STATE OF MINNESOTA

IN SUPREME COURT

C4-84-2133

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF CIVIL APPELLATE PROCEDURE

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center on April 21, 1998 at 1:30 p.m., to consider the proposed amendments to the Rules of Civil Appellate Procedure made by the Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure. A copy of the proposed amendments is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before April 15, 1998, and
2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before April 15, 1998.

Dated: February 18, 1998

BY THE COURT:

Kathleen A. Blatz
Chief Justice

STATE OF MINNESOTA
FIFTH JUDICIAL DISTRICT

JEFFREY L. FLYNN
DISTRICT COURT JUDGE
P.O. BOX 547
WORTHINGTON, MN 56187
507-372-8263

March 3, 1998

HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT
MINNESOTA JUDICIAL CENTER
25 CONSTITUTION AVE.
ST. PAUL, MINNESOTA 55155

RE: COMMENTS ON PROPOSED AMENDMENTS TO THE RULES OF CIVIL APPELLATE PROCEDURE.

Dear Honorable Justices:

I thank you for the opportunity to offer comments on the proposed amendments to the Rules of Civil Appellate Procedure. I am specifically calling your attention to the proposed change in Rule 110.02 Subd. 4, dealing with transcripts. I urge you to reject this proposed rule for the following reasons.

I have been a trial court judge for 14 years. During my tenure as Chief Judge of the 5th Judicial District, from 1993 to 1997, I served as the Chairperson of the Conference of Chief Judges "Worker's Compensation Committee". This committee was assigned the responsibility of studying the escalating worker's compensation costs in the Minnesota court system, and making recommendations as to how to reduce the growing expense.

In addition, for the past 5 years, I along with two other judges have comprised the "claims committee" for the Minnesota Court System which is the functional equivalent of a claims manager for an insurance company. The Minnesota Court System is "self-insured", i.e., every worker's compensation claim we have, we pay, dollar for dollar, from tax monies.

Far and away, the most significant cost and most frequently experienced injury, is carpal tunnel syndrome, or repetitive stress injury, suffered by court reporters. We presently have several significant claims pending, claims that could reach into the six-figure category.

The Conference of Chief Judges Workers Compensation committee spent a year holding hearings, inviting comment and studying the problem which focused entirely on court reporters' repetitive stress injuries. Eighteen recommendations were made,

and were adopted by the Conference of Chief Judges. Included in the recommendations was the suggestion of limiting the "required" transcripts, transcripts which, for the most part, are never read or referred to again. So far as I know very few of these recommendations have ever been acted upon by the Supreme Court.

We now are asked to comment on the recommended amendments to the Rules of Civil Appellate Procedure. As presently proposed, Rule 110.02 Subd. 4 will require our court reporters to transcribe all testimony "given by audiotape, videotape or other electronic means...".

I ask that you seriously consider abandoning this idea and eliminating the requirement of having court reporters transcribe tapes. The inutility of this proposal is patent, and the "harm" caused, by requiring countless hours of additional keyboard work, for no apparent reason, is, likewise, readily apparent. Unless the "evidence" contained on the tape is relevant to the issues on appeal, this is a useless exercise. If the information contained on the tape is important or relevant, it can always be obtained. But, the automatic requirement that it be transcribed is wasteful and harmful to our court reporters. (The same is true with guilty plea and sentencing transcripts--which is a whole different subject).

The court reporters association will undoubtedly oppose this suggestion, but I respectfully submit that this opposition is born from financial considerations, and does not take into account the larger issues here present.

I respectfully suggest that the "Rule" be changed to require transcription of the "tape" only if it is specifically requested by counsel, and only if a showing is made that the information on the tape is pertinent to the issues on appeal.

The enormous "human" toll repetitive stress injury is exacting from our court reporters, and the significant financial burden this problem is imposing on the court system are issues which must be faced. Mandatory transcripts, which is what this rule proposes, is a large part of the problem. It is time to address the issue head-on and turn the system in the right direction. I would be delighted to further discuss this matter with anyone.

Respectfully submitted,

Jeffrey L. Flynn
Judge of District Court

Hennepin County Court Reporters Association

Fourth Judicial District

Government Center 1251 Courts Tower Minneapolis, Minnesota 55487 (612) 348-3208 FAX (612) 348-2131

MEMORANDUM

TO: Supreme Court Advisory Committee
on Rules of Civil Appellate Procedure
Research and Planning
State Court Administration
120 Judicial Center
St. Paul, MN 55155

FROM: Lynne Krenz
President Hennepin County Court
Reporters Association

DATE: April 14, 1998

RE: Proposed Amendments to Rules of Civil Appellate Procedure, Rule 110.02, subd. 4

On behalf of the Hennepin County Court Reporters Association, I support the position as set forth by the Minnesota Association of Verbatim Reporters and Captioners.

MINNESOTA
ASSOCIATION OF VERBATIM
REPORTERS & CAPTIONERS

Telephone (612) 917-6258
Fax (612) 917-1835

1821 University Ave W Suite S-156 St. Paul, MN 55104

MEMORANDUM

TO: Michael B. Johnson, Esq.
Supreme Court Advisory Committee
on Rules of Civil Appellate Procedure

FROM: Minnesota Association of Verbatim Reporters & Captioners
Karen Lebens, President Elect
Lorilee K. Fink, Vice President – Official

DATE: April 14, 1998

RE: Proposed Amendments to Rules of Civil Appellate Procedure

The following language is offered in lieu of the last paragraph of the proposed changes to Rule 110.02, Subd. 4:

> Any audiotape or videotape record, whether an exhibit, deposition, statement or otherwise proposed to be utilized by a party during any trial court proceeding shall be accompanied by a written transcript thereof, which transcript, upon acceptance by or amendment or redaction by the parties, shall constitute the record thereof for all purposes, including appeal.

In support thereof, we offer the following:

1. The official court reporter is not present at the time an audiotape, videotape or other electronic testimony is taken, and therefore is not able to identify who is speaking, interrupt or clarify inaudible or otherwise incomprehensible utterances, and it follows from this that we do not want to be responsible for any annotation or verification of accuracy.

2. It would be beneficial to a judge or jury to have a written transcript at the time any audiotape or videotape is presented at trial.

3. Adoption of the proposed amendment as presented before the Supreme Court would encourage attorneys and/or parties to submit videotape depositions without including a transcript since it would be required to be transcribed by an official court reporter.

Karen M. Lebens

Karen Lebens, President Elect

Lorilee K. Fink

Lorilee K. Fink, Vice President – Official

THE SUPREME COURT OF MINNESOTA
RESEARCH AND PLANNING
STATE COURT ADMINISTRATION
120 MINNESOTA JUDICIAL CENTER
25 CONSTITUTION AVENUE
ST. PAUL, MINNESOTA 55155

Michael B. Johnson
Staff Attorney

(612) 297-7584
Facsimile (612) 296-6609

April 6, 1998

Mr. Fred Grittner
Clerk of the Appellate courts
305 Minnesota Judicial Center
St. Paul, Minnesota 55155

RE: C4-84-2133
Written Statement of Judge James Swenson for
Hearing on Proposed Amendments to Rules of Civil Appellate Procedure

Dear Mr. Grittner:

At the request of the Honorable James T. Swenson, District Court, Fourth Judicial District, I am submitting twelve copies of a February 18, 1998, letter from Judge Swenson as a written statement for the April 21, 1998, hearing on proposed amendments to the rules of civil appellate procedure. Judge Swenson is unable to attend the hearing.

