STATE OF MINNESOTA

IN SUPREME COURT

IN RE HEARING ON AMENDMENTS
TO THE RULES OF CIVIL APPELLATE
PROCEDURE

O R D E R

47193

WHEREAS the Advisory Committee on the Rules of Civil Procedure has recommended to the Supreme Court amendments to the Rules of Civil Appellate Procedure (Appendix A), and

WHEREAS the court has proposed amendments to the Rules of Civil Appellate Procedure (Appendix B),

NOW, THEREFORE, IT IS ORDERED that a hearing on the proposed amendments to the Rules of Civil Appellate Procedure which are incorporated in this order as Appendices A and B shall be held in the Supreme Court Chambers at 1:30 p.m. on Wednesday, January 10, 1979.

IT IS FURTHER ORDERED that true and correct copies of the proposed amendments to the rules be made available upon request to persons who have registered their names with the Clerk of the Supreme Court for the purpose of receiving such copies and who have paid a fee of 30¢ per page to defray the expense of providing the copies.

IT IS FURTHER ORDERED that advance notice of the hearing be given by the publication of this order once in the Supreme Court edition of Finance & Commerce and the St. Paul Legal Ledger.

IT IS FURTHER ORDERED that interested persons show cause, if any they have, why the proposed amendments to the rules should not be adopted. All persons desiring to be heard shall file briefs or petitions setting forth their objections, and shall also notify the Clerk of the Supreme Court, in writing, on or before December 29, 1978 of their desire to be heard on the matter.

Dated: November 17, 1978

SUPREME COURT
FILED
NOV 20 1978
JOHN McCARTHY
CLERK

BY THE COURT

Chief Justice Robert J. Sheran
Supreme Court of the State of Minnesota

APPENDIX A

The Supreme Court Advisory Committee on the Rules of Civil Procedure recommends the following amendments to the Rules of Civil Appellate Procedure. These recommendations have been modified to a limited extent by the Court.

The Supreme Court Advisory Committee on Rules of Civil Procedure recommends that Rule 133.01 and Rule 133.02 be amended to read as follows:

133.01 Summary Action

~~(1)--The Supreme Court, on its own motion or on motion of any party, may dismiss the appeal or other request for relief or may summarily affirm the order or judgment below if the Supreme Court lacks jurisdiction or if it clearly appears that the appeal presents no question of substantial merit, or the Supreme Court may limit the issues to be considered on appeal to those which present a substantial question.--In case of obvious error the Supreme Court may summarily reverse or remand for additional proceedings or grant other appropriate relief.~~

(1) The Supreme Court, on its own motion or on motion of any party, may summarily affirm, may summarily reverse with appropriate directions, may remand or dismiss an appeal or other request for relief upon grounds proper for remand or dismissal, or may limit the issues to be considered on appeal.

(2) Motions for such relief may be made at any time but shall be filed promptly when the occasion appears and shall comply with the requirements of Rule 127.

133.02 Prehearing Conference

The Supreme Court may direct the attorneys for the parties to appear before ~~the Supreme Court or a judge or a designated officer~~ a justice thereof for a prehearing conference to consider the application or nonapplication of Rule 133.01, settlement, simplification of the issues, and such other matters as may aid in the disposition of the proceedings by the Supreme Court. The

~~Supreme Court or judge thereof~~ justice shall ascertain whether or not the appeal should be decided or dismissed pursuant to Rule 133.01, shall so recommend to the Supreme Court and may participate in the decisional process of the Court with respect thereto. The justice shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel. Such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

To conform to the amendments in Rules 133.01 and 133.02, the Court and Advisory Committee recommends the following amendments to the prehearing conference procedure:

Prehearing Conference Procedures

By order of the Supreme Court of the State of Minnesota dated _____, the following procedures and prehearing conference statement were specified.

IT IS ORDERED that, pursuant to Appellate Rule 133.02, the following Prehearing Conference Procedures in all non-criminal matters are hereby established to remain in effect until further order of the Court:

A. Prehearing Conference Statement. Simultaneously with the service of the notice of appeal pursuant to Appellate Rule 103.01(1), or with the filing of the writ pursuant to Appellate Rule 115.03(3), the appellant or relator shall serve on all other parties separately represented, and transmit (with proof of service) to the ~~prehearing judge~~ clerk of Supreme Court a completed prehearing conference statement in the form attached hereto. The statement will not be treated as confidential.

