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Appellate Practice in Minnesota: A Decade of Experience with the Court of Appeals

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APPELLATE PRACTICE IN MINNESOTA: A DECADE OF EXPERIENCE WITH THE COURT OF APPEALS

DAVID F. HERR† & MARY R. VASALY††

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I. INTRODUCTION

The appellate courts are traditionally viewed as the apex of the court system.¹ Practice in the appellate courts can be challenging and sometimes difficult for practitioners not familiar with the fundamental nature of appellate courts and their specialized focus. Appellate courts review narrow issues of law and only a small fraction of the cases that enter the judicial system.² The vast majority of cases are resolved by judgments that are not appealed or through some form of settlement. In

1. An appellate court is a court having jurisdiction of appeal and review. BLACK'S LAW DICTIONARY 97 (6th ed. 1990). An appellate court has "the power to review and revise the judicial action of an inferior court." See *Trengen v. Mongeon*, 200 N.W.2d 50, 53 (N.D. 1972).

2. An appellate court only has "the power and authority to take cognizance of a cause and proceed to its determination, not in its initial stages (i.e. original jurisdiction), but only after it has been finally decided by an inferior court" BLACK'S LAW DICTIONARY 98 (6th ed. 1990).

1990, over two million cases were filed in the district courts of Minnesota, but only 3406 cases reached the appellate level.³

After a decade of experience with a two-tiered appellate court system in Minnesota, the time has come to assess how the appellate courts are functioning in practice. In most respects, the Minnesota Court of Appeals has served its purpose. The court allows some level of appellate review of all civil and criminal cases.⁴ Oral argument is available on request.⁵ Written decisions of some sort are issued in all cases.⁶ Moreover, decisions are rendered promptly.⁷ Decisions of the three-judge panels of the court are largely consistent. However, no mechanism exists to resolve conflicts between panels, short of review by the Minnesota Supreme Court, and that review is not certain to be available.

In theory, this Article will review the progress of the appellate court system in Minnesota over the past ten years. In practice, this Article will provide a broad outline of appellate practice in Minnesota and will discuss efficacious methods for

3. The comparison of pending cases, case dispositions, and appeal filings in a given year is not perfect. Appeals inevitably lag behind trial court dispositions, although a few appeals or other appellate court proceedings may precede trial court disposition. Nonetheless, these data give an accurate view and are essentially consistent with results in prior years. See Minnesota Supreme Court, Research and Planning, Minnesota Appellate Courts Case Filings by Year and Month Through December 1990 (1991) (on file with the Clerk of Appellate Courts, 245 Minnesota Judicial Center, 25 Constitution Avenue, Saint Paul, MN 55155); Wayne Kobbervig, Statistical Highlights 1990 Minnesota Trial Courts 1 (1990) (on file with the Clerk of Appellate Courts, 245 Minnesota Judicial Center, 25 Constitution Avenue, Saint Paul, MN 55155).

4. See MINN. R. CIV. APP. P. 103.03; MINN. R. CRIM. P. 28.02.

5. MINN. R. CIV. APP. P. 134.01.

6. MINN. STAT. § 480A.08(3) (1992). *But see* MINN. R. CIV. APP. P. 136.01(1)(a) (1992) (stating that, where the court determines the statement of decision sufficiently explains the disposition, the court may issue a written decision without opinion).

7. By statute, the court of appeals must render decisions within 90 days of argument. See MINN. STAT. § 480A.08(3) (1992) (requiring that decisions be rendered within 90 days of argument or within 90 days of the close of briefing in non-oral cases). Virtually all cases comply with this deadline.

The ABA standard calls for all cases to be decided within 180 days from the last brief. See Minnesota Appellate Courts, Caseload and Caseflow Statistics, 1987 through 1991, at 3 (1992) (on file with the Clerk of Appellate Courts, 245 Minnesota Judicial Center, 25 Constitution Avenue, Saint Paul, MN 55155). In 1991, only 0.6% of the Minnesota Court of Appeals cases took longer than permitted by the ABA standard. *Id.* Another ABA standard sets a 280-day period from filing a case to disposition in the appellate court. In 1991, the supreme court disposed of 92% of the cases within this time frame, while the court of appeals disposed of 97% of its cases within the ABA standard. *Id.* at 6.

the appellate practitioner to work within the appellate court system.

II. JURISDICTION AND STRUCTURE OF THE APPELLATE COURTS

A. *Structure of the Appellate Courts*

Before 1982, appellate jurisdiction lay primarily in the Minnesota Supreme Court, although certain matters were heard by district courts sitting in review of lower court or administrative proceedings.⁸ Since 1982, appellate jurisdiction has been divided between the Minnesota Supreme Court and the Minnesota Court of Appeals.⁹ This division arose with the creation of the Minnesota Court of Appeals.¹⁰

The court of appeals hears the majority of appellate matters. The three most significant exceptions to the Minnesota Court of Appeals' jurisdiction over appeals are first-degree murder cases, workers' compensation cases, and tax court appeals.¹¹ These matters must be appealed directly to the Minnesota Supreme Court. The supreme court also hears matters by accelerated review pursuant to Rule 118¹² or matters appealed following a decision in the court of appeals.¹³

8. Prior to creation of the court of appeals, the district court heard appeals from the county courts and from state administrative agencies. See MINN. STAT. §§ 14.63-.68, 488.06(3) (1957). When the court of appeals was created, it was also charged with hearing appeals from the former county courts. MINN. STAT. § 487.39(1) (repealed 1987). However, the merger of the trial courts has rendered this jurisdiction meaningless. The court of appeals has appellate jurisdiction over appeals from the district court, which includes the former county and municipal courts. MINN. STAT. § 480A.06(1) (1992).

9. See David Larson, *Jurisdiction of the Minnesota Court of Appeals*, 10 WM. MITCHELL L. REV. 627, 628 (1984).

10. The Minnesota Court of Appeals was created after the Minnesota Constitution was amended to permit it to exercise necessary jurisdiction. See MINN. CONST. art. VI, § 2. After the amendment was adopted on November 2, 1982, the legislature enacted the law that actually created the court of appeals. See Court of Appeals Act, 1982 MINN. LAWS ch. 501, §§ 3-25 (current version at MINN. STAT. §§ 480A.01-11 (1992)).

11. See Larson, *supra* note 9, at 628; see also MINN. STAT. § 176.471 (1992); MINN. STAT. § 271.10 (1992).

12. See MINN. R. CIV. APP. P. 118. Accelerated review is granted if the question presented not only meets the general criteria for review of decisions of the court of appeals but also is of such "imperative public importance" as to justify deviation from normal appellate procedure. Additionally, accelerated review is granted if the lower courts have held a statute unconstitutional or if the lower courts have departed from the accepted course of justice. MINN. STAT. § 480A.10(1)-(2) (1992); MINN. R. CIV. APP. P. 117.

13. See MINN. R. CIV. APP. P. 117.

District courts were once divided into district and municipal courts.¹⁴ In 1982, the district and municipal courts were consolidated, a unification that simplified the structure of the appellate courts.¹⁵ Currently, every county of the state is assigned to one of ten judicial districts, with varying numbers of judges, based upon the population of the district.¹⁶

B. Review of the Trial Courts

Appellate jurisdiction is the "power vested in an appellate court to review and to revise the judicial action of an inferior court."¹⁷ Appellate jurisdiction predominates over other forms of jurisdiction in the court of appeals.¹⁸ The supreme court and the court of appeals exercise appellate jurisdiction pursuant to Minnesota law.¹⁹

The function of the appellate courts is limited. Appellate courts only consider issues raised in the trial court.²⁰ As a result, parties must raise an issue in the trial court in order for

14. A trial court is the "court of original jurisdiction where all evidence is first received and considered; the first court to consider litigation." BLACK'S LAW DICTIONARY 1506 (6th ed. 1990). District court is simply another "name for [an] inferior state court[] of record having general jurisdiction." *Id.* at 476.

15. See MINN. STAT. § 489.191 (1992); see also Larson, *supra* note 9, at 633-34 (discussing appellate court review of the former trial court system, including the district courts, municipal courts, and county courts).

16. Effective July 1, 1959, Minnesota was divided into judicial districts numbered one through ten. MINN. STAT. § 2.722(1) (1992). The First Judicial District has 27 judges. The Second Judicial District has 24 judges. The Third Judicial District has 22 judges. The Fourth Judicial District has 54 judges. The Fifth Judicial District has 17 judges. The Sixth Judicial District has 15 judges. The Seventh Judicial District has 20 judges. The Eighth Judicial District has 11 judges. The Ninth Judicial District has 20 judges. The Tenth Judicial District has 32 judges.

17. BLACK'S LAW DICTIONARY 1320 (6th ed. 1990). This review consists of a reconsideration, revision, or consideration of the decision of an inferior court for the purpose of correction. *Id.*

18. Jurisdiction is "the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." *Id.* at 853 (citing *Pinner v. Pinner*, 234 S.E.2d 633, 636 (N.C. Ct. App. 1977)). See also *id.* (defining jurisdiction as "the powers of a court to inquire into the facts, apply the law, make decisions, and declare judgments.").

19. See MINN. STAT. § 480A.06 (1992).

20. See *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297, 305 (Minn. 1980); *Thayer v. American Fin. Advisers*, 322 N.W.2d 599, 604 (Minn. 1982). In *Thayer*, the Minnesota Supreme Court stated that "[a] reviewing court must limit itself to a consideration of only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thayer*, 322 N.W.2d at 604.

the issue to be appealable to the appellate court. This requirement conserves appellate resources.

Further, the trial court record must be complete. The record must clearly reflect all issues raised in the trial court. All proceedings must be recorded, including opening statements and closing arguments.²¹ In addition, counsel should make objections to inadmissible evidence and erroneous instructions, make offers of proof, submit requested instructions and a verdict form, and make post-trial motions.²² The motion for new trial is one of the most important post-trial motions because it is the only method of preserving most evidentiary errors made by the court during trial. A motion for a new trial gives the trial court the opportunity to correct its own errors, thus preventing an appeal. Without such motion, review on appeal is limited to whether the evidence supports the court's findings and whether the findings support the judgment.²³

C. *Scope of Review and Standard of Review*

Scope of review and standard of review are two significantly different concepts. These two distinct concepts are often confused by both the bench and bar perhaps because of the similarity of their names. Both the standard of review and the scope of review are fundamental parts of appellate jurisprudence. Both play important roles in most appeals.

1. *Scope of Review*

"Scope of review" refers to the breadth of the court's jurisdiction on appeal and is defined by Rule 103.²⁴ Unless "the interest of justice" requires, Rule 103.01 only permits review of the trial court's judgments and orders.²⁵ Accordingly, matters not first presented to the trial court for decision are not even potentially within the appellate court's scope of review.²⁶ The scope of review also determines which matters raised in

21. See *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1980).

22. *Blattner v. Blattner*, 411 N.W.2d 24, 26 (Minn. Ct. App. 1987) (noting that deference will be given to the trial court's decision upon a failure to make post-trial motions).

23. *Leininger v. Anderson*, 255 N.W.2d 22, 26-27 (Minn. 1977).

24. MINN. R. CIV. APP. P. 103.04.

25. MINN. R. CIV. APP. P. 103.01.

26. See *In re K.T.*, 327 N.W.2d 13, 16-17 (Minn. 1982); *Leininger*, 255 N.W.2d at 27; *Blattner*, 411 N.W.2d at 26.

the trial court are properly before the appellate court on a particular appeal.²⁷

The most significant scope of review issue in Minnesota appellate practice arises from the distinction between an appeal from a judgment and an appeal from an order denying a motion for a new trial.²⁸ On appeal from a judgment where no motion for new trial was made, the court of appeals determines only whether the evidence sustains the findings of fact and, in turn, whether those findings are sufficient to support the conclusions of law and judgment.²⁹ On an appeal from an order denying a motion for a new trial, however, the court of appeals may review any ruling made during trial that is identified in the new trial motion.³⁰ Thus, the scope of review on an appeal from a judgment does not include trial errors, and the scope of review of an appeal from an order denying a new trial is limited to trial matters.³¹

Limiting review to matters raised in the trial court serves a number of purposes. First, the scope of review is a rule of efficiency to prevent the cost and delay of appeals that could be obviated by bringing alleged errors to the attention of the trial court.³² Second, because the scope of review is limited to the record, it promotes the making of a better record. Third, the rule has an aspect of fairness to it. The trial judge has the opportunity to correct an error before an appeal is taken.

