parties.

Subd. 4. Amount of Security.

(a) In all cases, the amount of the security, if any, must be fixed at such amount as the trial court determines will preserve the value of the judgment or order to the respondent during the pendency of appeal.

(b) When the judgment or order is for the payment of money not otherwise secured, the amount of the security normally must be fixed at such sum as will cover the unpaid amount of the judgment or order, costs on appeal (to the extent security for costs has not already been given under Rule 107), interest during the pendency of the appeal, and any other damages that may be caused by depriving the respondent of the right to enforce the judgment or order during the pendency of the appeal.

(c) When the judgment or order determines the possession, ownership, or use of real or personal property (such as in actions for replevin, foreclosure, or conveyance of real property), the amount of the security normally must be fixed at such sum as will compensate the respondent for the loss of use of the property during the pendency of the appeal, costs on appeal (to the extent security for costs has not already been given under Rule 107), interest during the pendency of the appeal, and any other damages (including waste) that may be caused by depriving the respondent of the right to enforcement of the judgment or order during the pendency of the appeal.

(d) If a party seeks to stay enforcement of only part of the judgment or order on appeal, the security must be fixed at such sum as the trial court determines is sufficient to secure that portion of the judgment or order on appeal.

Subd. 5. Providers Submit to Jurisdiction of District Court. If security is provided in the form of a bond, letter of credit, or undertaking with one or more sureties, each provider (whether surety, issuer, or other person liable for the security) submits to the jurisdiction of the district court. A provider's liability may be enforced on motion in the district court, served on the provider or providers in accordance with the Minnesota Rules of Civil Procedure as if the provider or providers were a party or parties to the action, without the necessity of an independent action.

Subd. 6. Review by Court of Appeals. On a motion under Rule 127, the Court of Appeals may review the trial court's determinations as to whether a stay is appropriate, the terms of any stay, and the form and amount of security pending appeal. The motion for review must:

(a) set forth the reasons for granting the relief requested and the facts relied on;

(b) include originals or copies of affidavits or other sworn statements supporting the facts that are subject to dispute; and

(c) include a copy of any submissions to the trial court, any order entered by the trial court relating to security pending appeal, and any other relevant parts of the record in the trial court.

If the Court of Appeals grants the motion, it may give relief on the same terms that a trial court may give relief under Rule 108.02, subds. 2, 3, and 4, and may require that any security that the appellant must provide be posted in the trial court.

Advisory Committee Comment—2009 Amendments

Rule 108.02, subdivision 1, requires that an application for stay of a judgment or order be brought in the trial court. Subdivision 6 of the rule provides for the trial court decision on the stay to be reviewed by the court of appeals and establishes the procedure for allowing the appellate court to conduct that review. Although the matter is raised by motion in the appellate court, the review is for abuse of fairly broad trial court discretion in these matters. *See Axford v. W. Syndicate Inv. Co.*, 141 Minn. 412, 168 N.W. 97 (1918).

Subdivision 3 recognizes that security may be provided in any of several forms. The former rule's apparent limitation to a surety bond as security is expressly removed in favor of a wider array of potential security arrangements. In many cases, a deposit into court or posting of a letter of credit may be preferable and less expensive. Deposit into court is also allowed by statute as a means not only to stay enforcement of a judgment but to remove a docketed judgment's lien against real property. *See* MINN. STAT. § 548.12 (2008).

Subdivision 4 is intended to provide guidance to litigants and judges on the appropriate standards for the setting of required security for a stay. The rule addresses the amount of security required and establishes a guiding principle in subdivision 4(a) of an amount sufficient to preserve the value of the judgment or order during the appeal. For money judgments, the unpaid amount of the judgment, costs on appeal (less $500 if secured by a cost bond), and interest during the appeal will be the usual amount. This calculation is consistent with the amount of security specified in statutes relating to supersedeas bonds, MINN. STAT. § 550.36 (2008)(allowing stay upon posting of bond in the amount of judgment and interest or a lesser amount allowed by a court), and MINN. STAT. § 548.12 (2008)(allowing a party to deposit money into court in amount of judgment, plus interest and costs). The determination of the amount of a bond ultimately lies in the discretion of the courts and can even be waived in its entirety, although the Minnesota Supreme Court has recognized that this discretion must be exercised sparingly. *See N. Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312 (Minn. 1977); *Briggs v. Shea*, 48 Minn. 218, 50 N.W. 1037 (1892).