Within ten days after service of appellant's statement, the respondent shall serve on all other parties separately represented, and ~~bring~~ immediately file with the clerk of court (with proof of

service) ~~to-the-Prehearing-Conference~~, a Prehearing Conference Statement supplementing that of appellant in the particulars respondent deems to be of assistance to the Court.

B. Notice of Prehearing Conference--Duties of Parties. Following receipt of appellant's statement, the Court shall schedule a Prehearing Conference pursuant to Appellate Rule 133.02 unless it notifies the parties to the contrary. The attorneys for the parties shall be notified of the time and place of the conference, which will be held promptly, before the record is transcribed and briefs prepared. Attendance at the conference by the attorneys shall be obligatory. They shall have full authority to reach settlements, limit issues, and deal with such other matters as may aid in the disposition of the appeal. Upon receipt of the notice of Prehearing Conference, the attorneys shall make arrangements for their clients or their clients' insurers or indemnitors to be available at the time of the conference by telephone communication to approve matters requiring client approval. ~~In-divorce,-custody,-alimony-and-support cases,~~ The clients may in some instances be required to accompany their attorneys to the hearing.

C. Transcript. In all cases subject to Rule 133.02, the 60-day period permitted the reporter for furnishing a transcript pursuant to Rule 110.02(2) shall not commence to run until entry of the Prehearing Conference Order, or receipt of notice from the Court that a conference will not be held. The appellant shall notify the reporter of such order or notice, and will not order a transcript until authorized by the court to do so.

D. Prehearing Conference. The Prehearing Conference shall be conducted by a justice of the Court. ~~or-a-hearing-officer designated-by-the-Court.--The-justice-who-conducts-the-conference shall-not-participate-in-any-subsequent-decisional-process.--No-court-personnel,-attorney,-party-or-any-other-person-taking-part-in the-conference-shall-make-public-or-communicate-to,-or-discuss-with, anyone-engaged-in-the-decisional-process-any-matters-considered--or~~

~~divulged-at-the-conference-which-do-not-subsequently-appear-in-the Prehearing-Conference-Order.~~ The documents presented and discussions conducted will not be treated as confidential.

E. Prehearing Conference Order.

(1) An order shall be entered following the conference and shall reflect among other things ~~only~~ the procedure or disposition ~~to-which-the-parties-have-agreed,~~ as follows:

~~(1)~~ (a) Dismissal of the appeal

~~(2)~~ (b) Limitation of the issues

~~(3)~~ (c) Continuation of the appeal unaffected by Rule 133.02

(d) Remand to the trial court or tribunal

~~(4)~~ (e) Adoption of any other procedures appropriate to the purposes of Rule 133.02, including assignment of the appeal to En Banc, division, or non oral consideration.

(2) In addition, if the justice who conducted the conference determines that the appeal should be decided pursuant to Rule 133.01, the order shall so state. The justice shall recommend such disposition to the Supreme Court and may participate in the decisional process.

F. Sanctions. Failure of a party or his attorney to obey the foregoing provisions of this Order shall result in such sanctions as the Court may deem appropriate.

G. Exceptions. The provisions of this Order are not applicable to extraordinary writ pursuant to Appellate Rule 120.

~~S. Ct. File No.~~	STATE OF MINNESOTA	Please Complete and
_____	IN SUPREME COURT	~~Return to:~~ File Original
INFORMATION	CIVIL APPEAL PREHEARING	with: ~~"Prehearing Judge~~
FURNISHED HEREIN	CONFERENCE STATEMENT	John McCarthy, Clerk
WILL NOT BE	OF APPELLANT _____	of Supreme Court,
TREATED AS	OF RESPONDENT _____	230 State Capitol,
CONFIDENTIAL	(Mark One)	St. Paul, MN 55155