A more fundamental limitation on the scope of review relates to the appellate court practice of considering only issues that are specifically raised by the parties and necessary to the

27. See MINN. R. CIV. APP. P. 103.03.

28. A judgment is a final determination of the rights of the parties to a lawsuit. *In re Schneider's Estate*, 28 N.W.2d 567, 568 (S.D. 1974). In contrast, an order is a direction of the court on some matter incidental to the main proceeding that adjudicates a preliminary point or directs some step in the proceeding. *Thomas v. McElroy*, 420 S.W.2d 530, 533 (Ark. 1967).

29. See *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986); *Gruenhagen v. Larson*, 310 Minn. 454, 457, 246 N.W.2d 565, 568 (1976); *Meiners v. Kennedy*, 221 Minn. 6, 8, 20 N.W.2d 539, 540 (1945); *Potvin v. Potvin*, 177 Minn. 53, 55, 224 N.W. 461, 462 (1929).

30. *Stanger v. Gordon*, 309 Minn. 215, 217, 244 N.W.2d 628, 629 (1976).

31. *Muehlstedt v. City of Lino Lakes*, 466 N.W.2d 56, 58 (Minn. Ct. App. 1991) (stating that "[a]n appeal from an order denying a new trial brings up for review only the errors occurring *during* trial which were raised in the motion, and it does not present orders made *prior* to trial.>").

32. See *Wright v. M.B. Hagen Realty Co.*, 269 N.W.2d 62, 65 (Minn. 1978); *Phelan v. Carey*, 222 Minn. 1, 3, 23 N.W.2d 10, 12 (1946).

determination of the case.³³ The Minnesota Court of Appeals should not exceed its proper scope of review by “addressing matters unrelated to those issues and by considering matters unrelated to its appellate task of reviewing the exercise of the trial court’s discretion.”³⁴

2. Standard of Review

The “standard of review” refers to the extent to which the appellate court must defer to the lower court’s decision.³⁵ The appellate standard of review is integral to the disposition of all cases on appeal.³⁶

Despite its importance, the standard of review is frequently overlooked by attorneys not familiar with appellate practice. Even though the rules of appellate procedure do not specifically require parties to brief the standard of review, the court of appeals requests that the standard of review be discussed in the appellate brief.³⁷ The standard of review should be applied to each issue.³⁸ If an appellate brief fails to follow these procedural guidelines, the appellate court may disregard that part of the brief.³⁹

The standard of review should be discussed in the brief not

33. See *Morey v. School Board*, 268 Minn. 110, 113, 128 N.W.2d 302, 305-06 (1964).

34. *Pike v. Gunyou*, 491 N.W.2d 288, 289-90 n.1 (Minn. 1992). In *Pike*, the Minnesota Supreme Court found that the court of appeals exceeded its authority in reviewing the trial court’s decision. Instead of reversing the court of appeals, the supreme court vacated the court of appeals’ majority and concurring opinions and expressly directed that the holding would have neither “dispositional nor precedential value.” *Id.* at 290.

35. *Id.*

36. Heidi Westby, *Fourth Amendment Seizure: The Proper Standard for Appellate Review*, 18 WM. MITCHELL L. REV. 829, 832 (1992). A standard of review is a guidepost for appellate courts in approaching the issues before it. The standard of review frames the arguments and the court’s analytical response, and defines the power distribution between the reviewing and lower courts. It describes approximately where, on a continuum ranging from 100% substitution of judgment to total deference, the intensity of review lies for a particular issue.

Id. (citations omitted).

37. MINN. R. CIV. APP. P. 128.02(1)(c). See also Chief Judge D.D. Wozniak, Minnesota Court of Appeals Suggestions for Practice Before the Court (April 1, 1992) (on file with the Clerk of Appellate Courts, 245 Minnesota Judicial Center, 25 Constitution Avenue, Saint Paul, MN 55155) [hereinafter Court of Appeals Suggestions]. The Court of Appeals Suggestions state that the standard of review should be explicitly discussed at the beginning of the argument section of the appellate brief. *Id.*

38. *Id.*

39. *Id.*

only to meet procedural requirements but also because it is necessary for an effective presentation of the argument on appeal. The standard of review dictates how the court must approach the case and what consideration it must give to the evidence presented.⁴⁰ Accordingly, practitioners must understand the standard of review to present a persuasive argument to the appellate court.

The court of appeals has published a summary of the various standards of review and their application to the different issues before the court.⁴¹ This summary is a useful starting point for analysis of a standard of review question. However, in situations where one party must have the court determine the proper standard of review or where one party argues that the standard of review should be changed, the appellate lawyer should consult more comprehensive sources.⁴²

a. Abuse of Discretion

The appellate court applies the abuse of discretion standard in reviewing discretionary decisions made by a trial court.⁴³ The abuse of discretion standard permits the appellate court little latitude to change the lower court's result. In the absence of an affirmative showing that a discretionary power has been exercised arbitrarily, capriciously, or contrary to legal usage by the trial court, the appellate court is bound by the trial court's decision.⁴⁴

In reviewing a decision based on the abuse of discretion

40. STEVEN A. CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW § 1.02 (2d ed. 1992).

41. See Chief Judge D.D. Wozniak, Minnesota Court of Appeals, Standards of Review (1992) (on file with the Clerk of Appellate Courts, 245 Minnesota Judicial Center, 25 Constitution Avenue, Saint Paul, MN 55155).

42. See, e.g., CHILDRESS & DAVIS, *supra* note 40; Steven A. Childress, *A Standards of Review Primer: Federal Civil Appeals*, 125 F.R.D. 319 (1989).

43. "Abuse of discretion" is synonymous with a failure to exercise a sound, reasonable, and legal discretion." BLACK'S LAW DICTIONARY 10-11 (6th ed. 1990). Abuse of discretion does not imply an intentional wrong, bad faith, or misconduct. Instead, this standard implies a judgment that is clearly against logic. *Id.* The abuse of discretion standard is applied to a wide variety of trial court rulings such as evidentiary rulings, issuance of injunctive relief, and the denial of motions for new trial. See, e.g., *Jack Frost, Inc. v. Engineered Bldg. Components Co.*, 304 N.W.2d 346, 352 (Minn. 1981) (holding that the trial court did not abuse its discretion in refusing to grant appellant's motion for a new trial); *Heroff v. Metropolitan Transit Comm'n*, 373 N.W.2d 355, 356 (Minn. Ct. App. 1985) (reviewing a trial court's denial of a motion for a new trial).

44. *Plunkett v. Lampert*, 231 Minn. 484, 491, 43 N.W.2d 489, 494 (1950).

standard, the appellate court assumes that the trial court is not only familiar with the views of the appellate court but also that the trial court was aware of the standards of fairness that guide discretionary acts by the trial court.⁴⁵ The appellate court also presumes that the trial court acted regularly and in accordance with the law, unless the record affirmatively shows the contrary.⁴⁶ The appellate court must view the record in a light most favorable to the moving party in order to sustain an order involving the exercise of discretionary authority by a trial court.⁴⁷ In addition, the appellate court will not reverse a discretionary determination unless it determines that the error changed the result of trial and caused substantial prejudice to the rights of the appellant.⁴⁸ The appellant has the burden of showing prejudicial error.⁴⁹ Error is harmless if the evidence is cumulative or where other evidence supports the verdict.⁵⁰

b. Clearly Erroneous

The clearly erroneous standard, an intermediate standard of review, applies where the court of appeals is reviewing the trial court's findings of fact.⁵¹ The Minnesota Rules of Civil Procedure establish the clearly erroneous standard for findings of fact and require the trial court to state separately its factual findings and conclusions of law.⁵² "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."⁵³ Defining clearly erroneous is a matter of interpretation.⁵⁴ Gener-

45. *Id.*

46. See *Clark v. Clark*, 288 N.W.2d 1, 8 n.10 (Minn. 1979).

47. See *Zuleski v. Pipella*, 309 Minn. 585, 586, 245 N.W.2d 586, 587 (1976); *Malik v. Johnson*, 300 Minn. 252, 263, 219 N.W.2d 631, 638 (1974).

48. *Miller v. Hughes*, 259 Minn. 53, 62, 105 N.W.2d 693, 699 (1960) (citing *Church of the Immaculate Conception v. Curtis*, 130 Minn. 111, 153 N.W. 259 (1915)).

49. See *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990); *Midway Ctr. Assoc. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975).

50. See *In re Estate of Lea*, 301 Minn. 253, 259, 222 N.W.2d 92, 97 (1974).

51. MINN. R. CIV. P. 52.01.

52. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*

53. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

54. Steven A. Childress, "Clearly Erroneous": *Judicial Review Over District Courts in the Eighth Circuit and Beyond*, 51 Mo. L. REV. 93, 107 (1986) (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945)).

ally, an appellate court will reverse only when strongly persuaded, and, even then, it will do so reluctantly.⁵⁵

c. Substantial Evidence

The substantial evidence standard of review enhances the clearly erroneous standard.⁵⁶ The substantial evidence standard is based on the theory that, if factual findings are supported by substantial evidence, they are not clearly erroneous.⁵⁷ The substantial evidence standard is often used by appellate courts reviewing jury verdicts because it is directly related to a reasonable juror standard.⁵⁸

d. De Novo

De novo review of a trial court decision is proper where the question on appeal is a question of law or a mixed question of fact and law.⁵⁹ Under the de novo standard, the appellate court makes an independent determination of the issues, giving no deference to the trial court's judgment.⁶⁰ In other words, the appellate court decides the case as though it had originated in the reviewing court.⁶¹

D. The Minnesota Supreme Court

1. Original Jurisdiction

The Minnesota Constitution grants the Minnesota Supreme Court original jurisdiction only "in such remedial cases as are prescribed by law."⁶² The court has rarely discussed its original jurisdiction but has referred to it in a number of cases.⁶³

55. *Id.*

56. See Westby, *supra* note 36, at 833.

57. *Id.*

58. *Id.* at 833 n.28.

59. See Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984); A.J. Chromy Constr. Co. v. Commercial Mechanical Servs., 260 N.W.2d 579, 582 (Minn. 1977).

60. Westby, *supra* note 36, at 833.

61. *Id.* See, e.g., Carlson v. Powlish, 428 N.W.2d 471, 472 (Minn. Ct. App. 1988) (applying de novo standard to motion for directed verdict); Driscoll v. Driscoll, 414 N.W.2d 441, 445 (Minn. Ct. App. 1987) (applying de novo standard when reviewing trial court's interpretation of a statute); Dolphine Mfg. v. Tehaar, 404 N.W.2d 295, 297 (Minn. Ct. App. 1987) (applying de novo standard when reviewing summary judgment motion).

62. MINN. CONST. art. VI, § 2.

63. See Peterson v. Stafford, 490 N.W.2d 418, 421 (Minn. 1992) (holding original jurisdiction invoked in challenge to constitutionality of judicial ballot procedures es-

The supreme court's remedial jurisdiction encompasses those summary remedies traditionally exercised through the issuance of extraordinary writs. These writs include writs of prohibition, mandamus, certiorari, and quo warranto.⁶⁴ Various statutes, such as those governing elections, also invoke the remedial jurisdiction of the supreme court.⁶⁵ The supreme court also has inherent jurisdiction.⁶⁶

2. Administration of the Judicial System

In addition to appellate responsibilities, the supreme court is also the administrator of the entire Minnesota judicial system.⁶⁷ The court performs its administrative functions through the Office of the State Court Administrator. The State Court Administrator reports to the supreme court and has responsibility for nearly every aspect of the judiciary.