Although not constrained by the rule, trial court discretion to determine the amount of required security may be limited by statute or common law. There are cases in which no stay may be available, regardless of the amount of security. Child custody orders take effect as

directed by the trial court, notwithstanding an appealing party's willingness to post a bond for the purpose of obtaining a stay. *See Petersen v. Petersen*, 296 Minn. 147, 149, 206 N.W.2d 658, 600 (Minn. 1973)(stating, for the purpose of "future guidance of the bench and bar, . . . that orders changing the custody of children are not affected by supersedeas or cost bonds[,] but are to take effect at whatever date the trial court specifies"). For discussion of the factors to be weighed in deciding whether or not to change custody while an appeal is pending, see *Clark v. Clark*, 543 N.W.2d 685 (Minn. Ct. App. 1996)(holding that trial court abused its discretion in denying a stay of custody modification order, in light of drastic changes to living arrangements that would result from modification and lack of endangerment or other exigency requiring immediate change). The court of appeals has addressed the criteria governing whether to grant a stay in the nature of an injunction pending a certiorari appeal in *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. Ct. App. 2007)(citing MINN. R. CIV. P. 62.02 as to injunctive relief pending appeal; two juvenile rules, one of which establishes a presumption that there will be no stay pending appeal and the other of which explicitly stays further proceedings; and a criminal rule that identifies criteria governing whether to grant release pending appeal). MINN. STAT. § 525.714 (2008) provides that the filing of an appeal stays a probate order, although an "additional bond" may be required to secure payment of any damages that may be awarded as a consequence of the appeal. *But see In re Estate of Goyette*, 376 N.W.2d 438 (Minn. Ct. App. 1985)(holding that failure to post bond ordered by probate court precluded automatic stay of probate proceedings pending appeal).

Rule 108.03. Proceedings in Supreme Court.

Where a petition to the Supreme Court for review of a decision of the Court of Appeals is filed, or a case is transferred to the Supreme Court in accordance with these rules, and security has previously been given to stay proceedings in the trial court, the security shall remain in full force and effect during the pendency of review in the Supreme Court unless otherwise ordered by the Supreme Court. The Supreme Court may make any order appropriate to preserve the status quo or require security or additional security to any person who may suffer damage due to the continued stay of proceedings in the trial court during the pendency of review in the Supreme Court.

Advisory Committee Comment—2009 Amendments

Rule 108 is replaced by an entirely new rule. The changes are intended to provide greater guidance to parties, attorneys, and the courts on how stays of trial court orders and judgments can be obtained.

Recommendation 3: Rules 114 and 115 Should Be Modified to Change the Timing for Briefing in Declaratory Judgment and Certiorari Cases.

Introduction

Under Rules 114 and 115, the timing for briefing in appellate proceedings for review of administrative rulemaking and other administrative matters may result in a party's brief being due before the index of the record is transmitted to the parties. This results in uncertainty as to the contents of the record and in additional motion practice. The committee believes a simple change in the procedure, making the petitioner's brief due 30 days after the itemized list of the record is transmitted from the agency or administrative tribunal, would remedy many of these problems. Additionally, for certiorari proceedings under Rule 115, the rule currently requires that the record itself be transmitted to the appellate courts earlier than it is needed.

The record in proceedings under Rule 114 is transmitted to the appellate court within 30 days after the petition is served, even if a transcript is still being prepared. This procedure is not changed by the recommended amendment, but briefing is deferred until after the record is transmitted. Under Rule 115, the record is transmitted after the relator's brief is filed. But there are often disputes about what should be included in the record; and it would be preferable to ensure that any necessary transcripts are completed and the contents of the record are determined before briefs are filed, so that the parties can include accurate citations to the record in the briefs. The committee recommends that the process of indexing the record be differentiated from the process of transmitting the record to the appellate courts. Once the parties have the index, briefing can begin. If the record remains with the agency or body during the briefing process, the parties can more readily obtain necessary copies of documents for their appendices and addenda. Removing the existing deadlines for transmitting the record will give the

clerk of the appellate courts needed flexibility to request the record when appropriate, after briefs have been filed, and will help to relieve existing storage problems.

Specific Recommendation

1. Rule 114 should be amended as follows:

RULE 114. COURT OF APPEALS REVIEW OF ADMINISTRATIVE RULES

* * *

Rule 114.03 Record on Review of Petition for Declaratory Judgment; Transmission of Record

Subdivision 1. Review of the Record. Review of the validity of administrative rules shall be on the record made in the agency rulemaking process. To the extent possible, the description of the record contained in Rule 110.01 and the provisions of Rules 110.02, 110.05, and 111 shall apply to declaratory-judgment actions.

Subd. 2. Transmission of Record. Unless the time is extended by order of the court on a showing of good cause, the record shall be forwarded by the agency or body to the clerk of the appellate courts with an itemized list as described in Rule 111.01 within 30 days after service of the petition. A copy of the itemized list shall be served on all parties.

Rule 114.04 Briefing

Petitioner~~'s brief and appendix~~ shall ~~be served and filed~~ serve and file a brief and appendix within 30 days after transmission of the record by the agency or body, ~~in accordance with Rule 131.01~~ and briefing shall proceed in accordance with ~~that rule~~ Rule 131.01.