1. Title of Case: (Describe parties as appellant or respondent)

2. Names and Addresses and Telephone of Attorneys
   For Appellant or Relator:
   For Respondent:
   For Other Parties:

3. A. Court or Agency from which appeal is taken:
   B. Names of Judge or Hearing Office who presided:
   C. State whether appeal is from an order or judgment and the date therof:

4. Type of Litigation (e.g., automobile negligence, products liability, malpractice, real estate, zoning, taxation, UCC, domestic matters, insurance, etc.):

5. Brief Description of Claims, Defenses, Issues Litigated, and Result Below (Do not detail evidence):

6. Nature of Judgment or Order as to Which Review is Sought (Appellant: Attach copy of judgment or order, ~~as well as a~~ verdict, copy of any memorandum, findings of facts, or conclusions of law of the court or agency below, pleadings, trial briefs, and any documents which may be the subject of the litigation such as deeds, wills, contracts, or insurance policies)

7. Issues Proposed to be Raised on Appeal (Attach any trial briefs which are relevant to these issues and which were submitted to the court or agency below. DO NOT PREPARE OR SUBMIT AN APPELLATE BRIEF OR TRIAL TRANSCRIPT FOR THE PREHEARING CONFERENCE):

8. Reasons why the appeal or other proceedings should or should not be decided pursuant to Rule 133.01.

~~8.~~ One purpose of this prehearing conference is ~~designed~~ to encourage the parties to reach a voluntary settlement before incurring the expense of securing a transcript and preparing and printing briefs, or if that is not possible, to ~~limit~~ define the issues. ~~Please set forth succinctly any additional information which will assist the Court and the parties in reaching an agreement to accomplish these ends. Information concerning settlement negotiations will be kept strictly confidential.~~

Signed _____ Date _____

TO BE EXECUTED BY THE ATTORNEY FOR APPELLANT OR RESPONDENT WHO IS HANDLING THE APPEAL

APPENDIX B

RULE 103. APPEAL AS OF RIGHT--HOW TAKEN

103.01 Manner of Making Appeal

(1) An appeal shall be made by the service of a written notice of appeal on the adverse party. The case shall be entitled as in the trial court. The notice shall specify the judgment or order from which the appeal is taken and the names, addresses, and telephone numbers of opposing counsel and the parties they represent. Not more than five days after expiration of the time to appeal, the appellant shall file the notice of appeal and the cost bond required by Rule 107 with the clerk of the court in which the judgment or order was entered, together with a deposit of $25.00. The bond may be waived by stipulation of the parties.

(2) When a party in good faith serves notice of appeal from a judgment or an order, and omits, through inadvertence or mistake, to proceed further with the appeal, or to stay proceedings, the Supreme Court may grant relief on such terms as may be just.

(3) Upon compliance with subdivision (1) of this rule, the clerk of the trial court shall immediately transmit to the clerk of the Supreme Court $20.00 out of the prescribed fee together with a certified copy of the notice of appeal the affidavit of service of notice of appeal, the order or judgment from which the appeal is taken, and the bond or stipulation waiving such bond.

As amended Oct. 23, 1969; Feb. 14, 1975.

103.03 Appealable Judgments and Orders

An appeal may be taken to the Supreme Court:

(a) From a judgment or order for judgment entered in the trial court;

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

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

(d) From an order involving the merits of the action or some part thereof;

(e) From an order refusing a new trial, or from an order granting a new trial if the trial court expressly states therein, or in a memorandum

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

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

(g) From a final order or judgment made or rendered in proceedings supplementary to execution;

(h) Except as otherwise provided by statute, from the final order or judgment affecting a substantial right made in a special proceeding, provided that the appeal must be taken within the time limited for appeal from an order;

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

RULE 105. DISCRETIONARY REVIEW

105.01 Petition for Permission to Appeal; Time

The Supreme Court, in the interest of justice and upon the petition of a party, may allow an appeal from an order not otherwise appealable under Rule 103.03 except an order made during trial, or from a determination of the District Court pursuant to Minn. St. 487.39. The petition shall be served on the adverse party within the time limited for appeal from an appealable order. Four copies of the petition, including the original, shall be filed with the clerk of the Supreme Court, but the Supreme Court may direct that additional copies be provided.