The Minnesota Supreme Court also has rule making authority to regulate practice and procedure before the courts.⁶⁸ In 1991, the supreme court consolidated some of these rules and certain rules promulgated by the district courts into the Minnesota General Rules of Practice.⁶⁹

The Minnesota Supreme Court also exercises exclusive au-

established by MINN. STAT. § 204B.44 (1992)); *Page v. Carlson*, 488 N.W.2d 274, 277-78 (Minn. 1992).

64. See, e.g., *Page*, 488 N.W.2d at 279; *Rice v. Connolly*, 488 N.W.2d 241, 243 (Minn. 1992).

65. See MINN. STAT. § 204B.44 (1992).

66. *Id.* See also *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933). The court was created with inherent powers. "Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice." *Id.* at 55, 248 N.W. at 737. One of the prerequisites of this inherent jurisdiction is the power to suspend or disbar attorneys. *Id.*

67. MINN. CONST. art. VI, § 1. See also *Clerk of Court's Compensation v. Lyon County Comm'rs*, 308 Minn. 172, 176, 241 N.W.2d 781, 784 (1976) (stating that the court has the power to compel payment of public funds to ensure an efficient judiciary).

68. See MINN. STAT. § 480.05 (1992). This statute provides, in pertinent part: [T]he supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, including probate courts, by rules promulgated by it from time to time. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant.

Id. § 480.051; see also MINN. STAT. § 480.059(1) (1992) (providing same power for rules in criminal actions).

69. See generally MINN. GEN. R. PRAC. See also 3A DAVID F. HERR, MINNESOTA PRACTICE: GENERAL RULES OF PRACTICE ANNOTATED 1-4 (1993); David F. Herr, *Minnesota's New General Rules of Practice*, 48 BENCH & BAR OF MINN., Nov. 1991, at 14.

thority over the regulation of the practice of law.⁷⁰ The court has adopted rules governing admission of lawyers to the practice of law,⁷¹ including rules governing the State Board of Law Examiners.⁷² The court has also established rules governing lawyers' trust accounts,⁷³ student practice,⁷⁴ and certification of legal specializations.⁷⁵ The supreme court adopted mandatory continuing legal education (CLE) in 1975⁷⁶ and has promulgated rules governing mandatory CLE requirements.⁷⁷ The State Board of Continuing Legal Education has its own rules governing both compliance of lawyers and approval of courses.⁷⁸

3. Certification of Questions from the Federal Courts

Federal courts may certify questions to the Minnesota Supreme Court.⁷⁹ Jurisdiction over certified questions is governed by statute.⁸⁰ Certification may be initiated by the United States Supreme Court, any federal court of appeals, district court, bankruptcy court, or an appellate court of any other state.⁸¹ A question may be certified on the court's own initiative or by motion of the parties to a pending action.⁸² Certified questions must relate to Minnesota law and must be potentially

70. See MINN. STAT. § 480.05 (1992); *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973); *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933).

71. See Character and Fitness Standards of the Supreme Court and of the State Board of Law Examiners for Admission to the Bar of Minnesota, reprinted in MINNESOTA RULES OF COURT 763 (West 1993).

72. See Rules of the Supreme Court and of the State Board of Law Examiners for Admission to the Bar, reprinted in MINNESOTA RULES OF COURT 763 (West 1993).

73. See Rules of Lawyer Trust Account Board, reprinted in MINNESOTA RULES OF COURT 751 (West 1993).

74. See Student Practice Rules, reprinted in MINNESOTA RULES OF COURT 783 (West 1993).

75. See Plan for the Minnesota State Board of Legal Certification, reprinted in MINNESOTA RULES OF COURT 787 (West 1993). This board, in turn, adopted its own rules governing procedure and practice. See Internal Rules for the State Board of Legal Certification, reprinted in MINNESOTA RULES OF COURT 791 (West 1993).

76. See Rules of the Supreme Court for Continuing Legal Education of Members of the Bar, reprinted in MINNESOTA RULES OF COURT 769 (West 1993).

77. See *id.*

78. See Rules of the Board of Continuing Legal Education, reprinted in MINNESOTA RULES OF COURT 773 (West 1993).

79. See MINN. STAT. § 480.061 (1992).

80. *Id.*

81. *Id.* § 480.061(1).

82. *Id.* § 480.061(2).

dispositive of an action pending in the certifying court.⁸³

Once certification has been granted, the case proceeds in the Minnesota Supreme Court in the same fashion as any other appeal.⁸⁴ Most certification orders specify that one party will proceed as the appellant. If the certification order does not make such provision, the supreme court will enter an order governing subsequent proceedings.

The Minnesota Supreme Court frequently rejects questions certified by the Minnesota courts.⁸⁵ The Minnesota Supreme Court, however, has not refused review of questions certified by the federal courts. Questions certified by the federal courts tend to include specific issues upon which the court has not ruled and do not include extraneous procedural or error-correction issues.⁸⁶ The certification process has produced many important Minnesota Supreme Court decisions.⁸⁷

The standard for granting certification is governed by the Uniform Certification of Questions of Law Act.⁸⁸ This Act provides that a United States district court may certify questions to the Minnesota Supreme Court where the federal district court is considering a question of Minnesota law that may be determinative of a case then pending in the district court.⁸⁹ Certification is proper where the district court determines that there

83. *Id.*

84. *Id.* § 480.061(6).

85. *See State v. Kvale*, 352 N.W.2d 137, 140 (Minn. Ct. App. 1984) (rejecting the trial court's request for an answer to a certified question because it amounted to an advisory opinion); *Thompson v. State*, 284 Minn. 274, 276, 170 N.W.2d 101, 103 (1969) (stating that a certified question will not be answered when it presents "nothing more than a speculative question.").

86. *See, e.g.*, 80 So. Eighth St. Ltd. Partnership v. Carey-Canada, Inc., 492 N.W.2d 256, 259 (Minn. 1992) (deciding whether the economic loss doctrine bars building owners from suing asbestos manufacturers for costs of removal under tort theories of negligence and strict liability); *Kaiser v. Memorial Blood Ctr., Inc.*, 486 N.W.2d 762, 763 (Minn. 1992) (deciding questions regarding the proper statute of limitations for personal injury action for AIDS transmitted by blood bank); *Roering v. Grinnell Mut. Reins. Co.*, 444 N.W.2d 829, 831 (Minn. 1989) (deciding availability of underinsured motorist coverage for motorcyclists); *Sartori v. Harnischfeger*, 432 N.W.2d 448, 451 (Minn. 1988) (deciding whether an overhead rail crane was an improvement to real property under state statute and whether statute of repose was unconstitutional); *In re Tveten*, 402 N.W.2d 551, 552-53 (Minn. 1987) (deciding whether debtor's right to receive annuity and life insurance benefits is exempt under state bankruptcy statute).

87. *See, e.g.*, *Kaiser*, 486 N.W.2d at 763; *Minnesota Mining & Mfg. v. Travelers Ins.*, 457 N.W.2d 175, 176-77 (1990) (deciding important threshold issues in three actions for insurance coverage of environmental cleanup claims).

88. *See* MINN. STAT. § 480.061(1) (1992).

89. *Id.*

is no controlling precedent from the Minnesota Supreme Court.⁹⁰

The United States Supreme Court has stressed the propriety of certification in cases where the state law is uncertain.⁹¹ When the uncertainty involves questions of underlying public policy, certification affords the litigants a consistent final judicial resolution.⁹²

E. Extraordinary Writs and Discretionary Review

The appellate courts have the power to issue extraordinary writs as a necessary and inherent part of their jurisdiction.⁹³ The availability of these writs supplements and completes the jurisdiction available by appeal.⁹⁴

Rule 120⁹⁵ of the Minnesota Rules of Civil Appellate Procedure establishes the procedure for seeking and obtaining writs of mandamus⁹⁶ and prohibition.⁹⁷ In addition, Rule 121 pro-

90. *Id.*

91. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1224 n.4 (1991); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (holding that certification is "particularly appropriate" where the question presented is novel and state law is uncertain). See also *Elkins v. Moreno*, 435 U.S. 647, 649 (1978) (certifying a question which is purely a matter of state law on which there is no controlling state precedent); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976) (reasoning abstention is appropriate where a state statute has not been construed by the state judiciary); *Clay v. Sun Ins. Office*, 363 U.S. 207, 212 (1960) (remanding an unresolved question of local law to state court); *Eli Lilly & Co. v. Home Ins. Co.*, 764 F.2d 876, 883-85 (D.C. Cir. 1985) (holding that questions of extreme public importance involving issues of first impression are appropriately certified to state supreme court).

92. *Hatfield v. Bishop Clarkson Memorial Hosp.*, 701 F.2d 1266, 1267 (8th Cir. 1983).

93. See MINN. R. CIV. APP. P. 120.01.

94. See, e.g., Note, *Appealable Orders, Prohibition and Mandamus in Minnesota*, 51 MINN. L. REV. 115, 140 (1966) [hereinafter *Mandamus in Minnesota*].

95. MINN. R. CIV. APP. P. 120.

96. A writ of mandamus is an order from a "court of competent jurisdiction, commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law." BLACK'S LAW DICTIONARY 961 (6th ed. 1990). "Mandamus is distinguished from prohibition in that its function is to compel rather than to restrain." See *Mandamus in Minnesota*, *supra* note 94, at 147 (citation omitted). See also *Bakery v. Connolly Cartage Corp.*, 271 Minn. 79, 57 N.W.2d 657 (1953) (applying mandamus writ).

97. A writ of prohibition is a prerogative writ issued by the supreme court that prevents an inferior court from exceeding its jurisdiction. See *State v. Juvenile Court*, 194 N.E.2d 912, 914 (Ohio Ct. App. 1962). "The nature of the writ of prohibition is preventative, rather than corrective; its purpose is to restrain future actions or proceedings." See *Mandamus in Minnesota*, *supra* note 94, at 140 (citations omitted). See, e.g., *Thermorama, Inc. v. Shiller*, 271 Minn. 79, 83-84, 135 N.W.2d 43, 46 (1965) (applying prohibition writ).

vides an emergency mechanism for seeking these writs when the procedures of Rule 120 would prevent the writs from working to achieve their primary purpose—to allow review by the appellate courts when an ordinary appeal would be meaningless.⁹⁸

Writs of prohibition and mandamus are available when certain criteria are established.⁹⁹ Writ jurisdiction is inherently equitable, and the appellate court's application of the criteria in each case is discretionary.¹⁰⁰ Because the issuance of a writ is "extraordinary,"¹⁰¹ there is no entitlement to such a writ.¹⁰²

A writ may be obtained in four circumstances.¹⁰³ First, a writ may be obtained when no adequate remedy at law exists or in other words, the issue cannot be reviewed meaningfully on appeal from a final order or judgment.¹⁰⁴ Second, a writ may be obtained when the court is about to exceed its jurisdiction resulting in irreparable harm.¹⁰⁵ Third, a writ may be obtained when the trial court's action may effectively decide the case.¹⁰⁶ Finally, a writ may be obtained when review of the trial court decision will settle or establish a rule of practice affecting other litigants.¹⁰⁷

The Minnesota Supreme Court's jurisdiction over writs is somewhat undefined. Although the court of appeals appears

98. MINN. R. CIV. APP. P. 121. This rule provides: "If an emergency situation exists and the provisions of Rule 120 are impractical, the attorney for a party seeking a writ of mandamus or of prohibition directed to a lower court may orally petition the reviewing court for such relief by telephoning or by personally contacting the Supreme Court" *Id.*

99. See *Mandamus in Minnesota*, *supra* note 94, at 140.

100. 3 ERIC J. MAGNUSON ET AL., MINNESOTA PRACTICE: APPELLATE RULES ANNOTATED § 120.05 (2d ed. 1985 & Supp. 1993).