Advisory Committee Comment—2009 Amendments

Rule 114 is amended to alter the timing rules for briefing. The change is made to delay the first deadline for filing a brief to 30 days after the record is transmitted to the appellate courts and the itemized list is provided to all parties.

2. Rule 115 should be amended as follows:

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

Rule 115.01 How Obtained; Time for Securing Writ

Review by the Court of Appeals of decisions of the ~~Commissioner of Economic Security~~ Department of Employment and Economic Development and other decisions reviewable by certiorari and review of decisions appealable pursuant to the Administrative Procedure Act may be had by securing issuance of a writ of certiorari. The appeal period and the acts required to invoke appellate jurisdiction are governed by the applicable statute.

*** * ***

Rule 115.04 The Record on Review by Certiorari; Transmission of the Record; Timing of Briefing

Subdivision 1. General Application of Rules 110 and 111. To the extent possible, the provisions of Rules 110 and 111 respecting the record ~~and the time~~ and manner of its transmission and filing or return in appeals shall govern upon the issuance of the writ; and the parties shall proceed as though the appeal had

been commenced by the filing of a notice of appeal, unless otherwise provided by this rule, the court, or ~~by~~ statute. Each reference in Rules 110 and 111 to the trial court, the trial court administrator, and the notice of appeal shall be read, where appropriate, as a reference to the body whose decision is to be reviewed, to the administrator, clerk or secretary thereof, and to the writ of certiorari respectively.

Subd. 2. Transcript of Audiotaped Proceedings. If a proceeding has been audiotaped and a record of the proceeding is necessary for the appeal, the relator shall order the transcript from the agency or body within ten days after the writ of certiorari is filed. The relator shall make appropriate financial arrangements with the agency or body for the transcription. The agency or body shall designate a court reporter or other qualified person to transcribe the audiotape. The agency or body shall serve and file a transcript certificate pursuant to Rule 110.02, subdivision 2(a) within ten days after the transcript is ordered. The reporter shall file the original and first copy of the transcript with the agency or body, deliver a copy to the attorney for each party to the appeal separately represented, and file a certificate of filing and delivery pursuant to Rule 110.02, subdivision 2(b).

Subd. 3. ~~Transmission of Record~~ Notice of Contents of Record. ~~Within ten days after the due date for the filing of relator's brief , the agency or body shall transmit the entire record of the proceeding under review to the clerk of the appellate courts, pursuant to Rule 111.01.~~ Unless the time is extended by order of the court on a showing of good cause, the itemized list of the contents of the record as described in Rule 111.01 shall be served on all parties and filed with the clerk of the appellate courts by the agency or body within 30 days after service of the petition or 14 days after delivery of the transcript in accordance with subdivision 2 of this rule, whichever date is later. Service and filing shall be accomplished by notice of service and filing, as in Form 115C of these rules, which shall constitute proof of service.

Subd. 4. Timing of Briefing. Relator shall serve and file a brief and appendix within 30 days after the service of the itemized list of contents of the record by the agency or body, and briefing shall proceed in accordance with Rule 131.01.

Subd. 5. Transmission of Record. The record shall be retained by the agency or body until the clerk of the appellate courts requests that it be transmitted to the court. The record shall thereupon be transmitted promptly to the clerk of appellate courts with a copy of the itemized list of the contents, in quadruplicate.

Advisory Committee Comment—2009 Amendments

Rule 115.04 is amended to change the timing rules for certiorari proceedings. Subdivision 3 establishes a new Form 115C to ensure that the itemized list is provided to all parties and to determine the date and means of service and filing. One of the purposes of this amendment is to defer briefing until the contents of the record are known to the parties. Subdivision 4 establishes the timing requirements for briefing.

Subdivision 5 clarifies that the record itself is then to be retained by the agency or body until needed by the appellate court. This provision does not directly affect the litigants—it is primarily a matter of administration of the appellate court clerk's office. The rule requires that the record be accompanied by the itemized list of the contents in quadruplicate because that form is used to document receipt by the appellate courts and again to document receipt when the record is returned to the agency or body.

3. Form 115B should be amended to reflect these timing changes.

FORM 115B. WRIT OF CERTIORARI

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

WRIT OF CERTIORARI

Relator,

vs. COURT OF APPEALS NUMBER:

Respondent,

(AGENCY OR BODY) NUMBER:

(Agency or Body),
Respondent. DATE OF DECISION:

TO: (Agency or Body)

You are hereby ordered to return to the Court of Appeals and serve on all parties in accordance with Rule 115.04, subdivision 3, within 30 days after service of the petition or 14 days after delivery of a transcript, whichever is later, ~~10 days after the date relator's brief is due~~ an itemized statement of the record, exhibits and proceedings in the above-entitled matter so that this court may review the decision of the (agency or body) issued on the date noted above.

You are further directed to retain the actual record, exhibits, and transcript of proceedings (if any) until requested by the Clerk of the Appellate courts to deliver them in accordance with Rule 115.04, subdivision 5.