105.02 Content of Petition; Response

The petition shall be entitled as in the trial court and shall contain a statement of facts necessary to an understanding of the questions of law or fact determined by the order of the trial court; a statement of

the question itself; and a statement why an immediate appeal is necessary and desirable. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and any findings of fact, conclusions of law and memorandum relating thereto. Within seven days after service of the petition, any adverse party may serve and file a response thereto, with copies in the number required for the petition. All papers may be typewritten.

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

105.03 Grant of Permission--Procedure

If permission to appeal is granted, the clerk of the Supreme Court shall notify the clerk of the trial court and the appellant shall pay the appeal fee and file the bond as required by these rules and shall thereafter proceed as though the appeal had been noticed by service of a written notice of an appeal. The time fixed by these rules for transmitting the record and for filing the briefs and appendix shall run from the date of the entry of the order granting permission to appeal.

Advisory Committee Note

This rule is similar to P. Fed. R. App. P. 5. It follows the recommendation of the Judicial Council of Minnesota and permits the Supreme Court, in its discretion, to hear appeals from certain non-appealable orders~~.~~ and determinations. The writ procedure contained in Rule 120 provides an alternative method to obtain review of such orders.

Generally, either method may be used. However, the Supreme Court may permit a party to proceed pursuant to Rule 105 in cases where a writ may be inappropriate. See, e.g. Minn. St. 487.39, Subd. 2.

RULE 110. THE RECORD ON APPEAL

110.02 The Transcript of Proceedings; Duty of Appellant to Order; Notice to Respondent if Partial Transcript is Ordered; Duty of Reporter; Form of Transcript

(1) Within 10 days after ~~service of the notice of appeal~~ receiving an order or notice from the prehearing conference judge appellant shall in writing, with a copy to the clerk of the Supreme Court and all counsel of record, order from the reporter a transcript of such parts of the proceedings not already part of the record as he deems necessary for inclusion in the record. Unless the entire transcript is to be included, the appellant, within said 10 days, shall file and serve on the respondent a description of the parts of the transcript which he intends to include in the record and the statement of the issues he intends to present on appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary he shall within 10 days of service of such description order such parts from the reporter or serve and file a motion in the trial court for an order requiring the appellant to do so.

(2) At the time of ordering, a party must make satisfactory arrangements with the reporter for the payment of the cost of the transcript and all necessary copies. The reporter shall promptly acknowledge receipt of said order and his acceptance of it, in writing, with copies to the Clerk of the Supreme Court and all counsel of record and in so doing shall state the date, not to exceed a period of sixty days, by which the transcript will be furnished. Upon delivery of the transcript to the appellant, the reporter shall file with the Clerk of the Supreme Court, a certificate evidencing the date of delivery of the transcript.

(3) If any party deems the period of time set by the reporter to be excessive or insufficient, or if the reporter needs an extension of time for completion of the transcript, the party or reporter may request a different period of time within which the transcript must be delivered by written motion to the Supreme Court under Rule 127, showing good cause why said period of time is excessive or insufficient. The Court Administrator of the Supreme Court shall act as a referee in hearing said

motions and shall file with the Court appropriate findings and recommendations for an order of the Court in said matter. A failure to comply with the order of the Court fixing a time within which the transcript must be delivered may be punished as a contempt of Court,

(4) The transcript shall be typewritten on 11 x 8-1/2 inches or 10-1/2 x 8-1/2 inches unglazed opaque paper with double spacing between each line of text, shall be bound at the left-hand margin, and shall contain a table of contents. The name of each witness shall appear at the top of each page containing his testimony. A question and its answer may be contained in a single paragraph. The original and first copy of the transcript shall be filed with the clerk of the trial court, and a copy shall be promptly transmitted to the attorney for each party to the appeal separately represented. All copies must be legible. The reporter shall certify the correctness of the transcript.

As amended Aug. 8, 1973; Feb. 14, 1975.