101. The Minnesota Supreme Court has stated:

Prohibition is an extraordinary remedy and should be used only in extraordinary cases. It will be used only in those cases where it appears that the court is about to exceed its jurisdiction or where it appears the action of the court relates to a matter that is decisive of the case; where the court has ordered the production of information clearly not discoverable and there is no adequate remedy at law; or in rare instances where it will settle a rule of practice affecting all litigants.

Thermorama, Inc. v. Shiller, 271 Minn. 79, 83-84, 135 N.W.2d 43, 46 (1965).

102. *Carlson v. Carlson*, 371 N.W.2d 591, 594 (Minn. Ct. App. 1985) (reasoning that because issuance of a writ is "extraordinary," there is no entitlement to such a writ).

103. See *Thermorama*, 271 Minn. at 84, 135 N.W.2d at 46.

104. *Id.*

105. *Id.*

106. *Thermorama, Inc. v. Shiller*, 271 Minn. 79, 84, 135 N.W.2d 43, 46 (1965).

107. *Id.*

to possess jurisdiction over writs, the supreme court also has jurisdiction to issue writs of prohibition or mandamus directed to the court of appeals.¹⁰⁸

One significant trend in Minnesota appellate practice over the past decade has been the declining use of discretionary review. In addition to writ jurisdiction, the appellate courts may exercise discretionary jurisdiction over appeals. Discretionary review is allowed by rule¹⁰⁹ but is sparingly allowed in practice. The Minnesota appellate courts have allowed discretionary review to avoid injustice in cases where strict application of the rules would not allow review.¹¹⁰ Discretionary review has also been used to permit pre-trial appellate review of discovery and other pretrial orders that would not otherwise be appealable.¹¹¹ However, the appellate courts generally allow discretionary review only if an issue is ultimately dispositive of the entire case.¹¹²

F. Orders in Special Proceedings and Review of Administrative Decisions

A party may obtain review of an order, decision, or judgment affecting a substantial right made in an administrative or other special proceeding.¹¹³ A special proceeding is

such a proceeding as may be commenced independently of a pending action by petition or motion, upon notice, in order to obtain special relief. Its existence is not dependent upon the existence of any other action and it therefore is not an integral part of the original action but is separate and apart. It adjudicates by final order a substantial right distinct from any judgment entered upon the merits of the original action.¹¹⁴

108. MINN. R. CIV. APP. P. 120.01.

109. MINN. R. CIV. APP. P. 105. "Upon petition of a party, the Court of Appeals, in the interests of justice, may allow an appeal from an order not otherwise appealable . . . except an order made during trial." *Id.*

110. *See, e.g., E.C.I. Corp. v. G.G.C. Co.*, 306 Minn. 433, 237 N.W.2d 627 (1976) (allowing appeal from modified judgment where proper appeal would have been from initial judgment on the merits).

111. *See MAGNUSON ET AL.*, *supra* note 100, § 105.4.

112. *See Empire Fire & Marine Ins. Co. v. Hill*, 287 Minn. 58, 176 N.W.2d 757 (1970).

113. MINN. R. CIV. APP. P. 103.03(g).

114. *Willeck v. Willeck*, 286 Minn. 553, 554 n.1, 176 N.W.2d 558, 559 n.1 (1970). Likewise, Minnesota case law has defined special proceeding as a generic term for any civil remedy in a court of justice which is not of itself

Administrative decisions may be reviewed by obtaining a writ of certiorari in the Minnesota Court of Appeals.¹¹⁵ Under the Minnesota Rules of Civil Appellate Procedure, the writ of certiorari is not the common law writ of certiorari "but rather a writ in the nature of certiorari."¹¹⁶ Certiorari is the exclusive means of appellate review of some agency decisions.¹¹⁷ Detailed procedures for applying for the writ are established by statute and rule.¹¹⁸ A petition for a writ must be filed in the court of appeals and served on the agency within thirty days after the party receives the final decision and order of the agency, unless reconsideration by the agency is requested within ten days after its decision and order.¹¹⁹

Certiorari proceedings are fundamentally different from appeals. Rather than affording plenary review subject to the appropriate scope and standards of review, certiorari is severely limited. The supreme court has stated:

Review by certiorari is limited to an inspection of the record of the inferior tribunal in which the court is necessarily confined to questions affecting the jurisdiction of the board, the regularity of its proceedings, and, as to the merits of the controversy, whether the order or determination in a particular case was arbitrary, capricious, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.¹²⁰

Under the Administrative Procedure Act,¹²¹ review is available in contested cases to "any person aggrieved" by the final

an ordinary action, and which, if incidental to an ordinary action, independently of the progress and course of the procedure in such action, terminates in an order which, *to be appealable* . . . must adjudicate a substantial right with decisive finality separate and apart from any final judgment entered or to be entered in such action on the merits.

Chapman v. Dorsey, 230 Minn. 279, 282, 41 N.W.2d 438, 440-41 (1950) (emphasis in original).

115. See MINN. R. CIV. APP. P. 103.04(g).

116. See State *ex rel.* Kruse v. Webster, 231 Minn. 309, 313, 43 N.W.2d 116, 119 (1950).

117. See Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn. 1992) (noting that "this court has long held that in the absence of an adequate method of review or legal remedy, judicial review of the quasi-judicial decisions of administrative bodies, if available, must be invoked by writ of certiorari"); Dokmo v. Independent School Dist. No. 11, 459 N.W.2d 671, 673 (Minn. 1990) (recognizing that certiorari is sometimes the exclusive means of review).

118. See MINN. STAT. §§ 14.63-68 (1992); MINN. R. CIV. APP. P. 115.

119. See MINN. STAT. § 14.64 (1992); MINN. R. CIV. APP. P. 115.

120. Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn. 1992).

121. See MINN. STAT. §§ 14.001-14.69 (1992).

decision.¹²² Thus, while a contested case is defined as one that determines the rights, duties, or privileges of specific parties, one need not be a party to obtain review of the agency decision. An aggrieved party—for purposes of standing—is one who is injuriously or adversely affected by the judgment or decree when it operates on the person's property rights or bears directly upon the person's personal interest.¹²³ The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation.¹²⁴

III. APPEALABILITY

Appealability has always been a difficult issue for appellate practitioners. The appellate courts' jurisdiction is limited in nature. Thus, it is imperative that the appellate practitioner learn which trial court decisions are appealable. This determination is usually straight-forward because appealability is now defined primarily by rule. Generally, appeal may be taken only from final judgments and certain orders.¹²⁵

A. *The Unitary Appeal*

The cornerstone of appealability is the concept of a unitary appeal.¹²⁶ The concept of a unitary appeal has been a fundamental part of Minnesota's appellate jurisprudence since the earliest days of the Territory. In 1851, the Territorial Supreme Court rejected an attempt to appeal from an interlocutory ruling of the trial court.¹²⁷ The court stated:

To adopt a different rule, where there is no statutory prohi-

122. *Id.* § 14.63.

123. *In re Getsug*, 290 Minn. 110, 114, 186 N.W.2d 686, 689 (1971). See also *Mankato Aglime & Rock Co. v. City of Mankato*, 434 N.W.2d 490 (Minn. Ct. App. 1989) (stating that when an agency is acting pursuant to specific statutory authority, a person has standing if he can show an interest arguably among those intended to be protected by the statute).

124. *Mankato Aglime & Rock Co.*, 434 N.W.2d at 493.

125. MINN. R. CIV. APP. P. 103.03.

126. See ROGER HAYDOCK & JOHN SONSTENG, TRIAL § 12.8, at 687 (1991).

The general rule is that a case is not appealable until a final judgment has been entered. This requirement prevents piecemeal appeals from rulings the trial judge makes as the litigation and trial progress. . . . Pretrial and trial orders entered by a judge are generally not appealable during the trial. They are appealable as of right after a final judgment has been entered.

Id.

127. See *Chouteau v. Rice*, 1 Minn. 24 (1 Gil. 8) (1851).

bition, would be almost equivalent to closing the doors of justice. This rule has been sanctioned by experience, and is the one which commends itself to every rational mind. Manifest wrong, manifest delay, manifest injustice, would most indubitably be the result of allowing appeals from every decree of a court of chancery. We must establish some rule, and if not the one herein announced, where are we to stop? It is extremely dubious, if a contrary rule were adopted, whether there be a man amongst us, who would live to see the end of this, or any other cause, now pending in the courts of chancery of this territory.¹²⁸

Appealability is established by the Minnesota Rules of Civil Appellate Procedure.¹²⁹ These rules implement the policy favoring a single appeal.

B. The Requirement of Finality

The primary rule to ensure a unitary appeal is the rule requiring that an order or judgment be final before an appeal can be taken. The requirement of finality ensures that no further trial court proceedings will take place after an appeal, thereby ensuring that a subsequent appeal is not necessary (or possible). The primary purpose of the requirement of finality is the avoidance of delay and additional expense in multiple appeals. Requiring the completion of trial court proceedings serves another important purpose: it ensures that the appellate court will not intervene in an issue that would be resolved by further trial court decisions.¹³⁰ The requirement of finality is also a central part of the federal appellate court system. The "final judgment rule" is established by statute.¹³¹

C. Orders and Judgments

Upon the issuance of an interlocutory order,¹³² the appellate lawyer should determine whether or not the order is then appealable. If an order is immediately appealable and no appeal is filed, the order will not be reviewable on appeal from a final

128. 1 Minn. at 29 (1 Gil. at 13).

129. See MINN. R. CIV. APP. PRAC. 103.03.

130. See MARSHALL HOUTS ET AL., ART OF ADVOCACY: APPEAL § 2.03 (1993).

131. See 28 U.S.C. § 1291 (1988). The statute provides: "The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." *Id.*

132. An interlocutory order is "any decision prior to a final decision." BLACK'S LAW DICTIONARY 815 (6th ed. 1990).

judgment or subsequent order.¹³³ Appealable orders and judgments are identified in Rule 103.03.¹³⁴ Because appeals may be taken from both orders and judgments, it is important to review all orders and judgments for potential appealability.

D. *Partial Judgments*

Partial judgments, those disposing of fewer than all of the claims and parties, are not generally appealable.¹³⁵ However, if the trial court certifies in its order that “no just reason exists for delay in entry of judgment” and directs entry of judgment, the resulting judgment is immediately appealable.¹³⁶ Certification by a trial court makes the judgment appealable as if it were a final judgment. In addition to the obvious effect of making appeal permissible from the judgment, certification carries a less obvious result of requiring the parties to appeal the judgment at that time, without waiting for the final judgment. If the certified partial judgment is not appealed, it will become final, precluding discussion of those issues in a subsequent appeal from a later final judgment of the remaining claims or parties.¹³⁷ A trial court order determining costs may be reviewed on an appeal from the judgment, even where the judgment has been entered prior to the order determining costs.¹³⁸

E. *Certification of Order for Appeal*

A trial court may certify an otherwise unappealable order for appellate review only in limited circumstances.¹³⁹ Under Rule 103.03, the trial court may certify its decision as “important and doubtful” rendering it immediately appealable.¹⁴⁰ Rule 103.03 only permits certification of orders denying a motion to

133. See, e.g., *Stahl v. McGenty*, 486 N.W.2d 157, 159 (Minn. Ct. App. 1992) (stating that an order denying request to compel arbitration becomes final if not appealed because it does not implicate the merits of a case).

134. See MINN. R. CIV. APP. P. 103.03.

135. MINN. R. CIV. P. 54.02 (allowing partial judgments only where the judge has made an express determination that there is no just reason for delay and upon an express direction for the entry of judgment).