Copies of this writ and accompanying petition shall be served forthwith either personally or by mail upon the respondent (agency or body) and upon the respondent or its attorney at:

_____

_____
(address)

Proof of service of the writ and of the itemized list shall be filed with the clerk of the appellate courts.

DATED:

Clerk of Appellate Courts

(Clerk's File Stamp)

By: _____
Assistant Clerk

4. A new Form 115C should be adopted as follows:

FORM 115C. CERTIFICATE OF SERVICE AND FILING OF ITEMIZED LIST

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

Relator,	CERTIFICATE OF SERVICE AND FILING OF ITEMIZED LIST
vs.	Court of Appeals
Respondent,	APPELLATE COURT CASE NUMBER:
(Agency or Body), Respondent.	(AGENCY OR BODY) NUMBER:

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
St. Paul, MN 55155

A copy of the itemized list of the contents of the record is attached to this certificate, was served on each separately-represented party to this proceeding, and is transmitted to the Clerk of Appellate Courts in accordance with Rules 115.04, subdivision 3, and 111.01. Service was made as follows:

Party Name	Address	Date Served	Method of Service
Clerk of Appellate Courts	Minnesota Judicial Center St. Paul, MN 55155		

etc.

DATED:

_____

SIGNATURE

ADDRESS AND TELEPHONE NUMBER

cc: All Counsel of Record

(Rule 115.04, subd. 3, requires the service and filing of the itemized list of the contents of the record as specified in Rule 111.01 to take place within 30 days after service of the petition for writ of certiorari or 15 days after delivery of a transcript, whichever is later. This notice requires service and filing of the itemized list of the record; the actual record is to be retained until the clerk of appellate courts requests that it be transmitted to the court. *See* Rule 115.04, subd. 4.)

Recommendation 4: The Court Should Adopt a New Rule 112 to Provide Guidance on Handling Confidential and Sealed Information in Appellate Proceedings.

Introduction

The appellate courts have developed standard practices for dealing with information that is confidential—either by trial court order, by operation of rule in the trial courts dealing with restricted identifiers such as social-security or bank-account numbers, or in the very unusual circumstance where a party seeks to have materials treated as confidential for the first time on appeal. The committee believes it is appropriate that these practices be included in the appellate rules so that litigants and their attorneys are more likely to be aware of them and to allow the parties to deal more efficiently with sealing issues. The committee believes that the proposed rule is a true rule of procedure and that it does not expand or contract the right to have information sealed on appeal.

Specific Recommendations

Rule 112 should be amended as follows:

[Reporter's Note: Because this rule is entirely new, underscoring is omitted for clarity.]

RULE 112. CONFIDENTIAL INFORMATION; SEALING OF PORTIONS OF RECORD

Rule 112.01 Status of Confidential Record Material on Appeal.

Subdivision 1. Materials Filed Under Seal in the Trial Court. Materials that are filed under seal in the trial court pursuant to statute, court rule, or trial court order, as well as any documents containing restricted identifiers as defined in Rule 11 of the General Rules of Practice, will remain under seal on appeal unless either the trial court or appellate court orders otherwise.

Subd. 2. Sealing of Materials on Appeal. In extraordinary situations where material in the record is confidential or trade-secret information that was not protected by a confidentiality order in the trial court, a party may move to have it filed under seal on appeal. The motion must demonstrate the need for sealing the information and must set forth the efforts made to maintain the confidentiality of the information before the motion was brought.

Advisory Committee Comment—2009 Adoption

Rule 112 is a new rule intended to codify existing practices relating to handling confidential information on appeal.

The general policy of the Minnesota courts is that court records are accessible to any member of the public. See Rule 2 of Minnesota Rules of Public Access to Records of the Judicial Branch, *reprinted in* MINNESOTA RULES OF COURT: STATE 1083 (West 2009 ed.). This general policy is carried forward by Rule 4 governing accessibility of case records. Rule 4, subdivision 3, specifies that restricting access to case records is governed by court rules. Many statutes limit access to particular case types. *See* Minnesota Rules of Public Access to Records of the Judicial Branch Rule 4, Advisory Committee Comment—2005, *reprinted in* MINNESOTA RULES OF COURT: STATE 1085-86 (West 2009 ed.)(collecting citations to statutes). In addition, Minn. Gen. R. Prac. 11 requires filing of personal identifying information in a separate document filed under seal.

The majority of orders restricting access to court records in civil cases are entered pursuant to Minn. R. Civ. P. 26.03(e)(limiting persons present during discovery, (f)(allowing court to order sealing of depositions), and (h)(allowing court to order parties to file other documents under seal). *See generally Minneapolis Star & Tribune v. Schumacher*, 392 N.W.2d 197 (Minn. 1986). Criminal case protective orders are governed by Minn. R. Crim. P. 25. *See generally Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983); *Nw. Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn. 1977).