RULE 115. CERTIORARI

115.03 Contents of the Petition and Writ; Filing and Service Thereof

(4) Service; Time. The petitioner shall serve copies of the petition and writ upon the body to which it is directed and upon the adverse party in interest <u>with proof of service to the Supreme Court,</u> within 60 days after petitioner shall have received written notice of the decision to be reviewed unless a different time is prescribed by statute.

(As amended March 29, 1972)

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

~~120.01 Petition for Writ~~

~~Application for a writ of mandamus or of prohibition or for any other extraordinary writ directed to a judge or judges shall be made by petition. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; and a statement of the reasons why the extraordinary writ should issue.~~

~~120.02 Submission of Petition, Preliminary Conference~~

~~The attorney for the petitioner shall file the petition and a proposed writ with the clerk of the Supreme Court after submitting the petition to the Supreme Court or any justice and after having given all other parties to the action reasonable oral or written notice of the date and time of the submission and the conference thereon, but the Supreme Court or any justice may waive the requirement of such notice.~~

~~As amended Feb. 14, 1975.~~

~~120.03 Procedure Following Submission~~

~~If the Supreme Court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it may (a) issue a peremptory writ or (b) grant temporary relief and order that an answer be served and filed by the respondent within the time fixed by the order or (c) issue an order to show cause why the writ should not be granted. The petition, if not previously served, and the order shall be served by the petitioner on all the other parties to the action in the trial court and on the trial judge. All parties other than the petitioner shall be deemed respondents. Respondents may answer jointly. If a respondent does not desire to respond, he may so advise the clerk of the Supreme Court and all parties by letter, but the petition shall not thereby be taken as admitted. If briefs are required, the clerk of the Supreme Court shall advise the parties of the dates on which they are to be filed. There shall be no oral argument unless the Supreme Court shall so direct.~~

~~120.04 Filing; Form of Papers; Number of Copies~~

~~Upon receipt of a $20 filing fee, the clerk shall file the petition. All papers and briefs may be typewritten. Four copies, including an original, shall be filed with the clerk, but the Supreme Court may direct that additional copies be provided. Service of all papers and briefs may be made by mail.~~

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

120.01 Petition for Writ

Application for a writ of mandamus or of prohibition or for any other extraordinary writ directed to a judge or judges shall be made by petition. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; and a statement of the reasons why the extraordinary writ should issue.

120.02 Submission of Petition.

The attorney for the petitioner shall file the petition and a proposed writ with the clerk of the Supreme Court in the manner specified in Rule 120.04. All parties other than the petitioner shall be deemed respondents and may answer jointly within the time limitations contained in Rule 127. If a respondent does not desire to respond, the clerk of the Supreme Court and all parties shall be advised by letter, but the petition shall not thereby be taken as admitted.

In extraordinary situations, the Supreme Court may shorten the time for response to the petition or may schedule an immediate hearing at which all parties will be given an opportunity to be heard.

120.03 Procedure Following Submission

If the Supreme Court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it may (a) issue a peremptory writ or (b) grant temporary relief and direct the filing of briefs within the time fixed by the order. There shall be no oral argument unless the Supreme Court shall direct.

120.04 Filing; Form of Papers; Number of Copies

Upon receipt of a $20 filing fee, the clerk shall file the petition. All papers and briefs may be typewritten and in the form specified in

Rule 132.02. Four copies, including an original, shall be filed, together with proof of service, with the clerk, but the Supreme Court may direct that additional copies be provided. Service of all papers and briefs may be made by mail. The petition shall be entitled as in the trial court.

RULE 127. MOTIONS, PETITIONS

Unless another form is prescribed by these rules, an application for an order or other relief, including petitions pursuant to Rule 120, shall be made by serving and filing a motion or petition in writing for such order or relief. The motion shall specify the date of its submission, which date shall be not less than 8 days after service, and shall state with particularity the grounds therefor and set forth the order or relief sought. If the motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file an answer in opposition within 5 days after service of the motion. Any reply shall be served within 2 days thereafter. The motion and all papers relating thereto may be typewritten in conformance with Rule 132.02. An original and three copies of all papers shall be filed. Oral argument will not be permitted except by order of the Supreme Court.