136. *Id.*

137. MINN. R. CIV. APP. P. 104.01 (providing that appeals from certified partial judgments granted under Rule 54.02 must be made within 90 days of the entry of judgment).

138. See *Spinett, Inc. v. Peoples Natural Gas Co.*, 385 N.W.2d 834, 840 n.1 (Minn. Ct. App. 1986).

139. MINN. R. CIV. APP. P. 103.03(h).

140. *Id.*

dismiss for failure to state a claim upon which relief may be granted¹⁴¹ or denying a motion for summary judgment.¹⁴²

Certification of otherwise unappealable orders represents a significant exception to the unitary appeal rule.¹⁴³ Appellate courts do not routinely accept certification because appeals should not be brought or considered "piecemeal."¹⁴⁴ As a general rule, the courts will only entertain an appeal from a certified order when the order has the potential to end the litigation.¹⁴⁵

The trial court does not have the power or ability to certify any other orders for appeal. Furthermore, appellate courts will not assume jurisdiction whenever a party attempts to circumvent the limitation. If the parties desire review of an order not certifiable under Rule 103.03(h), they must request discretionary review under Rule 105 or review by extraordinary writ.¹⁴⁶

IV. PRACTICE IN THE APPELLATE COURTS

A. *Nature of Appellate Practice*

Appeals raise relatively narrow, focused issues for consideration. Even though de novo review of an issue may be available, review is limited to that issue. Cases are not given a plenary retrial on appeal. Appellate procedure is marked by unusually strict procedural and timing requirements.¹⁴⁷ Time limits and form requirements are strictly enforced, occasionally resulting in appeals not being decided on their merits.¹⁴⁸

An appellate court only reviews questions of law.¹⁴⁹ Even

141. See MINN. R. CIV. P. 12.02(e).

142. See MINN. R. CIV. P. 56.

143. See MINN. R. CIV. APP. P. 103.03(h) (providing for certification procedure).

144. *Patton v. Minneapolis St. Ry.*, 245 Minn. 396, 398, 71 N.W.2d 861, 862 (1955).

145. *Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176, 179 (Minn. 1988).

146. See *supra* part II.E.

147. See MINN. R. CIV. P. 104.01 (stating that an appeal from a judgment may be taken within 90 days after its entry, and within 30 days after service of written notice of an order).

148. See, e.g., *Wise v. Bix*, 434 N.W.2d 502, 504 (Minn. Ct. App. 1989) (concluding that mailing of notice of appeal to wrong address results in dismissal of the appeal as to that respondent).

149. Appellate courts are considered chiefly law courts:

[Appellate courts'] main responsibilities include correcting errors in individual cases and developing the law in ways that guide future conduct and future litigants. Appellate courts are well suited to develop and declare legal

the review of factual determinations presents the legal question of whether the trial court's factual determinations were clearly erroneous as a matter of law.¹⁵⁰ The standards of review together with the rules of appellate procedure prevent the retrial of the case in the court of appeals.

B. *Preparing for Appeal in the Trial Court*

Rule 110.01 defines the record on appeal as the papers filed with the trial court, the exhibits, and the transcript.¹⁵¹ The record is the foundation of all appeals because the court of appeals cannot base its decision on evidence outside the record.¹⁵² Thus, any issue a litigant wishes to appeal must appear in the record. Not only must a record be made, but other rules require the record to be made in a particular manner. For example, an attorney must make objections to improper evidentiary rulings,¹⁵³ make offers of proof regarding excluded evidence,¹⁵⁴ and object to improper jury instructions.¹⁵⁵ A motion for new trial is also necessary to obtain review of procedural errors, evidentiary rulings, and jury instructions.¹⁵⁶

C. *Post-Trial Motions*

No rule requires a party to bring post-trial motions in the trial court. However, as a practical matter, post-trial motions should be brought in the trial court in order to preserve the right to appellate review of most errors occurring at trial. The most common post-trial motions are the motion for a new

principles that will apply beyond the case at bar and serve as precedent in future cases. The appellate court is superior to the trial court in researching, interpreting, and applying the law. This superiority is due to its specialization in deciding legal questions, its customarily greater library and law clerk resources, and its habit of collegial decision making. A three-judge appellate panel is in a better position to make legal determinations because it benefits from the give and take of judicial negotiation and is not encumbered by the time-consuming process of evidentiary hearings.

Westby, *supra* note 36, at 836-37 (citations omitted).

150. See *supra* notes 43-61 and accompanying text (discussing the standards of review for various trial court determinations, including the review of fact issues).

151. MINN. R. CIV. APP. P. 110.01.

152. See, e.g., *Holtberg v. Bommersbach*, 235 Minn. 553, 553, 51 N.W.2d 586, 587 (1952); *Moose v. Vesey*, 225 Minn. 64, 67, 29 N.W.2d 649, 652 (1947).

153. MINN. R. EVID. 103(a).

154. MINN. R. EVID. 103(b).

155. MINN. R. CIV. P. 51.

156. *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986).

trial,¹⁵⁷ the motion for amended findings¹⁵⁸ and the motion for judgment notwithstanding the verdict.¹⁵⁹ The motion for a new trial is the most important of these motions because it is necessary to obtain review of procedural errors, evidentiary rulings,¹⁶⁰ and jury instructions.¹⁶¹ The motion for a new trial should clearly specify the claimed errors because only those grounds included in the motion may be reviewed by the appellate court.¹⁶² If a party fails to file a post-trial motion, the appellate court gives increased deference to the trial court's decision.¹⁶³

D. *Perfecting the Appeal*

"Perfecting" an appeal refers to taking the necessary steps to transfer jurisdiction from the lower court to the appellate court. "In practice, after all steps necessary to entitle a litigant to proceed in an appellate court have been accomplished, the appeal is said to be 'perfected.'"¹⁶⁴ Service and filing of a notice of appeal are universal parts of perfecting an appeal.¹⁶⁵ The most important part of perfecting an appeal, however, is to take the required steps in a timely manner.¹⁶⁶ In Minnesota, failing to comply with the specified time limitation is a jurisdictional defect,¹⁶⁷ and the appellate courts will not consider the appeal.¹⁶⁸ A party wishing to appeal from a judgment must appeal within ninety days of the entry of judgment even if the trial court has not yet ruled on the parties' post-trial motions.

157. See MINN. R. CIV. P. 59.

158. See MINN. R. CIV. P. 52.02.

159. See MINN. R. CIV. P. 50.02.

160. See, e.g., Gruenhagen v. Larson, 319 Minn. 454, 457, 246 N.W.2d 565, 568 (1976) (alleged trial court error of failing to admit newly discovered evidence would not be considered on appeal where issue had not been presented to trial court).

161. See, e.g., Sauter v. Wasemiller, 389 N.W.2d 200, 201 (Minn. 1986) (jury instructions are subject to appellate review only if there has been a motion for a new trial); Amatuzio v. Amatuzio, 431 N.W.2d 588, 589 (Minn. Ct. App. 1988) (review on appeal limited because appellant did not make a motion for a new trial).

162. Schaut v. Town Bd., 295 Minn. 571, 571, 204 N.W.2d 646, 648 (1973).

163. Leininger v. Anderson, 255 N.W.2d 22, 26-27 (Minn. 1977); Blattner v. Blattner, 411 N.W.2d 24, 26 (Minn. Ct. App. 1987).

164. BARRON'S LAW DICTIONARY 341 (2d ed. 1984).

165. See FED. R. APP. P. 25; MINN. R. CIV. APP. P. 104.01.

166. See, e.g., Amatuzio v. Amatuzio, 431 N.W.2d 588, 589 (Minn. Ct. App. 1988).

167. MINN. R. CIV. APP. P. 126.02.

168. See Tischendorf v. Tischendorf, 321 N.W.2d 405, 409 (Minn. 1982), cert. denied, 460 U.S. 1037 (1983).

The filing of the appeal may deprive the court of jurisdiction to issue its ruling on the post-trial motions.

The notice of appeal is filed with the clerk of appellate courts.¹⁶⁹ The notice of appeal must be served on all the parties to the case and must specify the order or judgment from which the appeal is taken.¹⁷⁰

If an appellant seeks review of a trial court decision affecting several parties, each of those parties must be served with notice of the appeal.¹⁷¹ Failure to serve notice on all parties may deprive the appellate court of jurisdiction over the appeal.¹⁷²

E. Notice of Review

If the respondent would like the court to review errors made by the trial court that were not raised by the appellant, the respondent must file a notice of review.¹⁷³ At the time a notice of review is filed, it is helpful to attach a copy of the order or judgment that is the subject of the notice.

A notice of review allows a respondent to raise issues in the same appeal taken by the appellant. The notice of review does not allow review of other decisions of the trial court. Nor does it allow review of issues involving additional parties. If a party seeks to add parties to the appeal, the party should file a separate notice of appeal. A notice of review, however, may permit review of issues that would not be independently appealable.¹⁷⁴ The respondent can obtain review of orders even though they were not properly preserved below.¹⁷⁵ There is, however, some authority prohibiting the review of findings that result in a judgment for respondent.¹⁷⁶

169. MINN. R. CIV. APP. P. 103.01(1).

170. MINN. R. CIV. APP. P. 103.01(1)(c).

171. MINN. R. CIV. APP. P. 103.01(1).

172. See *Johnson v. Nessel Town*, 486 N.W.2d 834, 837 (Minn. Ct. App. 1992) (finding that "where multiple parties are involved and a party is not served, the portion of the appeal relating to that party is dismissed.").

173. See MINN. R. CIV. APP. P. 106.

174. See *Anderson v. City of Coon Rapids*, 491 N.W.2d 917, 921-22 (Minn. Ct. App. 1992).

175. *Arndt v. American Family Ins. Co.*, 394 N.W.2d 791, 793-94 (Minn. 1986); *Kostelnick v. Kostelnick*, 367 N.W.2d 665, 669 (Minn. Ct. App. 1985), *review denied*, (Minn. July 26, 1985).

176. *Johnson v. American Economy Ins. Co.*, 419 N.W.2d 126, 128 n.1 (Minn. Ct. App. 1988) (stating that Rule 106 "does not permit review of an interstitial finding of fact that results in a judgment favorable to the respondent.").

F. *The Record on Appeal*

1. *The Record*

The "record" defines the universe of factual information concerning the particular appeal, including the basis and grounds for the trial court's decisions. The appellate court cannot base its decision on matters outside the record.¹⁷⁷ Similarly, counsel should not refer to matters outside the record. Such references can be stricken from the brief and ultimately result in sanctions against counsel.¹⁷⁸ The contents of the record are established by rule.¹⁷⁹

2. *The Appendix and Other Record Materials*

The appendix should include only those documents essential to understanding the case.¹⁸⁰ The appendix should not be overly long. A lengthy appendix is not useful to the court because it is unlikely that the court can sufficiently familiarize itself with the appendix prior to oral argument. On the other hand, every document that is necessary to an understanding of the issues on appeal must be included in the appendix, providing that the materials are part of the trial court record. Materials included in briefs or elsewhere in the appeal that were not part of the record may be stricken.¹⁸¹

3. *The Transcript*

The appellant has the duty to provide a transcript of the relevant portions of the record in order to facilitate review of any claimed errors.¹⁸² The failure to provide the appellate court

177. See *Holtberg v. Bommersbach*, 235 Minn. 553, 553, 51 N.W.2d 586, 587 (1952); *Moose v. Vesey*, 225 Minn. 64, 67, 29 N.W.2d 649, 652 (1947); *Brandenberg v. Auto-Owners Ins. Co.*, 352 N.W.2d 97, 100 (Minn. Ct. App. 1984).

178. See, e.g., *Kise v. Product Design & Eng'g*, 453 N.W.2d 561, 566 (Minn. Ct. App. 1990); *Chizmadia v. Smiley's Point Clinic*, 428 N.W.2d 459, 461 (Minn. Ct. App. 1988); *Mitterhauser v. Mitterhauser*, 399 N.W.2d 664, 667 (Minn. Ct. App. 1987).