The most common situation relating to sealed materials on appeal relates to the continued protection of materials filed under seal in the trial court. Subdivision 1 of Rule 112 restates the general rule that documents that are sealed in the trial court will remain sealed on appeal.

Rule 112.02. Handling of Sealed Portions of the Appellate Record.

Any sealed materials that need to be included in an addendum or appendix on appeal shall be prepared in a separately bound Confidential Addendum or Confidential Appendix and filed in a sealed envelope designated as "Filed under

Seal pursuant to Order of the _____ Court dated _____" or in substantially similar form. To the extent information filed under seal must be discussed in motions or briefs on appeal, the parties must file separate "public" and sealed versions of the motion or brief, with confidential information redacted in the public version and stated as necessary in the sealed version. Each separately represented party must be served with both the "public" and sealed versions of any documents filed with the court.

Advisory Committee Comment—2009 Adoption

Rule 112.02 creates the required process for handling sealed records on appeal. The rule is intended to permit the ready handling of confidential documents by the court and to ensure that sealed information remains inaccessible to the public. Because the parties to an action have an interest in ensuring that any "public" version of a document has appropriately been redacted, service of both the public and sealed version must be made on all parties.

Rule 112.03. Duty to Maintain Confidentiality.

Every party to an appeal must take reasonable steps to prevent the disclosure of confidential information, both in oral argument and written submissions filed with the court, except in the manner prescribed in Rule 112.02.

Advisory Committee Comment—2009 Adoption

Rule 112.03 imposes an affirmative duty on all parties to maintain the confidentiality of information that is protected by statute, rule, or court order. This rule requires filing information separately and under seal and may also require care at oral argument not to disclose confidential information.

Rule 112.04. Oral Argument.

Appellate arguments are public hearings.

Advisory Committee Comment—2009 Adoption

Even in cases where portions of the record are confidential and filed under seal, the oral argument hearing will be in open court, open to the public, and possibly televised. The rule does not forbid closing a

hearing to the public. Neither the Minnesota Supreme Court nor the Minnesota Court of Appeals has closed a hearing in the past.

Recommendation 5: Rule 128 Should Be Amended to Require the Appellant to State Where Every Issue was Raised in the Trial Court and How the Issue was Preserved for Appeal.

Introduction

As the Court is well aware, appellate courts generally do not review claims of error that were not raised in the trial court or that were not preserved for appeal by, for example, including them as grounds for a motion for a new trial. *See, e.g.*, *Minn.-Iowa Tel. Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297, 305 (Minn. 1980)(issues must be raised in order to be reviewed); *Sauter v. Wasemiller*, 364 N.W.2d 833, 835 (Minn. Ct. App. 1985)(quoting *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976)), *aff'd*, 389 N.W.2d 200 (Minn. 1986)(without motion for a new trial, appellate court may review nothing other than whether the evidence supports the findings of fact and the findings support the conclusions of law and the judgment).

Despite the existence of a fair amount of appellate court guidance on what is required to preserve issues for appeal, numerous appeals continue to be taken where these crucial steps have been overlooked. Even where the appellate issues are properly preserved, many appellate briefs fail to help the court determine where and how issues were preserved. The committee believes it is appropriate to create a standardized procedure to help appellate attorneys focus on these issues and to help the appellate courts recognize potential issues. The recommended rule requires appellants to state, as part of the statement of the legal issues in the brief, exactly where in the record the issue was raised before the trial court and how it was preserved for appeal. The amendment is derived from a similar provision in the Iowa Rules of Appellate Procedure, which appears to be helpful to litigants and the courts there. *See generally* Iowa R. App. P. 6.903(2)(g)(1).

Specific Recommendations

Rule 128 should be amended as follows:

RULE 128. BRIEFS

* * *

128.02 Formal Brief

Subdivision 1. Brief of Appellant. The formal brief of the appellant shall contain under appropriate headings and in the order here indicated:

(a) A table of contents, with page references, and an alphabetical table of cases, statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(b) A concise statement of the legal issue or issues involved, omitting unnecessary detail. Each issue shall be stated as an appellate court would state the broad issue presented. Each issue shall be followed by:

1. a description of how the issue was raised in the trial court, including citations to the record,

2. a concise statement of the trial court's ruling,

3. adescription of how the issue was subsequently preserved for appeal, including citations to the record, and

4. a list of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions.

(c) A statement of the case and the facts. A statement of the case shall first be presented identifying the trial court and the trial judge and briefly indicating the nature of the case and its disposition. There shall follow a statement of facts relevant to the grounds urged for reversal, modification or other relief. The facts must be stated fairly, with complete candor, and as concisely as possible. Where it is claimed that a verdict, finding of fact or other determination is not sustained by the evidence, the evidence, if any, tending directly or by reasonable inference to sustain the verdict, findings or determination shall be summarized. Each

statement of a material fact shall be accompanied by a reference to the record, as provided in Rule 128.03.