If there are any questions, please contact me immediately. Thank you.

Sincerely yours

Mike Johnson

Michael Johnson
Advisory Committee Staff

enc.

cc: Hon. James Swenson

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

JAMES T. SWENSON
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487-0421
(612) 348-2122
FAX (612) 348-2131

February 18, 1998

Michael B. Johnson, Esq.
Staff Attorney
Research and Planning
State Court Administration
120 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Proposed Amendments to Rules of Civil Appellate Procedure
C4-84-2133

Dear Mr. Johnson:

I received and reviewed your February 3, 1998 Memorandum regarding the proposed amendments to the Rules of Civil Appellate Procedure. Your advisory committee should consider one additional, essential change. Under the existing version of Rule 104.01, the time period within which to appeal from an order commences with service by an adverse party of notice of filing. Your committee proposes to change the key date to notice of filing by "any party," as distinct from just notice by the adverse party. This is a step in the right direction, but it does not go far enough. Please consider adding "any party or the court," along with making a corresponding change in District Court Rule 59.03. My tenure as a family court judge leads me to believe that this additional language is of the utmost necessity. Please let me explain.

During the last year on the family court bench I have had the misfortune of receiving many motions for amended findings, etc. that crossed my desk many months after my decisions. Inept attorneys failed to serve notice of filing, thus keeping open the door for extremely dilatory motions for amended findings. In the interim I presided over a number of similar cases and, as we all know, as time goes by subtle distinctions between our various custody battles or maintenance disputes begin to blur. In order to properly address such motions, my staff and I have to do at least twice the amount of work that we would have needed to do had the motions come across our desks in reasonably prompt fashion. Because requests for transcripts rarely precede motions to amend, we were left to our notes in order to reconstruct the nuances of cases heard six or more months before. There is a cure for this and it is to allow trial court judges or court administrators to serve their own notices of filing and thereby reduce the window within which such matters may come back to court. A number of counties other than Hennepin already follow such a procedure.

The necessity of my proposed change was not apparent to me during my twenty years of private litigation practice or during my time on the bench before I volunteered for family court. I believe I know the reasons why. First, the attorney's fee scenario in family court cases is unique. No other area of law of which I'm aware engenders such fights over attorneys fees, resulting in so many unpaid or underpaid lawyers who fail to stick around long after trial is over. Post trial "details," such as serving notice of filing of an order, seem not to get done because the attorneys often promptly part ways with their clients. The fact that counsel's action, or should I say inaction, may be malpractice offers no relief to the busy trial judge who must address a very stale motion for amended findings. Second, even if my first reason is wrong and this malady is present on an equal basis throughout all substantive areas of civil litigation, it remains a much more serious practical problem in family court. As a trial lawyer and a trial judge who tried a contract case, followed by a real estate case, followed by a personal injury case, and so on, the pure variety of subject matter made it easier to remember the peculiarities of each case. A stale motion on a contract case is easier to address if there have not been ten similar contract cases in the interim. In contrast, we family court trial judges may be inundated with four or five child custody cases in a row. By the time we complete the fifth, the distinctions between the first and second are almost impossible to remember with any degree of detail and nuance.

I'm not aware of any downside inherent in my proposed language. In my opinion clients are better served by prompt motions for amended findings, etc. and prompt appeals. It is hard to envision how a stale record helps anyone.

Thank you in advance for considering my proposal.

Sincerely,

James T. Swenson

cc: Hon. Sandra Garberding, Chair
Hon. Marianne Short, Vice-Chair

WASHINGTON COUNTY COURT REPORTERS
WASHINGTON COUNTY GOVERNMENT CENTER
STILLWATER, MINNESOTA 55082

DATE: April 14, 1998

TO: Supreme Court Advisory Committee on Rules of Civil Appellate Procedure Research and Planning

FROM: Douglas Lindee
Washington County Court Reporter Representative
Tenth Judicial District
Stillwater, MN 55082

RE: Proposed Amendments to Rules of Civil Appellate Procedure, Rule 110.02, Subd. 4

On behalf of the Washington County Court Reporters, I support the position as set forth by the Minnesota Association of Verbatim Reporters and Captioners.

FAEGRE & BENSON LLP

2200 NORWEST CENTER, 90 SOUTH SEVENTH STREET
MINNEAPOLIS, MINNESOTA 55402-3901
TELEPHONE 612-336-3000
FACSIMILE 612-336-3026

JOHN F. BEUKEMA
jbeukema@faegre.com
612/336-3162

April 13, 1998

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

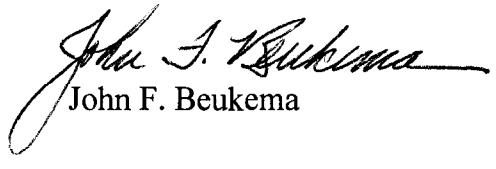
BY MESSENGER

Re: Proposed Amendments to the Rules of Civil Appellate Procedure
Appellate File No. C4-84-2133

Dear Mr. Grittner:

In accordance with the Supreme Court's Order dated February 18, 1998, enclosed for filing in connection with the subject matter please find the original and 11 copies of the Statement of John D. French, John F. Beukema, John P. Borger, Jeffrey D. Hedlund, and Bruce Jones. Please call me if there are any questions about this Statement.

Very truly yours,



John F. Beukema

Enclosures

M2:20164969.01

STATE OF MINNESOTA
IN SUPREME COURT

No. C4-84-2133

In re:)
Proposed Amendments to the)
Rules of Civil Appellate Procedure)

STATEMENT OF
JOHN D. FRENCH, JOHN F. BEUKEMA, JOHN P. BORGER,
JEFFREY D. HEDLUND, AND BRUCE JONES
CONCERNING PROPOSED AMENDMENTS

We are members of the Bar of this Court and partners in the firm of Faegre & Benson LLP who have a particular interest in appellate practice in the state and federal courts. We submit this statement in response to the Court's Order dated February 18, 1998, inviting members of the Bench and Bar to comment on the proposals of the Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure for amendments to those Rules.

I. The Advisory Committee's Recommendations

With a single exception noted below, we support the Advisory Committee's proposals. We particularly endorse proposed Rule 104.01, subd. 2, which would extend the time for appeal when specified post-trial motions have been filed. This salutary proposal would eliminate the uncertainty that currently exists about the proper course of action when the deadline for appealing from a judgment is approaching but the district court has not yeet decided the post-trial motions. It would also bring the procedure in state court closer to the

procedure in federal courts, thereby eliminating a potential source of confusion for lawyers who practice in both systems.

The one aspect of the Committee's proposals with which we disagree is proposed Rule 104.01, subd. 3. If that proposal were adopted, a notice of appeal filed before the disposition of any of the post-trial motions itemized in Rule 104.01, subd. 2 would essentially be void, and a new notice of appeal would have to be filed after all pending motions were decided.