179. "[The] papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." MINN. R. CIV. APP. P. 110.01

180. See MINN. R. CIV. APP. P. 130.01 (listing required sections for the index).

181. This can be achieved by a motion to strike. See *St. Paul Fire & Marine Ins. Co. v. Mori*, 486 N.W.2d 803, 809 (Minn. Ct. App. 1992) (granting party's motion to strike material not in record).

182. See, e.g., *Leininger v. Anderson*, 255 N.W.2d 22, 26-27 (Minn. 1977) (recognizing that it is the duty of the appellant to provide a trial record).

with a transcript may significantly limit the scope of review.¹⁸³ For example, in the absence of a transcript, the appellate court may not review the evidence to determine if it supports the findings.¹⁸⁴ In such cases, the court is limited to a determination of whether the trial court's findings support its conclusions.¹⁸⁵ An appellant who deliberately leaves the record incomplete will find it very difficult to meet its burden of proving error.¹⁸⁶

G. Briefing

The lawyer should carefully select the issues to be raised on appeal. A lawyer may believe there are dozens of legal errors. The page limits for briefs will prevent the appellate lawyer from providing the court in-depth legal or factual analysis if more than a few of these issues are discussed in the brief. By raising numerous issues, the practitioner decreases the likelihood that the court will fully consider all of the facts and arguments relevant to a consideration of the best issues. In addition, by raising numerous issues, the appellate lawyer loses the opportunity to focus the court's attention on the best issues. Limiting the number of issues discussed in the brief increases the likelihood that the court will identify and devote its limited time to the best issues.

The Minnesota appellate rules contain page limits for briefs.¹⁸⁷ These page limits are taken seriously by the courts and are flouted only at some peril.¹⁸⁸ The court may not impose draconian sanctions but clearly discourages over-length briefs.¹⁸⁹ The rules provide for a motion for leave to file a

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (stating that the appellant has the burden to show "either that the record clearly contradicts the trial court's findings or that the trial court's legal conclusions do not follow from its findings of fact.").

187. See MINN. R. CIV. APP. P. 132.01(3) (requiring that briefs be 50 pages or less).

188. See, e.g., *Semrad v. Edina Realty*, 470 N.W.2d 135, 147 (Minn. Ct. App. 1991) (stating that a 53-page brief constituted a technical violation of applicable page limits for which no sanctions were to be imposed); *Reserve Life Ins. Co. v. Commissioner of Commerce*, 402 N.W.2d 631, 634 (Minn. Ct. App. 1987) (granting motion to strike material which was in excess of page limits).

189. See, e.g., *Semrad*, 470 N.W.2d at 147 (stating that the practice of submitting over-length briefs is "unquestionably . . . discouraged").

longer brief.¹⁹⁰ However, these motions have rarely, if ever, been granted in recent years.¹⁹¹ Furthermore, a litigant may not avoid the page limits by using smaller type and slimmer margins. In 1992, Rule 132.01 was amended to provide that type size must be at least eleven points and that no more than sixteen characters per inch are allowed.¹⁹² The practice of “stuffing”¹⁹³ briefs has not been well-received in the appellate courts.¹⁹⁴

A brief should be drafted as early as possible. The brief is a party’s primary means of providing the court with the facts and legal reasoning that support its position. Allow enough time to outline and organize the arguments in a logical sequence and prepare a draft which can be rewritten several times. Aim to streamline the finished product as much as possible. Eliminate any redundant, weak, or unnecessary arguments. Cite Minnesota Supreme Court precedent insofar as Minnesota law applies or precedent from the highest authority in any other relevant jurisdiction. Avoid citation to the Minnesota Court of Appeals if a Minnesota Supreme Court cite is available. Do not cite unpublished Minnesota Court of Appeals’ decisions to the

190. MINN. R. CIV. APP. P. 132.01(3) (providing that an application to file an enlarged brief shall be filed at least 10 days prior to the date the brief is due).

191. See, e.g., *Semrad*, 470 N.W.2d at 139 (denying request to file an expanded brief during pendency of appeal).

192. *Id.* This rule provides that “[a]ll material other than footnotes must appear in at least 11 point type, or its equivalent of not more than 16 characters per inch, on unglazed opaque paper.” *Id.* The advent of sophisticated word processing equipment has given lawyers powerful tools to evade the rule. The rule now includes both a “point-size” and “character-per-inch” restriction because of the ingenuity of lawyers in taking small type and placing the characters even closer together than intended, thus resulting in higher type density per page.

193. “Stuffing” refers to putting as much as possible into the brief, using various techniques in addition to smaller type. For example, using single-spaced footnotes for major, substantive arguments may be viewed negatively by the court. See *Semrad v. Edina Realty*, 470 N.W.2d 135, 147-48 (Minn. Ct. App. 1991) (discouraging such practices but failing to impose sanctions).

194. See *Semrad*, 470 N.W.2d at 147; *D’Aston v. Aston*, 844 P.2d 345, 354 n.12 (Utah 1992) (noting that while additional arguments were being set forth in the appendix of the brief, a practice at odds with the applicable rule, the court reached the issues because no harm resulted to the opposing party); see also *Westinghouse Elec. Corp. v. National Labor Relations Bd.*, 809 F.2d 419, 424-25 (7th Cir. 1987) (imposing penalty on counsel for use of one and a half rather than double line spacing, smaller type size than smallest permitted by rules, and smaller than permitted margins); *Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 480-81 (7th Cir. 1986) (criticizing novel page numbering scheme to achieve 54-page brief ending on “page 50.”).

Minnesota Supreme Court. Thoroughly shepardize the brief to avoid citing authorities which are no longer authoritative. Allow enough time to proof-read the brief for spelling and citation errors. Finally, state the facts on appeal with candor and accuracy.

H. Oral Argument

1. Obtaining Oral Argument

Oral argument plays an important role in the Minnesota appellate courts. Minnesota generally permits oral argument in almost all cases in the court of appeals and the majority of cases reviewed by the supreme court.¹⁹⁵ Before the advent of the Minnesota Court of Appeals, however, oral argument in the supreme court was a rare and valued treasure. Beginning in August of 1980, the supreme court began hearing cases only en banc, resulting in only 150 to 160 cases being heard orally each year.¹⁹⁶ The remaining cases were decided solely on the basis of what was contained in the briefs and often by summary decision.¹⁹⁷

Oral argument may be waived.¹⁹⁸ Waiver can either be express or inadvertent through failure to include a request for oral argument in a party's statement of the case.¹⁹⁹ Waiver is automatic if a party fails to file a brief or, as is more common, fails to file a timely brief.²⁰⁰

2. What to Expect at Argument

The court of appeals will be prepared for oral argument. Prior to oral argument, a bench memorandum is prepared for the judges on the panel hearing the case. In addition, the judges will have reviewed the parties' briefs. As a result, the judges will be familiar with the issues and prepared to ask questions.

In the supreme court, oral argument proceeds in much the same manner. The supreme court is more flexible about ad-

195. MINN. R. CIV. APP. P. 134.01.

196. See Justice George M. Scott & David J. Moskal, *The Prehearing Conference—Perhaps Your Only Opportunity to Present Oral Argument to the Minnesota Supreme Court*, 7 WM. MITCHELL L. REV. 283, 299 (1981).

197. Scott & Moskal, *supra* at 299.

198. MINN. R. CIV. APP. P. 134.01.

199. MINN. R. CIV. APP. P. 134.01(a), (c).

200. MINN. R. CIV. APP. P. 134.01(b).

justing the length of permitted argument to suit the complexity and needs of the case. Both the court of appeals and the supreme court are considerate of the impact that extensive questioning from the court may have on the oral argument and will generally offer a few minutes of additional time when the questioning has been particularly intense.

3. *Effective Oral Argument*

The new appellate lawyer would be well-advised to visit the court of appeals prior to the day of argument to become familiar with the room and standard procedures. The court of appeals frequently will move cases forward on the argument schedule by as much as thirty minutes. Thus, on the day of oral argument, it is wise to arrive at least thirty to forty minutes before the scheduled argument. This will also provide extra time to listen to other arguments and to become acquainted with the styles of the judges on the panel.

The advocate should introduce herself to the court. An introduction is helpful to the court and makes it less likely that the court will be confused as the advocate begins to address the issues.²⁰¹ The advocate should also introduce the major points to be covered at oral argument. Oral argument is not an effective vehicle to review all the issues raised in the brief. The introduction should highlight those specific issues to be raised in the argument. Unlike the failure to argue an issue in a brief, failure to raise an issue at argument will not be deemed a waiver of the issue.²⁰²

An introduction should be interesting enough to forestall any questioning by the court until the advocate moves to the substantive arguments. If crafted carefully enough, the advocate may have an opportunity to make a few uninterrupted points. Any questions asked during an introduction, however, should be answered immediately.

Selection of issues for oral argument is a challenging exercise. The importance of the issue may not be the best criterion for selection. While a party's brief may comprehensively cover

201. See Hon. Peter S. Popovich & Michael T. Miller, *Oral Argument in the Court of Appeals*, 43 BENCH & BAR OF MINN., May/June 1986, at 18, 21.

202. If an issue is not raised in the appellant's brief, the issue is waived. See *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

a particular issue, that issue may be difficult to address clearly at oral argument. Given the limited time available for argument, discussion of some issues may force the advocate into a morass of questions and confusion. These types of issues are best left to the briefs. Of course, if a judge wishes to discuss a different issue, the advocate should do so. Thus, the appellate practitioner must be prepared to discuss all issues including those he or she does not intend to raise.

Be prepared.²⁰³ This oft-repeated generality is crucial but not self-defining. It means more than simply being ready with the intended main argument. Although this basic level of preparation is important (and not always done), much more is required. The appellate advocate must be familiar with all of the important cases involved in the argument and with the entire record. The lawyer must be familiar with the record and must have transcript or appendix cites for facts that may be mentioned. In essence, the lawyer must be prepared to answer any question that might arise whether it relates to the law, the facts, or the course of the proceedings below. Counsel should also be familiar with the trial court decision. Preparation often may include the presentation of a "moot" argument. Many appellate advocates find this an especially useful tool to hone the arguments and to gird for both the expected and unexpected questions. Anticipation of questions, problems, and dilemmas of the court will invariably improve the appellate argument.

Prior to oral argument, the Minnesota Court of Appeals will announce which members of the court will hear the appellate argument. To prepare for questioning by the court, the appellate advocate must research and review the panel's prior decisions. Although the court of appeals' law-making function is limited, the case is not decided in isolation but fits into a framework of legal decision-making in the area. Consequently, the appellate practitioner should review any trend of decisions in the area and how the judge's particular philosophy is likely to affect the resolution of the issues on appeal.

In addition, the appellate practitioner may glean useful information from observation of the panel in the process of hearing other cases. The dynamics of each panel and its decision

203. See *BOY SCOUT HANDBOOK 9* (Robert C. Birkby ed., 10th ed. 1990); *JUNIOR GIRL SCOUT HANDBOOK 10* (1986).

will differ depending on how the philosophies of the panel members affect one another.

Questioning by the court is one of the hallmarks of the appellate decision-making process. Questioning is also one of the best opportunities for advocacy. The cardinal rule is simple: answer the question. The appellate advocate should not evade questions, defer an answer and then omit it, or tell the judge that he or she does not intend to answer a question. Again, the key to handling questions is preparation. Determine what questions are likely and formulate answers in advance.

Perhaps the hardest thing to say at oral argument is "I don't know." All experienced appellate lawyers have had to admit at least once that they are unfamiliar with some aspect of the case. The best, indeed the only, thing to do in this situation is to tell the court "I don't know" or "I am not certain."