(d) An argument. The argument may be preceded by a summary introduction, but it must include the contentions of the party with respect to the issues presented, the applicable standard of appellate review for each issue, the analyses, and the citations to the authorities. Each issue shall be separately presented. Needless repetition shall be avoided.

(e) A short conclusion stating the precise relief sought.

(f) The appendix required by Rule 130.01.

Subd. 2. Brief of Respondent. The formal brief of the respondent shall conform to the requirements of Rule 128.02, subdivision 1, except that a statement of the issues or of the case or facts need not be made unless the respondent is dissatisfied with the statement of the appellant. If a notice of ~~review~~ related appeal is filed pursuant to Rule ~~106~~ 103.02, subdivision 2, the respondent's brief shall present the issues specified in the notice of ~~review~~ related appeal. A respondent who fails to file a brief either when originally due or upon expiration of an extension of time shall not be entitled to oral argument without leave of the appellate court.

Advisory Committee Comment—2009 Amendments

Rule 128.02, subdivision 1(b), is amended to require specification of how each issue was raised in the record and preserved for appeal in the trial court, including citations to the record. These are matters that are important to many appeals and adding this requirement is intended to make it easier for the court to determine that each issue was properly raised, decided, and preserved for appeal. This requirement has been implemented by other courts, *see, e.g.*, Iowa R. App. P. 6.14, and the committee believes this requirement will improve the quality of briefing in Minnesota appeals. For example, subparagraph 1 requires specification of where an evidentiary objection or offer of evidence was made, including a transcript citation, and subparagraph 3 where it was raised in a motion for new trial to preserve it for appeal. The rule does not expand what is required to raise or preserve an issue for appeal; it only requires that specific information be provided in the statement of issues in the appellant's brief about how these steps were taken.

Rule 128.02, subdivision 1(d), is amended to require that a brief address the applicable standard of appellate review. The standard of

review is crucial to the analysis of every issue by the appellate court. A useful compendium of the standards of review for particular issues is Minnesota Court of Appeals, Standards of Review (Aug. 2008), available for review or download at http://www.lawlibrary.state.mn.us/casofrev.html. The rule does not dictate how the standard of review be set forth—whether in a separate section or at the beginning of the argument for an issue—although in most cases it is best handled at the beginning of the argument for each issue. The applicable standard of review must be addressed for each issue in an argument.

Subdivision 2 is amended to reflect the amendment of rule 106 to abolish the notice of review and adoption of Rule 103.02, subdivision 2, to adopt the notice of related appeal.

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

July 17, 2009

Frederick Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr., Blvd.
St. Paul, MN 55155

Re: Proposed Changes to Rules of Civil Appellate Procedure

Dear Mr. Grittner:

I am writing on behalf of the Civil Commitment–Human Services Committee of the Minnesota County Attorney Attorneys Association ("MCAA"). County attorneys, along with the Attorney General in some cases, represent the commitment petitioners in all civil commitment cases in this State. As you know, we handle many appeals to the state appellate courts relating to such cases. Last year (2008), there were about 38 court of appeals opinions issued in cases under the Minnesota Commitment and Treatment Act, as well as two decisions in habeas corpus cases related to civilly committed persons. In addition, there were a number of petitions for review to the Supreme Court.

On May 27, 2009, the Supreme Court issued an order proposing changes to the Rules of Civil Appellate Procedure. Our committee is very concerned about one of the proposed changes, and requests that the Court modify the proposal in the rule finally adopted.

Proposed Appellate Rule 112—Handling Confidential Information on Appeal

The proposed rule we are concerned about is Rule 112, which addresses how to handle confidential and sealed information in appellate proceedings. Under the proposed Rule 112.01, this rule applies to "[m]aterials that are filed under seal in the trial court pursuant to statute, court rule, or trial court order, as well as any documents containing restricted identifiers."

In civil commitment cases, much (often most) of the evidence presented at trial and then discussed in the appellate briefs is this type of "confidential information." Minn. Commitment & Treatment Act Rule ("Commitment Rule") 21(b) provides:

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> The court administrator shall create a separate section or file in which the prepetition screening report, court appointed examiner's report, and all medical records shall be filed. Records in that section or file shall not be disclosed to the public except by express order of the district court. This provision shall not limit the parties' ability to mention the contents of the pre-petition screening report, court appointed examiner's report and medical records in the course of proceedings under Minn. Stat. ch. 253B.

In many cases involving commitment for mental illness and chemical dependency, the great majority of the evidence comes from the examiner's report and the person's medical records. In cases involving commitment as sexual psychopathic personalities ("SPPs") and/or sexually dangerous persons ("SDPs"), a considerable amount of the evidence is contained in court and law enforcement records, which are public. However, the examiners' reports in such cases are lengthy (typically 20-50 pages) and provide much of the information supporting commitment. There are usually two examiners, and thus two examiners' reports, in each SPP/SDP case. In addition, SPP/SDP cases often involve extensive non-public records such as records of prior treatment programs, prison psychological interviews and mental health records, and court psychological exams and pre-sentence investigations. Thus, unlike most other areas of legal practice, district court and appellate records in civil commitment matters consist significantly—often primarily—of confidential information.