This procedure was followed in the federal courts between 1979 and 1993 but was abandoned when it was found to cause many appellants unwittingly to forfeit their right to appeal. Between 1979 and 1993, Federal Appellate Rule 4(a)(4) provided:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party [under any of a variety of rules providing for post-trial motions], the time for appeal for all parties shall run from the entry of the order denying . . . such motion. A notice of appeal filed before the disposition of [such motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fee shall be required for such filing.

Quoted in Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 59 (1982). Considerable difficulty was experienced with this provision. Despite the clear language of the rule, many appellants mistakenly believed that their original notice was merely suspended until the post-trial motions were decided, and they failed to file a new notice after such decision. In such cases, the appellant was held to have lost the right to appeal altogether, despite having filed his or her notice within the required time after the order or judgment

appealed from. Several federal courts of appeals criticized the requirement of a new notice of appeal, terming it "a trap for the unwary," Averhart v. Arrendondo, 773 F.2d 919, 920 (7th Cir. 1985), and a "seemingly functionless provision" that caused "harsh results," Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278, 281 (5th Cir. 1984). *See also* 16A Charles Alan Wright, *et al.*, Federal Practice & Procedure: Jurisdiction 2d § 3950 at 99 (describing the provision as "a trap that had -- without substantial advantage -- thwarted appeals."); *see generally* Advisory Committee Notes on 1993 Amendment to Rule 4(a)(4), F. R. App. P.

In 1993, therefore, Federal Appellate Rule 4(a)(4) was amended to eliminate the requirement of a new notice of appeal. The Rule now provides that a notice of appeal filed before post-trial motions have been decided is merely suspended, rather than being void. A new notice of appeal need not be filed after the ruling on the motions, but the original notice must be amended if the appellant wishes to obtain review of that ruling as well as the order or judgment from which the original appeal was taken.

We do not urge the Court to follow the Federal Rules on this matter simply for the sake of conformity (although substantial similarity between state and federall procedures probably is desirable unless there is a good reason for variance). But the adverse federal experience with the procedure proposed by the Advisory Committee offers good reasons wny that procedure should not be adopted in Minnesota. We therefore urge the Court to adopte a revised version of the Advisory Committee's proposed Rule 104.01, subd. 3, as follows:

> 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. Such a notice shall be ineffective to appeal from the judgment or order, or part thereof, specified in the notice until the entry of the order disposing of the last such motion outstanding. Once such order is entered, the notice of appeal shall become effective as to the matters identified therein, but a new notice of appeal must be filed, within the time specified in subdivision 1 of this Rule, to obtain review of any order disposing of any of the above motions. ~~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 review pursuant to Rule 106.

The revised language is based on the current version of Federal Appellate Rule 4(a)(4), except that a new notice of appeal, rather than mere amendment of the prematurely filed notice, would be needed to obtain review of the ruling on post-trial motions, because the Minnesota Appellate Rules do not provide for amendment of a notice of appeal after it has been filed.

Except in the foregoing respect, we respectfully urge the Court to adopt the Advisory Committee's recommendations.

II. Suggested Additional Amendments Not Addressed by the Advisory Committee

We also urge the Court to consider amendment of the Appellate Rules in three respects that are not addressed in the Advisory Committee's Report.

A. Rule 105 -- Discretionary Review

First, we suggest that Rule 105 be amended to clarify what papers may be filed in support of and in opposition to petitions for discretionary review. The Rule speaks only of the petition itself, which "shall not exceed five pages." We have learned from experience,

however, that the Clerk of Appellate Courts will also accept for filing, and the Court of Appeals apparently will consider, a memorandum in support of the petition, the length of which apparently is governed only by the petitioner's good judgment and discretion. The only textual reference suggesting that such a memorandum may be filed is the observation, in the comments to Form 105, that "a memorandum of law and pertinent lower court documents should be attached to the petition."

We respectfully suggest that Rule 105 either should be enforced as written, so that a petitioner must make the case for discretionary review within the five-page petition for which the Rule currently provides, or should be amended to authorize explicitly the supporting documents that informal practice now permits. The current practice penalizes litigants who take the Rule literally, filing only the minimal papers specifically permitted by the Rule, and rewards those who either discover the practice by combing through the comments to the Official Forms or simply ignore the apparent terms of the Rule.

Reasonable people may disagree about whether petitioners for discretionary review should be limited to a five page petition (the same limitation imposed by Rule 117 on petitions to this Court for discretionary review of decisions of the Court of Appeals) or should be permitted also to file a supporting memorandum. But there is nothing to commend the current ambiguity about what may be filed in support of a petition under Rule 105. Moreover, if a memorandum in support of the petition is permitted, a maximum length should be specified, and the Rule should include more specific provisions concerning the permitted response to the petition.

B. Rule 117, subd. 6 -- Brief of an Amicus Curiae

Second, we urge that the Rules be amended to resolve a sometimes troublesome ambiguity concerning the circumstances in which an interested nonparty may seek leave to file a brief as an *amicus curiae* in cases in the Supreme Court. Rule 117, subd. 6, provides that a party who wishes to participate as an *amicus* if review is granted must seek permission for such participation within the time specified in subd. 5 of the same rule, *i.e.*, within 20 days after the petition for review is filed. This is the only provision in the Appellate Rules that addresses the timing of an *amicus* petition, and it could be read as holding that all such petitions must be submitted before this Court has decided whether to accept the case for review.

There are strong reasons why the Rules should not require a petition for leave to participate as an *amicus* to be submitted at such an early stage. In many cases, a potential *amicus* may not become aware of the case until after review has been granted. In other cases, the grant of review may heighten the desire of the potential *amicus* to be heard. For example, a potential *amicus* who favors the result reached by the court of appeals presumably would be happy to have that decision stand without further review and, indeed, may be reluctant to express its interest in the case while a petition for review is pending, lest that expression increase the likelihood that review will be granted. Once review has been granted, however, such a person will have a much stronger reason to want to submit an *amicus* brief on the merits of the issue before this Court.

Perhaps in recognition of these realities, this Court has been willing to entertain applications for leave to file *amicus* briefs that are submitted after the case has been accepted for review, even if such applications are not specifically provided for in the Rules. We believe that this willingness is entirely appropriate, and we urge the Court to revise Rule 117 (or perhaps Rule 129) to make clear that applications for leave to participate as an *amicus* in cases before the Supreme Court may be filed after, as well as before, review has been granted. *Cf.* U.S. Sup. Ct. R. 37 (*amicus* brief may be filed, with consent or parties or leave of Court, either in connection with cert. petition or after petition has been granted). Deadlines should also be established for submission of the *amicus* application in all such cases.

C. Rule 139 -- Costs and Disbursements

Finally, we urge the Court to amend Rule 139 to provide that, in a case that is reviewed by the Supreme Court, the party who prevails may recover its costs in both the Supreme Court and the Court of Appeals, regardless of which party obtained the decision in the Court of Appeals. As the Clerk of Appellate Courts currently interprets Rule 139, the identity of the "prevailing party" who is entitled to recover its costs is determined independently at each level of the appeal process, which can lead to anomalous results.