The use of visual aids is an often overlooked aspect of oral argument. Trial lawyers try to keep their trial presentations interesting and comprehensible through the use of a wide variety of visual aids. Appellate advocates, however, often do not consider using devices to improve the court's comprehension of the factual record and issues. Visual aids can be as useful in appellate argument as they are in bench trials.²⁰⁴

The time pressures and the narrow focus of the appellate argument, however, should limit the use of visual aids. Extensive discussion of exhibits and use of numerous visual aids should not occur. Further, counsel should not use visual aids as if presenting a jury argument rather than an appellate argument.

An effective use of visual aids at oral argument is to demonstrate the interrelationship of various pieces of evidence. A chart summarizing various witnesses' testimony may be effective. Similarly, a chronology may be an effective way to demonstrate the force of proof contained in a series of exhibits, the sheer number of which would otherwise prevent discussion at oral argument. Another way to use visual aids is to include charts or similar information in the appendix or make them available in hand-out form.

The appellate advocate should conclude an oral argument

204. See, e.g., HAYDOCK & SONSTENG, *supra* note 126, § 7.4(G), at 312 (stating that visual aids "significantly increase the effectiveness of an opening statement").

with a specific request for relief. In many cases, the appellate court will perceive a variety of potential rulings that might be “favorable” to your client. If the case should be remanded, explain what the remand would accomplish. If the trial court decision should simply be reversed without any remand, make clear why that result is appropriate. Tell the appellate court the specific relief needed in the case.²⁰⁵

As a final commandment, the appellate advocate must maximize the opportunity for rebuttal. Only rarely should rebuttal be waived in its entirety. In many cases, rebuttal may be very valuable. Rebuttal provides an opportunity to answer the questions raised by the court during the respondent’s argument, to address and respond to points made by the respondent, and to repeat the request for the specific relief needed in the case. But, the admonition not to waive rebuttal must be tempered by judicious use of it. Often the most effective rebuttal will be to answer one or two points briefly and to sit down.

Most importantly, rebuttal is not an opportunity to present arguments that are not responsive to matters raised by the respondent’s argument. Advocates who attempt this practice may find their arguments cut short by the appellate court. Alternatively, the court may allow an otherwise impermissible surrebuttal to discourage litigants from reserving matters for rebuttal in order to avoid any opportunity for response.

I. Decision

The Minnesota Statutes require the supreme court to render its decision in writing.²⁰⁶ Decisions are issued in slip opinion to the parties and made available to the press shortly before release to the public. Opinions are released early to the parties and press under an embargo rule limiting further circulation until they are officially released.²⁰⁷ Decisions are generally released officially every Friday, although release on other days may occur.

The appellate courts have used varying approaches to the

205. See Popovich & Miller, *supra* note 201, at 21 (stating that alternative requests for relief should be noted to the court).

206. See MINN. STAT. § 480.06 (1992).

207. See Supreme Court and Court of Appeals News Embargo Rule, *reprinted in* MINNESOTA RULES OF COURT 420-21 (West 1993).

issuance of concurring and dissenting opinions. The majority of cases decided by both appellate courts in Minnesota are unanimous, but a significant number of cases, particularly more important cases, result in the release of multiple opinions.

The vast majority of decisions are final as initially issued. The court may, however, be persuaded to withdraw an opinion or to correct errors.²⁰⁸ If the decision initially issued contains errors, those errors may be corrected either by correction of the opinion by a subsequent order or by withdrawal of the opinion and issuance of an entirely new opinion.²⁰⁹ The court may also withdraw erroneous portions of an opinion even if the correct result was reached.²¹⁰ Where facts have been misstated, the court may withdraw or delete misstatements from the opinion.²¹¹

J. Rehearing and Reconsideration

The court of appeals does not allow motions for rehearing or reconsideration and there is no mechanism to request rehearing en banc.²¹² Rehearing is available in the supreme court,²¹³ although it is rarely granted. Early on, the Minnesota Supreme Court identified the fundamental purpose of rehearing. In *Derby v. Gallup*,²¹⁴ the court described what should be necessary for rehearing:

[I]t is, perhaps, impossible to lay down a general rule which shall be applicable to every case that may arise. But we may say, in general, that the applicant must be able to show some manifest error of fact, into which counsel or the court have fallen in the argument or decision of the case; as, for example, that a provision of a statute decisive of the case

208. See *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 327, 104 N.W.2d 301, 302 (1960); *Randall v. Goodrich-Gamble Co.*, 238 Minn. 10, 11, 54 N.W.2d 769, 769 (1952); *Larson v. Christgau*, 234 Minn. 561, 561, 51 N.W.2d 63, 64 (1952).

209. See *Schwartz*, 258 Minn. at 327, 104 N.W.2d at 302; *Randall*, 238 Minn. at 11, 54 N.W.2d at 769; *Larson*, 234 Minn. at 561, 51 N.W.2d at 64.

210. See *Robbins v. New York Life Ins. Co.*, 195 Minn. 205, 206, 262 N.W. 872, 872 (1935).

211. See *80 So. Eighth St. Ltd. Partnership v. Carey-Canada, Inc.*, 492 N.W.2d 256 (Minn. 1992), *modifying*, 486 N.W.2d 393 (Minn. 1992).

212. See MINN. R. CIV. APP. P. 140. Rule 140.01 provides, "[n]o petition for rehearing shall be allowed in the Court of Appeals." *Id.*

213. *Id.*

214. 5 Minn. 119 (5 Gil. 85) (1860).

has, by mistake, been entirely overlooked by counsel and the court; or, perhaps, that a case has been decided upon a point not raised at all upon the argument, and there be strong reason to believe that the court has erred in its decision; or, unless, in a case where great public interests are involved, and the case has either not been fully argued, or strong additional reasons may be urged, to show that the court has erred in its ruling. But where a question of law has once been fully discussed on the argument, and considered by the court, we cannot admit that a party is entitled to a reargument, on the ground that there is manifest error in the decision.²¹⁵

These criteria have effectively guided the courts since 1860. The court has allowed rehearing to consider changes in the law occurring after issuance of the original decision²¹⁶ or to explain and clarify an earlier decision.²¹⁷ Rehearing has been used to permit the court to consider a question of retroactivity of its earlier decision.²¹⁸ Rehearing is not an opportunity to reargue matters that were covered in the argument and in the initial decision.

A motion for rehearing may accomplish something even if it is denied. In a number of cases, the supreme court has denied a motion to rehear a case but nonetheless has withdrawn the initial opinion to correct the error raised in the motion.²¹⁹

The unavailability of rehearing in the court of appeals is occasionally troubling. Although rehearing should rarely be granted in any appellate system, some cases require rehearing to correct errors. The theoretical availability of review by the supreme court is not a sufficient substitute for rehearing in the court of appeals, because errors that would qualify for rehearing under the traditional standard might well fail to satisfy the broader standard for obtaining further review.²²⁰ Any mistake or inaccuracy in an opinion that is not outcome determinative

215. 5 Minn. at 140 (5 Gil. at 104).

216. See, e.g., *Loftis v. Legionville Sch. Safety Patrol Training Ctr.*, 297 N.W.2d 237, 238-39 (Minn. 1980).

217. See *Gudvangen v. Austin Mut. Ins. Co.*, 284 N.W.2d 813, 817 (Minn. 1978), *on reh'g* (Minn. Sept. 7, 1979), *appeal dismissed*, 444 U.S. 1062 (1980).

218. See *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 623 n.4 (Minn. 1984); *Gudvangen*, 284 N.W.2d at 817.

219. See, e.g., *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 864 (Minn. 1984) (denying motion for rehearing but reversing and remanding for a new trial on basis of error asserted).

220. See *infra* parts VI-VII (discussing the standard for obtaining further review).

nor likely to be of interest in other litigation would be worthy of correction in the court of appeals but not entitled to further review by the supreme court. Thus, the unavailability of rehearing in the court of appeals may deny the litigant any opportunity to have these errors corrected. Moreover, even where the supreme court criteria are satisfied and review by that court granted, neither logic nor judicial efficiency favor having a prolonged new proceeding in the supreme court if a summary proceeding for rehearing in the court of appeals would suffice.

K. *Costs and Sanctions*

The taxation of costs and disbursements on appeal is governed by Rule 139.²²¹ Costs and disbursements must be taxed within fifteen days after the filing of the court's decision or they are deemed waived.²²² In effect, this requires that the party seeking recovery of costs and disbursements file and serve its request within ten days of the decision since five days notice is required. If written objections are not served and filed within five days of the request, the written objections are deemed waived.²²³ However, the appellate court may deny the prevailing party its costs and disbursements *sua sponte* for "good cause."²²⁴ Therefore, even if a party fails to object to a notice of taxation of costs and disbursements in a timely manner, where a party has violated the rules or other good cause exists, it may be appropriate for the opposing party to point this out in a memorandum to the court. Rule 139 provides that the decision of the court as to taxation of costs is not appealable. The rule does not specifically prohibit appeal from a decision regarding the taxation of disbursements.²²⁵

Sanctions in the appellate courts have been used sparingly. Large monetary sanctions are never awarded. The rules provide for the denial of otherwise taxable costs where the prevailing party has not complied with the rules.²²⁶

221. See MINN. R. CIV. APP. P. 139.

222. See MINN. R. CIV. APP. P. 139.03.

223. See MINN. R. CIV. APP. P. 139.04.

224. See MINN. R. CIV. APP. P. 139.05.

225. See MINN. R. CIV. APP. P. 139.04

226. See MINN. R. CIV. APP. P. 139.05. See also *Sayers v. Beltrami County*, 481 N.W.2d 547, 552-53 (Minn. 1992) (denying appellate costs and disbursements for failure to substantially comply with rules governing appellate briefs).

L. Attorney's Fees

The appellate courts may award a party attorney's fees in connection with defending the trial court's judgment on appeal.²²⁷ None of the statutes, upon which the court of appeals bases its decisions, distinguishes between fees incurred in the pre-trial, trial or appellate stages of an action. Accordingly, the court will award attorney's fees and costs incurred in connection with the action, if the court finds that the statutory prerequisites for an award exist. The Minnesota Supreme Court has recognized that, where a statute entitles the prevailing plaintiff to recover attorney's fees at trial, the plaintiff is also entitled to attorney's fees on appeal.²²⁸ The Minnesota Supreme Court explained that, "[t]o deny a prevailing plaintiff compensation for fees reasonably incurred in defending a judgment on appeal would defeat the intent of the legislature in providing for recovery of attorney fees."²²⁹ The appellate court has also awarded attorney's fees on appeal in order to prevent dilution of a fee award in the trial court by denying fees for appellate work.²³⁰

A party may request attorney's fees in its brief on the merits of the action or in a motion filed after the court has ruled in that party's favor. The appellate court has jurisdiction to determine whether to award attorney's fees on appeal.²³¹ The appellate court has broad discretion to determine the amount of a reasonable attorney's fee.²³² The party may submit an affidavit stating the reasonable amount of its fees and costs incurred in connection with the appeal directly to the court with its motion for an award of fees, or, in the alternative, the appellate court may remand the case after a decision has been rendered for a determination of the reasonable amount of fees.

V. MOTIONS IN APPELLATE PRACTICE

Requests to the court of appeals for orders or other relief

227. See *Hughes v. Sinclair Mktg.*, 375 N.W.2d 875, 879 (Minn. Ct. App. 1985), *aff'd in part, rev'd in part*, 389 N.W.2d 194, 200 (Minn. 1986).

228. See *Bucko v. First Minn. Sav. Bank*, 471 N.W.2d 95, 99 (Minn. 1991); *Anderson v. Hunter, Keith, Marshall & Co.*, 401 N.W.2d 75, 83 (Minn. Ct. App. 1987), *aff'd in part, rev'd in part*, 417 N.W.2d 619 (Minn. 1988); *Hughes*, 389 N.W.2d at 200.

229. *Bucko*, 471 N.W.2d at 99.