RULE 128. BRIEFS

128.02 Brief of Respondent

The brief of the respondent shall conform to the requirements of Rule 128.01, 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 appellant. If a notice of review is filed pursuant to Rule 106, the respondent's brief shall contain the issues specified in the notice of review and the argument thereon as well as the answer to the brief of appellant. A respondent who fails to file a brief either when originally due or upon expiration of an extension of time therefor shall not be entitled to oral argument without leave of the Court.
As amended Feb. 14, 1975.

~~RULE 129. BRIEF OF AN AMICUS CURIAE~~

~~Upon prior notice to the parties, a brief of amicus curiae may be filed by leave of the Supreme Court. A request for leave shall identify the interest of the applicant and shall state the reason why a brief of an amicus curiae is desirable. Copies of an amicus curiae brief shall be served on the parties. An amicus curiae will not participate in oral argument.~~

~~Advisory Committee Note~~

~~This rule is similar to F.Fed.R.App.P. 29. Prior notice to the parties is required to afford them an opportunity to object if they have reason to believe that a request for leave to file an amicus curiae brief is improper and should not be granted. The proper function of an amicus curiae brief is to advise the Court on doubtful matters of law or to remind the Court of legal matters which might escape its notice. State v. Finley, 242 Minn. 288, 64 N.W.2d 769 (1954).~~

RULE 129. BRIEF OF AN AMICUS CURIAE

Upon prior notice to the parties, a brief of amicus curiae may be filed by leave of the Supreme Court. A request for leave shall identify whether the applicant's interest is public or private in nature and shall state the reason why a brief of an amicus curiae is desirable. Copies of an amicus curiae brief shall be served on all parties, with proof of service filed with the clerk of the Supreme Court. An amicus curiae shall not participate in oral argument except with leave of the court.

RULE 142. DISMISSAL; DEFAULT

142.01 Voluntary Dismissal

If the parties to an appeal or other proceeding shall sign and file with the clerk a stipulation that the proceedings be dismissed, the clerk shall enter an order of dismissal accordingly.

142.02 Default of Appellant

The respondent may serve and file a motion for judgment of affirmance or dismissal if the appellant shall fail or neglect to serve and file his brief and appendix as required by these rules. If the appellant is in default for 30 days and respondent has not made a motion under this rule, the Supreme Court shall order the appeal dismissed without notice, subject to ~~reinstatement upon motion to the Supreme Court for good cause shown.~~ a motion to reinstate the appeal. In support of the motion, appellant must show good cause for failure to comply with the Rules governing the service and filing of briefs, that the appeal is meritorious and that reinstatement would not substantially prejudice respondent's rights.

142.03 Default of Respondent

If the respondent shall fail or neglect to serve and file his brief, the case shall be determined on the merits. If a defaulting respondent

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221-1809
WRITER'S DIRECT LINE

December 29, 1978

The Honorable Clerk of
the Supreme Court
State of Minnesota
Minnesota State Capitol
St. Paul, Minnesota 55101

47193

Re: Proposed Amendments to the Rules of
Civil Appellate Procedure

Dear Sir:

Although I will be unable to appear for oral presentation at the time set for hearing on these proposed changes, I would like to present these few thoughts in written form. This will undoubtedly serve the desired purpose at least as well.

My reference is to those proposed changes as published in the Supreme Court Edition of Finance and Commerce of December 1, 1978, referring exclusively to Appendix A thereof.

I. The Prehearing Conference Statement.

This proposal makes no significant change, except with respect to confidentiality, which change I do not consider significant with respect to the statement itself. However, I would urge a change concerned with the time of service and filing of the Prehearing Conference Statement.

The suggestion is that the Prehearing Conference Statement be served within 10 days after service of the Notice of Appeal, and filed with the Clerk within 3 days thereafter. This would replace the present and proposed requirement for such service with the Notice of Appeal.

The reason for this proposal is quite simple and practical. Once judgment has been entered in the trial court, execution thereon may be immediately undertaken unless and until a Supersedeas Bond is provided. There appears to be no provision for

providing such a bond to stay execution unless and until the Notice of Appeal is served. Rule 108.01 provides that the Appeal shall stay all proceedings in the trial court, etc. "if the appellant provides a Supersedeas Bond, etc.". Thus until the Appeal is commenced by service of the Notice of Appeal (Rule 103.01) there is no provision for the stay of execution, which is accomplished then or thereafter only by providing the bond.