Proposed Appellate Rule 112.02 contains two provisions regarding the handling of confidential information in appeals. First, it states that, if such materials

> need to be included in an addendum or appendix on appeal [they] shall be prepared in a separately bound Confidential Addendum or Confidential Appendix and filed in a sealed envelope designated as "Filed under Seal pursuant to Order of the _____ Court dated _____" or in substantially similar form.

This provision should not present significant difficulty, and indeed is consistent with current practice. In *In re Jarvis*, 433 N.W.2d 120, 124 (Minn. Ct. App. 1988), the court of appeals held that, if a committed person's medical records are included in an appendix on appeal, they must be placed in a separate "confidential appendix." Since the time of the *Jarvis* decision, many appellate practitioners have used the "confidential appendix" not only for the person's medical records, but also for the other confidential records specified in Commitment Rule 21 as well as other non-public documents.

Our Concern—Redacting Confidential Information from Briefs in Civil Commitment Matters

However, the other provision of proposed Appellate Rule 112.02 will, we believe, create significant problems. It states:

> To the extent information filed under seal must be discussed in motions or briefs on appeal, the parties must file separate "public" and sealed versions of the motion or brief, with confidential information redacted in the public version and

> stated as necessary in the sealed version. Each separately represented party must be served with both the "public" and sealed versions of any documents filed with the court.

In civil commitment cases, *much* of the discussion in the appellate briefs will involve information taken from confidential records. It would be a very formidable task to do a redacted version of the brief to comply with this rule. Not only is the volume of confidential information in these briefs substantial, but there would be many difficult judgments regarding what must be redacted. While it would be clear that the statement of a fact contained only in a confidential document must be redacted, it would be less clear what to do with an argumentative statement referring to that fact. For example, if the fact that the proposed patient struck another patient is contained only in a medical record (which is confidential), would a statement in the argument referring to that fact have to be redacted? Would parts of a Statement of Issues that referred to (or were based on) facts taken from confidential documents have to be redacted?

In addition, Commitment Rule 21 makes certain *records* confidential, but does not make the testimony at the commitment hearing confidential. Thus, an examiner may include information in her report and also testify to the information at the hearing. The report is non-public, but the testimony is public. And the examiner may testify about information derived from confidential records. Similarly, a doctor from a hospital may testify about information that is also contained in the hospital's medical records, which are exhibits in the case. The doctor's knowledge of this fact may, or may not, come only from reading the record. Would a party redact such information in an appellate brief? We have no idea, but we assume that one would redact information if there is any doubt about what to do.

Moreover, it should be kept in mind that, after completing the drafting of the brief, the respondent's time to do this redaction would be extremely limited. The court of appeals routinely issues expedited briefing schedules in civil commitment matters in order to comply with the shortened appeal time frame provided in Minn. Stat. § 253B.23, subd. 7 (2008). Typically, the respondent (represented by the County Attorney) is required to file its brief within 2½ or 3 weeks after the appellant's brief is due. And briefs in commitment cases are, of necessity, quite lengthy and fact intensive. Doing such a complicated redaction of such lengthy briefs within very short time periods would be extremely difficult.

And, finally, a brief containing such significant redactions would be of little assistance to the public, and could well be affirmatively misleading. A reader could not understand the party's argument without knowing information such as what the experts' opinions were, how the proposed patient had behaved in hospitals and other treatment settings, and how the patient had done in treatment. Someone reading a brief with such information redacted may actually *mis*understand the party's argument.

Our Recommendation

In light of these impracticalities, we request that the adopted rule exempt briefs in cases arising under Minn. Stat. ch. 253B (and in habeas corpus proceedings involving civil commitment) from the requirement to submit redacted copies of appellate briefs and instead

provide that such briefs, if they reference any confidential material, must identify the committed person in the caption and throughout the brief only by initials, as is done in juvenile matters.

Thank you for your consideration. We would be happy to provide any other information or explanation that you, the rules committee or the Court may wish.

Sincerely,

JOHN L. KIRWIN
Assistant Hennepin County Attorney
Telephone: (612) 596-7704

On behalf of MCAA Civil Commitment–
Human Services Committee

JLK
Cc: Janelle B. Kendall, President, MCAA
Lori Swanson, Attorney General
Coleen M. Brady, MCAA Civil Commitment–Human Services Committee Co-Chair
Terry Frazier, MCAA Civil Commitment–Human Services Committee Co-Chair
John Kingrey, Executive Director, MCAA

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

July 21, 2009

Frederick K. Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

RE: Comments of the Minnesota County Attorneys Association on 2009 Proposed Amendments to the Rules of Civil Appellate Procedure

Dear Mr. Grittner:

I am writing on behalf of the Minnesota County Attorneys Association (MCAA) CHIPS Subcommittee of the Juvenile Law Committee. Thank you for the opportunity to submit comments to the Minnesota Supreme Court on the proposed amendments to the Rules of Civil Appellate Procedure. The CHIPS Subcommittee of the MCAA submits the following specific comment concerning the proposed Rule 112.