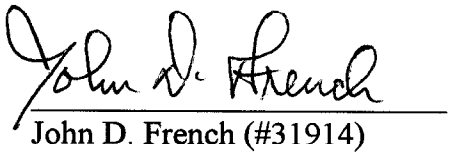
Suppose, for example, that a defendant against whom judgment is entered in the district court obtains a reversal in the Court of Appeals, but this Court accepts the case for review and again reverses, reinstating the district court judgment for plaintiff. Under this Court's unpublished decision in Johnson v. Morris, 454 N.W.2d 620 (Minn. 1990)(table), the defendant in this situation will not be able to recover its costs in the Court of Appeals,

because, although it did "prevail" in that court, it was not the "prevailing party" in the appeal as a whole. *See* 3 Eric J. Magnuson & David F. Herr, Minnesota Practice: Appellate Rules Annotated § 139.3 (3d ed. 1996). On the other hand, the Clerk will also deny the ultimately successful plaintiff its costs in the Court of Appeals, because it did not "prevail" *in that court*.

We respectfully submit that the clerk's interpretation of the Rule is illogical, and that Rule 139 should therefore be amended to clarify who is the "prevailing party" for purposes of taxation of costs in a case in which the ultimate judgment is rendered by this Court rather than the Court of Appeals. As this Court apparently recognized in Johnson v. Morris, the relevant question for an award of costs should be who ultimately prevails in the appellate process as a whole, not who prevails at a particular step of that process. The party in whose favor the Supreme Court ultimately rules should be allowed to recover all relevant costs incurred in the appellate process as a whole. That party clearly may recover costs in both courts if the Court of Appeals rules in his or her favor and the Supreme Court affirms. We see no reasonable basis for a different result where the Court of Appeals erroneously rules against that party, so that he or she is forced to pursue an additional step of appellate review to secure vindication of his or her legal position.

Dated: April 15, 1998

Respectfully submitted,



John D. French (#31914)
John F. Beukema (#8023)
John P. Borger (#9878)
Jeffrey D. Hedlund (#175791)
Bruce Jones (#179553)
FAEGRE & BENSON LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: 612/336-3000

M2:20163808.01

FIRST JUDICIAL DISTRICT COURT REPORTERS ASSOCIATION
Counties of: Carver, Dakota, Goodhue, Le Sueur,
McLeod, Scott, and Sibley

M E M O R A N D U M

TO: Supreme Court Advisory Committee
On rules of Civil Appellate Procedure
Research and Planning
State Court Administration
120 Judicial Center
St. Paul, MN 55155

FROM: Paul H. Lyndgaard, President PHL
First Judicial District Court Reporters Association
Le Sueur County Courthouse
88 South Park Avenue
Le Center, MN 56057

RE: Proposed Amendments to Rules of Civil Appellate Procedure, Rule 110.02, Subd. 4

DATE: April 13, 1998

On behalf of the First Judicial District Court Reporters Association, I support the position as set forth by the Minnesota Association of Verbatim Reporters and Captioners.

The Ramsey County Court Reporters Association
Amy Ruemelin, President
1010 Ramsey County Courthouse
15 West Kellogg Boulevard
St. Paul, MN 55102
612.266.9188

April 15, 1998

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: Comments and Oral Presentation Regarding
Proposed Amendments to the Rules of Civil Appellate Procedure
File No. C4-84-2133

Dear Mr. Grittner:

The undersigned respectfully requests the opportunity to make an oral presentation on behalf of the Ramsey County Court Reporters on April 21, 1998, regarding proposed amendments to Rule 110.02, subd. 4, of the Rules of Civil Appellate Procedure.

Enclosed are twelve (12) copies of the material to be presented, as well as twelve (12) copies of this request to make an oral presentation.

Thank you.

Sincerely,

Amy Ruemelin
President
Ramsey County Court Reporters Association

AR/lh
enclosure

STATE OF MINNESOTA

IN SUPREME COURT

C4-84-2133

In Re The Matter of:

Proposed Amendments to the
Rules of Civil Appellate Procedure

TO: Frederick Grittner, Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

The Ramsey County Court Reporters Association respectfully makes the following comments regarding the proposed amendment of Rule of Civil Appellate Procedure 110.02, subd. 4, (paragraph 2) (pp. 40-41 of proposed amendments).

BACKGROUND:
CONCERNS OF OFFICIAL COURT REPORTERS REGARDING THE TRANSCRIPTION OF AUDIO/VIDEOTAPE TESTIMONY/EVIDENCE

As this Court is aware, audio and videotapes often are introduced during both civil and criminal court proceedings (particularly with the advent of *State v. Scales)*. These tape-recordings oftentimes contain portions which are indiscernible by the listener due to poor tape quality, overlapping speakers and extraneous background noise (not to mention the inability to distinguish among unseen and unidentified speakers).

Professional verbatim court reporters are charged with the task of producing

accurate transcripts which reflect actual live proceedings. Court reporters assure the integrity of the record by requesting that speakers identify themselves, speak one at a time, and repeat that which is not understood. Court reporters by virtue of their training do not possess a unique ability to understand the incomprehensible. As professionals, court reporters are dedicated to the accuracy of the record, and cannot allow holes in transcripts of proceedings filled with such parentheticals as "(unintelligible)," "(incomprehensible)," or "(baby crying in background obliterating speakers)."

Further, court reporters must prepare transcripts on their own, out-of-court time, spending many hours per week (and weekends) in this pursuit. The transcription of audio/videotapes often requires repeated listening to the same material in order to create a usable record, which the verbatim reporter cannot certify as to accuracy. Requiring a court reporter to certify as to accuracy testimony taken outside of her/his presence is unconscionable.

Court reporters currently are compensated per page of transcript recorded at live proceedings over which the reporter wields some control during the making of the record. Requiring official court reporters to transcribe audio/videotapes would prove a poor use of resources if reporters are forced to charge an hourly rate in order to be fairly compensated as professionals for this task.

Most judges in Ramsey County District Court require the provision of a transcript (by the offering party) to accompany any testimony or exhibit offered in the form

of audio/videotape,[1] recognizing that this is a transcription task more appropriately performed by a typist who can listen to the tape-recordings as many times as necessary to produce a usable transcript.

As a result of the concerns surrounding the transcription of audiotape and videotape exhibits/testimony, the Ramsey County Court Reporters Association has sought assistance from the committee currently drafting proposed changes to the Rules of Criminal Procedure, requesting a rule requiring that, if any party offers into evidence videotape or audiotape exhibits or testimony, that party also shall provide to the court a transcript of the proposed exhibit or testimony, which transcript shall be made a part of the record in the event of an appeal. (Such a rule would not govern whether any such transcript was admissible as evidence in the case.)

The Criminal Rules Advisory Committee currently is considering several alternate drafts, all of which specifically relieve the court reporter of the duty to certify as to accuracy the transcription of audio/videotapes created outside of the court proceedings. Currently, this committee is considering a proposed rule which requires that the party offering the audio/videotape only provide a transcript in the event of an appeal, and further adding the language that "[i]f either of the parties questions the accuracy of the transcript of a videotape or audiotape [as transcribed by the other party], that party may seek to

[1] It is the position of Chief Judge Lawrence Cohen that this is a Ramsey County District Court bench policy.

correct the transcript either by stipulation with the other party or by motion to the trial court under Rule 110.05 of the Rules of Civil Appellate Procedure."