Often the trial judge will provide a sufficient stay prior to Entry of Judgment to enable a party to do the necessary preparatory work before judgment is in fact entered, so that the Notice of Appeal and Bond can then be provided promptly upon the Entry of Judgment. But the trial judge is not required to order such a stay. I say this because we recently encountered such a situation where the trial judge, for reasons known only to him, refused the request for a stay. Judgment was thereupon entered at once by the opposing party.

When this occurs, it is almost impossible to prepare an adequate Prehearing Conference Statement and also make arrangements for the Supersedeas Bond quickly enough to accomplish the required stay of execution, so as to prevent prompt execution by a determined and aggressive judgment creditor.

If the appellant were permitted a reasonable time after serving the Notice of Appeal (we have suggested 10 days) to present the required Prehearing Conference Statement, this problem could be largely avoided. Of all the initial appeal papers, this Statement, if adequately prepared, is the most time consuming. It is believed that allowing this time after commencement of the Appeal would serve the desired purpose without delaying or complicating the Prehearing Conference program.

The second paragraph of the proposed Section A would need no change, allowing the prescribed time after appellant's Statement for the respondent to file the Statement.

II. The Question of Confidentiality.

Item D of the proposed Order provides for the Prehearing Conference to be conducted by a justice, which I believe desirable, but then eliminates the element of confidentiality. "The documents presented and discussions conducted will not be treated as confidential."

It has appeared to me that one of the significant advantages of such conferences, and of their confidentiality, has been the

fostering of practical, down-to-earth, "off the record" discussion of the real differences between the parties. With the presiding justice participating and guiding such discussion, it would seem that resolution of differences and settlement at a relatively early stage must be promoted. This has occurred to my knowledge on two such occasions in which I have participated.

Once this confidentiality is removed, both as to documents and discussion, such candor is likely to be hard to come by.

Without confidentiality I would anticipate the news media obtaining "news worthy" items, from a variety of sources including the litigants themselves, concerning cases of public interest undergoing the appeal process. Indeed, absent any provision for confidentiality, one may expect the news media to soon insist on attending such conferences and reporting on the proceedings in the same fashion, and to the same extent as is done in other court proceedings.

Briefs of appellants and respondents, and oral arguments before the court, may be expected to contain reference to matters, utterances and documents presented, or claimed to have been presented at the Prehearing Conference. Thus, instead of appeals being considered entirely "on the record below", these extraneous matters are likely to create undesired difficulties.

I would sincerely believe that the multitude of problems, even distortions, which likely would result from the removal of the cloak of confidentiality, would far outweigh any benefits to be derived. Add to this the fact that no participating attorney with any perception would feel any urge towards real candor in such environment, and the need for confidentiality seems real.

III. <u>The Scope and Effect of the Prehearing Conference Order.</u>

The first paragraph of Rule 133.02, as changed, provides for recommendations to the court by the presiding justice, with the resulting action, if any is required, to be taken by the court. Yet Section E(1) of the proposed Order seems to provide for disposition by the Prehearing Conference Order itself of some or possibly all of the listed procedures, such as:

(a) Dismissal of the Appeal

(b) Limitation of the Issues

(c) Continuation of the Appeal Unaffected by Rule 133.02

(d) Remand to the Trial Court or Tribunal

(e) Adoption of Any Other Procedures Appropriate to the Purposes of Rule 133.02, Including Assignment of the Appeal to En Banc, Division, or Non-Oral Consideration

It is felt that perhaps it is intended that some of these items, including possibly (b) and (c) are intended to be determined by the Prehearing Conference Order itself without further action of the court. Yet it seems apparent that others, such as (a) and (d) should require further action by the court to accomplish the specified result.

It would seem desirable to clarify the intention of these provisions, perhaps specifying those which the Prehearing Conference Order itself will finalize, and those requiring further court action thereafter.

Respectfully submitted,

M. C. Green

MCG:bjm