Proposed Rule

RULE 112. CONFIDENTIAL INFORMATION; SEALING OF PORTIONS OF RECORD

Rule 112.01 Status of Confidential Record Material on Appeal.

Subdivision 1. Materials Filed Under Seal in the Trial Court. Materials that are filed under seal in the trial court pursuant to statute, court rule, or trial court order, as well as any documents containing restricted identifiers as defined in Rule 11 of the General Rules of Practice, will remain under seal on appeal unless either the trial court or appellate court orders otherwise.

Subd. 2. Sealing of Materials on Appeal (text omitted)

Rule 112.02. Handling of Sealed Portions of the Appellate Record. (text omitted)

Rule 112.03. Duty to Maintain Confidentiality. (text omitted)

Rule 112.04. Oral Argument. (text omitted)

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MCAA members are involved in virtually all juvenile protection matters filed in the state, including juvenile protection appeals. In 2008, our members were involved in approximately 49 juvenile protection appellate courts cases and a number of other filings before appellate courts. The CHIPS Subcommittee of the MCAA has concerns that the proposed Rule 112 will create difficulties in practice regarding the handling of confidential information on appeal.

Practice regarding handling of records in juvenile protection cases has evolved since the proceedings were opened to the public. Practitioners seek to balance respect for the families and individuals involved with the need to provide meaningful access to the proceedings. Practitioners and the courts also continue to develop ways to deal with the extensive amount of information used in our cases that would otherwise be partially or completely confidential, particularly given the developing reality of electronic access to an expanding universe of records. Appellate court records may tend to be more open and easily accessible, such as the growing online availability of briefs. Current rules seem to acknowledge a need to adjust the balance, such as the manner in which captioning changes between trial and appellate courts, in Juvenile Protection Procedure Rule 8.08.

The proposed Rule of Civil Appellate Procedure 112 creates an area of potential confusion given these issues and the current state of practice. Rule of Juvenile Protection Procedure 8.04 identifies records not accessible to the public and in more limited instances to the parties. These records include medical records, chemical dependency evaluations and records, psychological evaluations, and a variety of other reports and statements, as well as videos and photos of victims of abuse or neglect. Most juvenile protection trials involve extensive use of this documentation, and most appellate briefs discuss these records at significant length. In trials, these records are offered as exhibits. Rule 8.05 makes these records public at that point. However, the specific language of Rule 8.04 and the references in the comment to other rules and statutes, including federal law, effectively urge a restrictive approach. In addition, records considered for dispositional purposes under Minnesota Statute 260C.193 may not be entered as exhibits at trial but may be subject to portions of appellate discussions. A juvenile protection appeal thus stands likely to include significant amounts of discussion of confidential or formerly confidential records.

Proposed Rule 112 speaks only to sealed records. However, if the intent of the proposed Rule is to speak to confidential records, then the proposed Rule 112 appears to address all the records in Juvenile Protection Procedure Rule 8.04. If that is the case, then a substantial portion of appellate briefs in many if not all juvenile protection appeals would involve discussions of records subject to redaction under the proposed Rule 112.

If this interpretation of the relevant rules is correct, then most appellate briefs would be subject to extensive redaction. This in turn raises at least two problems. Redacting briefs creates a significant additional burden. The new Rules of Juvenile Protection Procedure include a provision that requires filing of respondents' briefs

in only twenty days from service. MCAA members are already aware of the burdens of redacting because members or their clients must do so for petitions addressing the same types of data under Juvenile Protection Procedure Rule 33.01, subdivision 1. Redacting creates a significant and time-consuming step. In addition, given the extensive use of confidential information in the cases at issue, redacted briefs likely would be unreadable at best and potentially misleading at worst.

As a result, we recommend that briefs from juvenile protection cases be exempted from any rules regarding redacting or filings of alternative briefs. The requirement that captions be modified to include only initials on appeal at least partially address confidentiality concerns. The Court could also consider formalizing in either rule or comment a frequent practice of using only initials or partial names in the bodies of briefs. Finally, in the alternative, a clarification that proposed Rule 112 does not apply to juvenile protection matters under current rules would relieve future confusion.

Sincerely,

Julie K. Harris
Managing Attorney
Hennepin County Attorney's Office
Co-Chair Juvenile Law Committee (CHIPS)
Minnesota County Attorneys Association

JKH:
c: John Kingrey, Executive Director MCAA
Doug Johnson, Washington County Attorney