SPECIFIC CONCERNS REGARDING THE PROPOSED AMENDMENT/ADVISORY COMMITTEE COMMENT RULE 110. THE RECORD ON APPEAL

The proposed amendment and advisory committee comment read as follows:

Rule 110. The Record on Appeal.

* * *

RULE 110.02. THE TRANSCRIPT OF PROCEEDINGS; DUTY OF APPELLANT TO ORDER; NOTICE TO RESPONDENT IF PARTIAL TRANSCRIPT IS ORDERED; DUTY OF REPORTER; FORM OF TRANSCRIPT

* * *

Subd. 4. Transcript Requirements.

* * *

The transcript should include transcription of any testimony given by audiotape, videotape, or other electronic means unless that testimony has previously been transcribed, in which case the transcript shall include the existing transcript of testimony, with appropriate annotations and verification of accuracy, as part of the official transcript.

Advisory Committee Comment - 1998 Amendments

* * *

The rule also includes the requirement that videotaped

> depositions must be transcribed unless the court reporter provides an existing transcript of the videotape testimony, verifying its accuracy.
>
> * * *

While the Advisory Committee Comment indicates that this section refers to "deposition" testimony, the language of the proposed rule makes no such distinction. If adopted, the rule should clearly state "deposition testimony" in order to differentiate it from *Scales* tapes, 911 tapes, and other types of taped testimony/evidence. Current practice is that pretrial depositions, including video depositions, are reported at the time of the making of the videotape by free-lance verbatim court reporters, who possess some control over the proceedings. The deposition transcript is then prepared by the free-lance reporter, who also certifies its accuracy. The adoption of this rule would encourage attorneys/parties to submit videotape depositions without including a transcript since it would be required to be transcribed by an official court reporter at trial.

If a transcript does exist as provided by an offering party, court reporters cannot verify as to accuracy the transcription as prepared by an outside source. (For instance, *Scales* tapes commonly are transcribed by clerical personnel at law-enforcement agencies and/or city or county attorney's offices.)[2]

---

[2] The general method by which custodial-interview (*Scales*) tapes are transcribed by the Ramsey County attorney's office is as follows: First, clerical staff in that office type up a draft transcript while listening to the tapes. The draft transcript is then sent to the law-enforcement officers who were actually present for the interview, who listen to the tapes while going through the transcript and making corrections to it.

Official verbatim court reporters cannot verify as to accuracy their own attempts at transcribing imperfect audio/video recordings when they have no control over the speakers, did not make the tape-recording, were not present when the tape-recording was created, and are unable to identify or distinguish among the speakers on the tape-recording.

CONCLUSION

Even though, in Ramsey County District Court, it is the common practice of judges to require the submission of a written transcript to accompany any audio/videotape evidence or testimony offered, court reporters statewide are concerned at the lack of a uniform rule requiring a party offering a video/audiotape to provide a transcript thereof. Court reporters are professional, verbatim preservers of the live record, not clerk-typists who can spend many hours at a typewriter trying to determine sounds made by electronic means. And, when a transcript is provided by the offering party, it is impossible for the court reporter to certify such a transcript as to accuracy. Nor can the court reporter certify as to accuracy his/her own attempt to create a transcript by such means. And while some may argue that the preparation of these transcripts by typists is time-consuming and costly, it would be far more costly to compensate professional court reporters by the hour to perform such clerical duties for the parties. Additionally, the offering party is in the best position to prepare a transcript, which enables it to fully present its case to the fact-finder, and it would be beneficial to a judge or jury to have a

written transcript at the time any audiotape or videotape is presented.

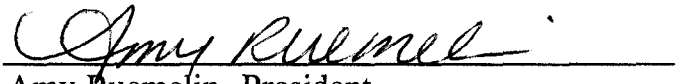
Accordingly, the court reporters of Ramsey County respectfully request that the proposed second paragraph of Rule 110.02, subd. 4, concerning the transcription and verification as to accuracy of testimony given by audiotape, videotape, or other electronic means, be rejected, and would propose the following rule:

> **Any audiotape or videotape record, whether an exhibit, deposition, statement or otherwise, proposed to be used by a party during any court proceeding shall be accompanied by a written transcript thereof, which transcript, upon acceptance or redaction by the parties, shall constitute the record thereof for all purposes, including appeal.**
>
> **If either of the parties questions the accuracy of such a transcript, that party may seek to correct the transcript either by stipulation with the other party or by motion to the trial court under Rule 110.05 of the Rules of Civil Appellate Procedure.**

Respectfully submitted,

THE RAMSEY COUNTY
COURT REPORTERS ASSOCIATION

Dated: April 15, 1998

By: 

Amy Ruemelin, President
1010 Ramsey County Courthouse
15 West Kellogg Boulevard
St. Paul, MN 55102
612.266.9188

SEMCRA
Southeastern Minnesota Court Reporters Association of the Third Judicial District

GARY OFSTEDAHL AND CHRISTINE CLARK
CO-PRESIDENTS

MARGARET A. MORGAN
SECRETARY-TREASURER
507/287-1636

DISTRICT COURT
151 SE FOURTH STREET
ROCHESTER, MN 55904
PHONE: 507/285-8185
FAX: 507/285-8996

MEMORANDUM

DATE: April 15, 1998

TO: Michael B. Johnson
Staff Attorney
The Supreme Court of Minnesota
Research and Planning
State Court Administration
120 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

C4-84-2133

FROM: Gary Ofstedahl and Christine M. Clark
Co-presidents of SEMCRA

RE: Proposed Amendments to Rules of Civil Appellate Procedure

---

On behalf of the Southeastern Minnesota Court Reporters Association, we offer our support of the position as set for by the Minnesota Association of Verbatim Reporters and Captioners relative to the Proposed Amendments to Rules of Civil Appellate Procedure.

AMY L. KELLER, RPR
District Court Reporter

151 4th Street SE ✦ Rochester, MN 55904 ✦ 507/285-8185 ✦ FAX 507/285-8996

MEMORANDUM

DATE: April 15, 1998

TO: Michael B. Johnson
Staff Attorney
The Supreme Court of Minnesota
Research and Planning
State Court Administration
120 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

FROM: Amy L. Keller
Court Reporter Representative to the Conference of Chief Judges

RE: Proposed Amendments to Rules of Civil Appellate Procedure

---

As Court Reporter Representative to the Conference of Chief Judges, and on behalf of the Official Reporters Advisory Board, I am writing to express support of the position set forth by the Minnesota Association of Verbatim Reporters and Captioners as it relates to the Proposed Amendments to the Rules of Civil Appellate Procedure, specifically Rule 110.02, Subd. 4.

Thank you in advance for your consideration.

WILLIAM E. MCGEE
CHIEF PUBLIC DEFENDER

(612) 348-7530
FACSIMILE (612) 348-6179
(612) 348-2025

OFFICE OF THE PUBLIC DEFENDER
HENNEPIN COUNTY - FOURTH JUDICIAL DISTRICT
317 SECOND AVENUE SOUTH, SUITE 200
MINNEAPOLIS, MN 55401-2700

April 15, 1998

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: *In re* 1998 Proposed Amendments To The Rules Of Civil Appellate Procedure
App. Ct. File No. C4-84-2133

Dear Mr. Grittner,

Enclosed for filing is the statement of the appeals division of the Hennepin County Public Defender--Fourth District.

We do not request time to make an oral presentation.

Sincerely,

Peter W. Gorman
Assistant Public Defender
Appeals Unit
(612) 348-6618

C4-84-2133

STATE OF MINNESOTA

IN SUPREME COURT

In re 1998 Proposed

Amendments To The Rules

Of Civil Appellate Procedure

STATEMENT OF THE
HENNEPIN COUNTY PUBLIC
DEFENDER--FOURTH DISTRICT

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA AND ITS ADVISORY COMMITTEE ON THE RULES OF CIVIL APPELLATE PROCEDURE

We are the appeals division of the Hennepin County Public Defender, Fourth District. Although we have practiced appellate law together for eight years, we each have experience in Minnesota's appellate courts which exceeds that period.

In juvenile court, our division handles pretrial appeals by the prosecution in delinquency, certification and E.J.J. cases, and post-trial appeals of delinquency adjudications and dispositions, of certifications and E.J.J. dispositions, and of C.H.I.P.S. adjudications, terminations of parental rights and custody transfers under the permanency statute. In adult criminal court, we handle pretrial appeals by the prosecution, post-trial appeals of misdemeanor convictions and sentences, and an occasional post-trial appeal in felony cases, as either appellant or respondent to a sentencing appeal.

We have three comments on the proposed amendments to the rules of civil appellate procedure which we hope this Court and its advisory committee will consider.

1. Recommendation # 3 Proposing Amendments To Minn. R. Civ. App. P. 104 Should Be Adopted.

The February 27, 1998 summary of the proposed rule changes printed in Finance and Commerce does not include the actual proposed language, so our comment is based on the summary printed there.

Rule 104 should be amended to provide that the time for appeal begins to run when post-trial motions are decided. The rule should also be amended to provide for the same, 60-day period for taking an appeal.

At present, Rule 104 is very difficult to understand, and has provoked many jurisdictional memoranda in the Court of Appeals over whether an appeal was taken properly or improperly from an order, a judgment, or an order for judgment.

As applied to our work in juvenile court, both amendments to Rule 104 are very important. At present, Minn. Stat. § 260.291, subd. 1(a) and Minn. R. Juv. P. 63.01, subd. 2(B) require that appeals be taken within 30 days of the filing of the order from which the appeal is taken. However, another rule of appellate practice precludes appellate review of issues which were not the subject of a new-trial motion, Welfare of D.N., 523 N.W.2d 11 (Minn. Ct. App. 1994).

It is quite rare for a party to receive the juvenile court's order, obtain a time for hearing of a new-trial motion, write, serve, and argue that new-trial motion, and obtain a decision within 30 days of the filing of the order. But, under present rules of law, an appellant must file the appeal within thirty days, regardless of whether post-trial motions have been decided. Of course, the filing of the appeal deprives the juvenile court of jurisdiction to rule on that new-trial motion, even if the issue on appeal is the same issue raised in the new-trial motion. Spaeth v. City of Plymouth, 344 N.W.2d 815, 824-25 (Minn. 1984). This means that the new-trial motion, although necessary to perfect the appeal, is actually a waste of the lawyers' and the judge's time, except in those rare cases in which a new-trial motion can be brought, heard and decided within 30 days of the order. But the whole purpose of a new-trial motion is to reduce unnecessary appeals by calling error to the court's attention to give the trial court a chance to correct it. Sauter v. Wasemiller, 389 N.W.2d 200, 201-202 (Minn. 1986). A judge can hardly correct a trial error when the judge has no longer any jurisdiction to do so.

This anomaly can be cured by amending Rule 104.01 and Minn. R. Juv. P. 63.01, subd. 2(B) to state that the time for appeal begins only when the post-trial motions have been decided. Even if that amendment is not made, an amendment to the time for taking an appeal to 60 days would go a long way toward curing the

timing problems we have noted.

We recognize that the proposals for enlarging the time for taking an appeal and for tolling that time until decision on the post-trial motions would require a change in § 260.291, subd. 1(a). However, even if such a change were not made, it appears to us that this Court's amendment to Rule 104 [especially if Minn. R. Juv. P. 63.01, subd. 2(B)] were amended in the same fashion at the same time] would control over § 260.291, subd. 1(a). State v. Johnson, 514 N.W.2d 551 (Minn. 1994).

2. Appeals In C.H.I.P.S. And T.P.R. Cases Should Not Be Accelerated.

We understand that some of what follows might perhaps be better addressed to the advisory committee considering changes to the child-protection rules, but we believe these comments are properly addressed to the Court and to this Advisory Committee.

The Court of Appeals routinely accelerates appeals in C.H.I.P.S. and T.P.R. proceedings in juvenile court under its Spec. R. Pract. 1. That rule states, in this regard, that cases involving child custody or the termination of parental rights will be given priority and other cases will be expedited for good cause. The Court does not, however, apply this rule to family-court appeals, many of which also involve child custody. These acceleration orders deny oral argument and direct briefing 15 days after transcript instead of the 30 days provided for by Minn. R. Civ. App. P. 131.01.

The Court of Appeals will usually rescind one or both of these acceleration orders on motion, but we do not file such motions in every case, and would like not to have to file them.

These acceleration orders pose extreme difficulties. The Hennepin County Attorney, since it began enforcing the permanency statute in 1995, has been bringing huge numbers of C.H.I.P.S., T.P.R.'s and custody transfers to trial. It is unfair to us and to our clients to require us to provide decent appellate services, under the strictures of the acceleration orders, in these very-complicated cases involving lengthy trials, especially when we were not trial counsel and are not familiar with the families and the issues. The transcripts in these cases are often many hundreds of pages long, and sometimes well over a thousand pages.

Public policy in the 1990's may well favor the speedy and permanent placement of children who have been removed from their parents, but that policy should not abrogate the parents' due-process right to a fair adjudicatory and appellate process. *See generally* M.L.B. v. S.L.J., ___ U.S. ___, ___, 117 S.Ct. 555, 564-65 (1996); Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

Thirty-day briefing periods and oral argument do not significantly prolong the appellate process. We have surveyed our own cases in which acceleration orders have been issued in recent years and concluded that the Court of Appeals rarely decides accelerated cases much more quickly than cases which were

not accelerated. In termination cases, the most-significant delay in finally placing the children is usually the adoption process, which occurs after the children are committed to the Commissioner of Human Services. That adoption process can be especially prolonged when the children are, as is often the case, developmentally delayed, or efforts are made to find an adoptive home for siblings. Frequently, no efforts are made whatever to explore adoptive placements before trial, even when it is obvious that a termination petition will be filed and will be granted. This adoptive-placement delay, of course, has nothing to do with the appellate process.[1]

Nor should oral argument be denied, just because the case is a termination or a C.H.I.P.S. case. Minn. R. Civ. App. P. 134.01 states that parties on appeal are entitled to oral argument unless: 1) they waive oral argument; 2) they fail to comply with the appellate rules; or 3) the issue on appeal is so settled that not only argument but the appeal itself is a waste of the Court of Appeals' time.

---

[1] For these same reasons, we fervently oppose the proposed Minn. R. Juv. P. 37 (formerly 63.01) currently under consideration by the Advisory Committee on Child Protection Rules, and which was brought to our attention while this memo was being drafted. To allow only 15 days for all principal briefs in protection cases and to compound that "rush to judgment" by requiring the Court of Appeals to rule on all protection cases in 30 days is to sacrifice deliberate appellate consideration for simple expediency without gaining anything. It assumes that all protection appeals are meritless. While we don't prevail on all of our protection appeals, we have won a handful of reversals, and we raised legitimate issues in those cases in which we did not prevail.

When the Court of Appeals denies oral argument as soon as the appeal is filed, especially if the appellant has requested argument, the first two parts of Rule 134.01 do not justify denial of argument. It is hard to see how the Court could determine, at the very outset of an appeal, that the appeal is meritless before it has even received the transcript or briefs.

In 1982, during the campaign for ratification of the Court of Appeals constitutional amendment, Minnesota lawyers were told that they would be entitled to oral argument in every case, which the Supreme Court, as the only appellate court, was then unable to provide. The Court of Appeals' acceleration practices conflict with that promise. Since the Court of Appeals' acceleration practices conflict with Minn. R. Civ. App. P. 134.01, they are also in violation of Minn. Stat. § 480A.11 (1996), which states that the Court of Appeals may adopt supplementary rules not in conflict with the rules of appellate procedure.

3. <u>The Briefing Periods For All Juvenile Appeals Should Be The Same.</u>

Minn. R. Juv. P. 21.03, subd. 2(D)(1) provides for a 45-day briefing period for the appellant's brief. By contrast, Minn. R. Crim. P. provides an appellant a 60-day briefing period.

C.H.I.P.S. and T.P.R. appeals often involve lengthy trials and transcripts which are several hundred pages long. Most delinquency, certification and adult-felony trials do not produce

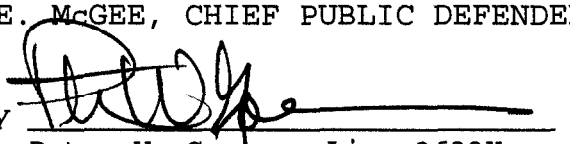
transcripts as long as most C.H.I.P.S. and termination trials. There is no logical reason why the briefing periods for those appeals should be so much shorter than other briefing periods.

We believe that the standard briefing period for termination and permanency appeals, if not also for C.H.I.P.S. appeals, should be the same 45-day period as Minn. R. Juv. P. 21.03, subd. 2(D)(1).

Respectfully submitted,

OFFICE OF THE HENNEPIN COUNTY PUBLIC DEFENDER

WILLIAM E. McGEE, CHIEF PUBLIC DEFENDER

By 

Peter W. Gorman, Lic. 3633X
Renée J. Bergeron, Lic. 133711
Warren R. Sagstuen, Lic. 95187
Assistant Public Defenders
317 2nd Ave. S., Suite 200
Minneapolis, MN 55401
Tel.: (612) 348-7530

Dated: April 15, 1998

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

SOLICITOR GENERAL SECTION
SUITE 1100
445 MINNESOTA STREET
ST. PAUL, MN 55101-2128
TELEPHONE: (612) 282-5700

April 14, 1998

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
Saint Paul, Minnesota 55155-6102

Re: Hearing To Consider Proposed Amendments To The Rules Of Civil Appellate Procedure

Dear Mr. Grittner:

I hereby request the opportunity to make a brief oral presentation on behalf of the Office of the Attorney General at the above-referenced hearing scheduled for April 21, 1998. The subject of the oral presentation is described in the Statement of the Office of the Attorney General which accompanies this request. Pursuant to the Court's order of February 18, 1998, twelve copies of this request and the Statement are enclosed.

Thank you.

Sincerely,

RICHARD S. SLOWES
Assistant Solicitor General

(612) 282-5712

RSS:ddj

Enc.

cc: Cynthia Johnson
Cynthia Lehr
Eric Magnuson
David Herr

AG:122569 v1

STATE OF MINNESOTA

IN SUPREME COURT

C4-84-2133

In re: Proposed Amendments To The Rules Of Civil Appellate Procedure

STATEMENT OF THE OFFICE OF THE ATTORNEY GENERAL

TO: The Supreme Court of the State of Minnesota:

I. General Comments.

The Office of the Attorney General strongly supports the recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Civil Appellate Procedure. We believe the proposed amendments will be of benefit to both the Bench and Bar.

We were privileged to have two members of this Office serve on the Advisory Committee, and we made a number of recommendations for amendments to the Advisory Committee. Some of those recommendations were adopted and some were not. We appreciate the opportunity to have representatives on the Committee and the consideration of our input. At this stage we wish to reiterate one of our suggestions that was not considered by the Advisory Committee and to raise one additional issue generated by amendments proposed by the Committee, as described in the following sections.

II. Proposed Amendments to Rule 129.

Among our proposals to the Advisory Committee were suggested amendments to the appellate rules relating to amicus curiae briefs. Our suggested amendments, patterned on Rule 29 of the Federal Rules of Appellate Procedure, consolidated all procedural requirements relating to amicus curiae briefs in one rule. The proposed rule would have done the following:

- Established a deadline for filing motions for leave to file an amicus curiae brief in both the Court of Appeals and this Court, fifteen days after the appeal is initiated or after review is granted.
- Provided that amicus briefs would be due at the time of the brief of the party whose position is supported by the amicus curiae.
- Eliminated the need for a motion for leave in cases where all parties consent or where the amicus is a governmental agency or officer.

A copy of the proposed rule that was submitted to the Advisory Committee is attached as Exhibit A.

The Advisory Committee did not consider this proposal because it was advised that the Court is not inclined to make any changes to the rules regarding amicus curiae briefs. Nevertheless, we are submitting these comments and recommendations so that the Court is apprised that there is some concern with existing amicus procedures. In particular, we believe that two of the suggested changes relating to amicus curiae practice before this Court would be particularly helpful to the Bar. Those changes concern the timing for filing of motions for leave to file a brief and the deadline for filing amicus briefs themselves.

Currently, Rule 117, subd. 6, requires that an application for permission to participate in an appeal as amicus curiae in the Supreme Court must be filed within the time provided for the filing of a response to a petition for review. This means that a motion for leave to file an amicus brief must be filed before review has been granted. In our view, this has two undesirable effects. First, potential amici may not be aware of a case or that a petition for review has been filed until review has been granted -- after the opportunity to seek amicus status has passed. Second, potential amici are forced to file motions that may well turn out to be unnecessary if review is denied. We recommend amending the rules to provide that motions for leave must be filed no later than 10 days after the granting of a petition for review (shortened from 15 days in our earlier proposal). This would eliminate the problems noted, without delaying the appellate proceedings.

The second change we recommend is to alter the Court's currently unwritten rule that all amicus curiae briefs are due at the time the petitioner's brief is due. While theoretically an amicus curiae files its brief as a friend of the court and not a friend of one of the parties, the reality is that more often than not an amicus curiae takes a position on the issues before the Court that is aligned with that of one or the other of the parties. Moreover, there are circumstances in which the filing of an amicus curiae brief simultaneously with the petitioner's brief simply does not allow for as cogent or as helpful an analysis as would be possible if the amicus curiae had the opportunity to review the petitioner's brief first. One such circumstance is where the Attorney General's Office files an amicus brief to defend the constitutionality of a state statute that is challenged by the petitioner. Without the opportunity to first see the petitioner's brief, our office must anticipate what the constitutional arguments will be.[1] We believe that on balance it would be helpful to both the Bar and the Court if amicus curiae briefs were permitted to be filed in accordance with the timetable suggested in our proposed rule. This proposal is consistent with the current practice in the Court of Appeals, as well as the United States Supreme Court and the federal Courts of Appeals.

The following proposal incorporates these two changes into Rule 129, so that all information regarding the procedure for seeking amicus status is in one rule. Since the provision about the timing of briefs is consistent with existing practice in the Court of Appeals, that language has been added to subdivision 1 and would apply to both appellate courts. In conjunction with the addition of subdivision 2, subdivision 6 of Rule 117 would be deleted. Rule 129 would be amended as follows (new language is underscored):

[1] It is true that often lower court briefs are available for review, but these do not always reflect the arguments that will be made in the Supreme Court.

RULE 129. BRIEF OF AN AMICUS CURIAE

Subdivision 1. General Procedures. Upon prior notice to the parties, a brief of an amicus curiae may be filed with leave of the appellate 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 and filed with the clerk of the appellate courts with proof of service. An amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae brief will support, unless the appellate court specifies otherwise. If the amicus curiae brief does not support the position of either party or supports affirmance in part and reversal in part, it shall be filed within the time allowed for filing of the appellant's or petitioner's brief. An amicus curiae shall not participate in oral argument except with leave of the appellate court.

Subd. 2. Procedure in Supreme Court. An application for leave to participate as an amicus curiae in an appeal in the Supreme Court shall be filed and served no later than 10 days after the order granting the petition for review is filed. The application shall, in all other respects, comply with subdivision 1 of this Rule.

III. Proposed Amendments to Rule 108.

The new Rule 108.01, subd. 1, proposed by the Advisory Committee attempts to clarify the effect of an appeal on enforcement of a judgment and the need for a supersedeas bond to stay enforcement. The proposed new Rule 115.03, subd. 2(b), makes specific reference to Rule 108 for stay of enforcement of administrative decisions. We support these changes, but have recently noted some inconsistency among existing and amended provisions that may create problems for enforcement of some decisions, particularly those in contested cases, pending appeal.

The new language in Rule 108.01, subd. 1, distinguishes between those proceedings in the trial court that are automatically stayed by the filing of a proper and timely appeal and those that are not.[2] The proposed subdivision 1 also specifies that a stay of an order or judgment or enforcement proceedings may be obtained by providing a supersedeas bond or other security as determined by the trial court.

[2] For the convenience of the Court, the full text of Rule 108, as it would be amended in accordance with the Advisory Committee Report, is attached as Exhibit B.

Rule 108.01, subd. 6, which remains unchanged in the Advisory Committee report, provides: "In cases not specified in subdivisions 2 to 5, filing the bond specified in Rule 107 shall stay proceedings in the trial court." Existing (and unchanged) subdivisions 2-5 delineate particular types of judgments and the security that should be required for each. Subdivision 6 seems to establish that for all other categories of orders and judgments the mere filing of an appeal and a cost bond under Rule 107 will stay trial court proceedings. Subdivision 7 seems to provide the adverse party with an opportunity to move for a supersedeas bond where, according to subdivision 6, a cost bond would be all that is required for a stay. This provision for an automatic "cost bond stay" in an unspecified category of cases conflicts with the language in the proposed subdivision 1 that an appeal does not stay an order or judgment or enforcement proceedings and that a stay may be obtained through the trial court.

The "cost bond stay" language of subdivision 6 presents another issue. Since subdivisions 2 through 5 do not describe circumstances often found in administrative enforcement decisions (such as revocation of a license or permit), we are concerned that the combined effect of the new Rule 115.03, subd. 2(b), and the unchanged Rule 108.01, subd. 6, would be that stay of enforcement of an administrative decision is accomplished merely by filing a cost bond under Rule 107.

This potential problem has apparently been avoided in the past in part by reliance on Minn. Stat. § 14.65, which provides for a stay of enforcement in a contested case appeal only if the agency or court of appeals orders a stay "upon such terms as it deems proper." The present concern is that the new Rule 115.03, subd. 2(b), expressly refers to Rule 108 as the procedure for obtaining a stay in an administrative appeal, and Rule 108, subd. 6, arguably requires only the filing of a cost bond under 107 in many circumstances presented by administrative appeals. Similar enforcement problems could arise in other contexts where the order or judgment appealed from is not one of the types described in subdivisions 2-5 of Rule 108.01.

We believe that the inconsistencies described above and the risk to the enforceability of orders and judgments during appeal can be eliminated by amending subdivision 6 as follows:

Subd. 6. In cases not specified in subdivisions 2 to 5, ~~filing the bond specified in Rule 107 shall stay proceedings in~~ 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.

This proposal incorporates language describing the matters for which a stay is necessary from subdivision 1 and the security language from Minn. R. Civ. P. 62.02.

IV. Conclusion

We appreciate the Court's consideration of these proposals. We would be happy to provide any additional information that might be helpful.

Dated: April 14, 1998

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

LEE E. SHEEHY
Chief Deputy Attorney General

102 State Capitol
St. Paul, Minnesota 55155
(612) 296-2351 (Voice)
(612) 297-7206 (TTY)

AG:122355 v1

RULE 129. BRIEF OF AN AMICUS CURIAE

~~Upon prior notice to the parties, a~~ A brief of an amicus curiae may be filed if accompanied by the written consent of all parties, or with leave of the appellate court granted on motion, except that consent or leave shall not be required when the brief is presented by the state or an officer or agency thereof or the United States or an officer or agency thereof. A motion for leave shall be filed and served no later than 15 days after the filing of the notice of appeal, the issuance of a writ of certiorari under Rule 115 or Rule 116, or the granting of a petition for review or a petition for accelerated review. A motion ~~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 and shall conform with the requirements of Rule 127, except that no reply to a response to the motion shall be permitted. Any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae brief will support unless the appellate court specifies otherwise. If the amicus curiae brief does not support the position of either party or supports affirmance in part and reversal in part, it shall be filed within the time allowed for filing of the petitioner's or appellant's brief. Copies of an amicus curiae brief shall be served on all parties and filed with the clerk of the appellate courts with proof of service. An amicus curiae shall not participate in oral argument except with leave of the appellate court.

EXHIBIT A

Rule 108.01. SUPERSEDEAS BOND

Subd. 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, ~~An~~ a proper and timely appeal ~~from~~ does not stay an order or judgment ~~shall stay~~ or enforcement proceedings in the trial court ~~and save all rights affected by it only if~~, but the appellant may obtain a stay by provide~~s~~ing 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 in 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 cases not specified in subdivisions 2 to 5, filing the bond specified in Rule 107 shall stay proceedings in the trial court.

Subd. 7. 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.

EXHIBIT B