230. See, e.g., *Anderson*, 401 N.W.2d at 83.

231. MINN. R. CIV. APP. P. 139.

232. *Hughes v. Sinclair Mktg.*, 389 N.W.2d 194, 200 (Minn. 1986).

must be made by motion. Motion practice before the court of appeals is governed by Rule 127.²³³ Examples of common motions include requests for mandamus²³⁴ or other extraordinary relief,²³⁵ requests for additional time within which to file a brief,²³⁶ requests to strike non-record submissions,²³⁷ and requests to submit additional argument or briefing.²³⁸ Motions to dismiss or limit issues on appeal should be made promptly to minimize unnecessary efforts by court and counsel.²³⁹ The filing of a motion does not suspend or otherwise alter the running of any other time period provided by the rules. Motions may seek dismissal of an appeal for default or jurisdictional reasons,²⁴⁰ but there is no appellate court equivalent of the motion for summary judgment. Neither party can obtain a summary determination of the appeal on the merits of the issues.²⁴¹

Rule 127 governs the form and time limits for the motion.²⁴² There is no page limit. Oral argument on motions is not permitted.²⁴³ The motion must "state with particularity the grounds and set forth the order or relief sought."²⁴⁴ An original and four copies with proof of service must be filed.²⁴⁵ Responsive memoranda must be filed within five days after service of the motion.²⁴⁶ The moving party is allowed two days to

233. MINN. R. CIV. APP. P. 127.

234. MINN. R. CIV. APP. P. 120.

235. *Id.*; MINN. R. CIV. APP. P. 121.

236. *See* MINN. R. CIV. APP. P. 131.02.

237. *See* MINN. R. CIV. APP. P. 128.03.

238. *See* MINN. R. CIV. APP. P. 128.02(4).

239. Hon. D.D. Wozniak & Cynthia L. Lehr, *Avoiding Practice Errors Before the Minnesota Court of Appeals*, 13 *HAMLIN L. REV.* 1, 12 (1990).

240. *See* MINN. R. CIV. APP. P. 142.

241. *See, e.g., In re Estate of Magnus*, 436 N.W.2d 821, 821-22 (Minn. Ct. App. 1989).

242. MINN. R. CIV. APP. P. 127.

243. *Id.*

244. *Id.*

245. *Id.* This requirement is frequently overlooked. *See* Hon. Peter S. Popovich & Donald W. Niles, *A Practitioner's Guide to Bringing an Appeal in the Minnesota Court of Appeals*, 11 *WM. MITCHELL L. REV.* 627, 652 (1985).

246. MINN. R. CIV. APP. P. 127. The five-day response time is frequently overlooked. *See* Popovich & Niles, *supra* note 245, at 652. Intermediate weekends and holidays are not counted in the five-day period. MINN. R. CIV. P. 6.01. However, if the motion is served by mail, a responding party is allowed eight days to respond. MINN. R. CIV. P. 6.05. Weekends and holidays are counted when a party is allowed eight days to respond. MINN. R. CIV. P. 6.02.

submit a reply.²⁴⁷ Papers must be filed with the clerk of court.²⁴⁸ If they are submitted to the court rather than the clerk, they will be forwarded to the clerk. The date of filing will be the date they reach the clerk.²⁴⁹

Motions may be decided by a single judge. The chief judge or a special term panel appointed by the chief judge rules on motions for extraordinary remedies.²⁵⁰ The chief judge also decides routine motions such as voluntary dismissals, case management order exceptions, postponements, and extensions of time to file briefs.²⁵¹ Motions involving substantive or complex matters are decided by a special term panel made up of the chief judge and two other judges.²⁵² Motions made after submission of a case are directed to the panel which has been selected to hear the appeal.²⁵³ Most motions are decided as soon as possible after submission.

Although no case law appears to discuss the issue, some authority suggests that, once a three-judge panel has determined a motion, the issue may not be raised anew before another panel, designated to decide the balance of the case. This result is noted in Rule 140 of the Minnesota Rules of Civil Appellate Procedure, the rule that prohibits rehearings in the court of appeals.²⁵⁴ Because the decision by a limited panel on a motion is considered the decision of "the court,"²⁵⁵ any attempt to reargue the motion before another panel would constitute a request for rehearing in violation of Rule 140.01.²⁵⁶

A useful guide to motion practice in the court of appeals is an index of decisions issued by the court of appeals at special term.²⁵⁷ The court began publishing significant procedural de-

247. MINN. R. CIV. APP. P. 127.

248. See Wozniak & Lehr, *supra* note 239, at 11.

249. *Id.*

250. SPECIAL R. OF PRAC. FOR THE MINN. CT. APP. 8, *reprinted in* MINNESOTA RULES OF COURT 423 (West 1993).

251. *Id.* See also MINN. STAT. § 480A.08(4) (1992).

252. See Wozniak & Lehr, *supra* note 239, at 11.

253. See SPECIAL R. OF PRAC. FOR THE MINN. CT. APP. 8, *reprinted in* MINNESOTA RULES OF COURT 423 (West 1993).

254. See MINN. R. CIV. APP. P. 140.01.

255. See MINN. STAT. § 480A.08 (1992).

256. MINN. R. CIV. APP. P. 140.01.

257. See Central Staff of the Court of Appeals, Minnesota Court of Appeals Special Term Opinion Subject Matter Index (Feb. 7, 1992) (on file with the Clerk of Appellate Courts, 245 Minnesota Judicial Center, 25 Constitution Avenue, Saint Paul, MN 55155).

cisions, indexed by topic, in 1987. This index is a useful source of guidance on how the court may respond to a particular motion. However, the court of appeals has ruled that special term decisions are not to be given any precedential weight.²⁵⁸ The decisions nonetheless are good predictors of how the court may rule.

VI. REVIEW OF COURT OF APPEALS

Rule 117 governs review of the court of appeals' decisions by the Minnesota Supreme Court.²⁵⁹ The Minnesota Supreme Court grants further review in approximately eleven percent of the cases requested.²⁶⁰ Consideration of cases on further review is now one of the most important parts of the supreme court's jurisdiction. This jurisdiction comprises the primary opportunity for review of the court of appeals.

Further review is granted to consider particular issues meeting the criteria of the rule.²⁶¹ Issues that do not meet the criteria of the rule, however, may still be heard.²⁶²

VII. ACCELERATED REVIEW

Although no civil cases may be appealed directly from the district court to the supreme court as a matter of right, the rules provide a mechanism to allow direct review.²⁶³ Under Rule 118, the supreme court may consider a motion for accel-

258. *State v. Russell*, 481 N.W.2d 148, 150 (Minn. Ct. App. 1992) (holding that special term orders are written solely for the benefit of the parties to an individual case and have no precedential value).

259. *See* MINN. R. CIV. APP. P. 117.

260. Minnesota Court of Appeals Discretionary Review Statistics, Dispositions on Cases Granted Review Through December 31, 1990 (on file with the Clerk of Appellate Courts, 245 Minnesota Judicial Center, 25 Constitution Avenue, Saint Paul, MN 55155).

261. MINN. R. CIV. APP. P. 117(2). The criteria considered include the following: the question presented is important for the supreme court to consider; the court of appeals has ruled on the constitutionality of a statute; the lower courts have so far departed from justice as to call for the supreme court to exercise its supervisory powers; or a decision of the supreme court will help develop, clarify, or harmonize the law and the issue requires the application of a new principle or policy, has statewide impact, or is likely to recur. *Id.*

262. MINN. R. CIV. APP. P. 117(2). The comment to Rule 117 states: "While the rule enumerates criteria which may be considered by the court in exercising its discretion, they are intended to be instructive and are neither mandatory nor exclusive." *Id.*

263. MINN. R. CIV. APP. P. 118.

erated review.²⁶⁴ This procedure is authorized by statute and allows complete bypass of the court of appeals.²⁶⁵

There are no decisions interpreting the rule that permits petitions for accelerated review. Although the supreme court has considered hundreds of petitions for accelerated review, the court has written virtually nothing about why or when it views those petitions favorably. The decisions themselves, however, do add some gloss to the bare language of the rule.

In *Uselman v. Uselman*,²⁶⁶ the Minnesota Supreme Court granted accelerated review where a district court judge had imposed substantial monetary sanctions against an attorney under the newly-enacted version of Rule 11.²⁶⁷ The case clearly raised issues significant both to the parties and the bench and bar. Underscoring the case's importance were four petitions from entities who participated as amici curiae.²⁶⁸ In *State by Humphrey v. Strom*, the court also granted accelerated review because of the decision's potential importance to a high number of condemnation appeals, arising from a large interstate highway project in Minneapolis.²⁶⁹

The decision to seek accelerated review may be a difficult one. Although a party may seek the finality of having the supreme court decide a legal issue, that court may be less willing than the court of appeals to review the myriad other issues raised in most appeals. *Uselman* also exemplifies the limited review that may be available in cases heard upon accelerated review.²⁷⁰ In *Uselman*, the attorney sanctions issue arose in the context of a minority shareholders' dispute.²⁷¹ Although the supreme court considered fully the sanction issue, the court summarily affirmed various other important issues of the case.²⁷² Thus, accelerated review may not be appropriate in a case presenting both novel and far-reaching issues warranting accelerated review and more mundane or settled issues that would normally be heard in the court of appeals.

264. *Id.*

265. See MINN. STAT. § 480.061(1) (1992).

266. 464 N.W.2d 130 (Minn. 1990).

267. *Id.* at 134 (construing MINN. R. CIV. P. 11 and MINN. STAT. § 549.21 (1990)).

268. *Id.*

269. See *State by Humphrey v. Strom*, 493 N.W.2d 554, 557 (Minn. 1992).

270. *Uselman v. Uselman*, 464 N.W.2d 130, 134 (Minn. 1990) (reviewing the trial court's imposition of sanctions and costs against plaintiff's counsel).

271. *Id.*

272. *Id.* at 145.

The court of appeals may also certify a case to the supreme court for review.²⁷³ Certification by the court of appeals does not transfer jurisdiction to the supreme court.²⁷⁴ The court may consider the certification as it would a motion for accelerated review, although it gives considerable weight to the court of appeals' certification.

VIII. PUBLICATION OF OPINIONS

A. *Publication in Minnesota*

Minnesota appellate courts no longer publish all decisions in the bound reporters. Many decisions are designated "unpublished" pursuant to statute.²⁷⁵ Unpublished decisions are included in the weekly supreme court edition of *Finance & Commerce*²⁷⁶ and in the *St. Paul Legal Ledger*²⁷⁷ but are not included in Northwestern Reporter Second Edition. Unpublished opinions are also available on Lexis²⁷⁸ and Westlaw.²⁷⁹

B. *Criteria for Non-publication*

To date, the Minnesota Court of Appeals has not addressed the standards applied for deciding publication. Many unpublished court of appeals decisions have been reviewed by the supreme court.²⁸⁰ Review in these cases, however, has not included discussion of the publication status of the intermediate court decision.

273. See MINN. STAT. § 480A.10(2)(b) (1992); MINN. R. CIV. APP. P. 118(3). See also *O'Brien v. Mercy Hosp. & Convalescent Nursing Care Section*, 356 N.W.2d 367, 368 (Minn. Ct. App. 1984) (certifying question of constitutionality of statute to supreme court).

274. See MINN. STAT. §§ 480.061, 480A.10 (1992).

275. MINN. STAT. § 480A.08(3)(b) (1992). "The decision of the court need not include a written opinion. A statement of the decision without a written opinion must not be officially published and must not be cited as precedent except as law of the case, *res judicata*, or collateral estoppel." *Id.*

276. *Finance & Commerce*, 615 South Seventh Street, Minneapolis, MN 55415.

277. *St. Paul Legal Ledger*, 640 Minnesota Building, Saint Paul, MN 55101.

278. Mead Data Central, 9443 Springboro Pike, P.O. Box 933, Dayton, OH 45401.

279. West Publishing Company, 610 Opperman Drive, Eagan, MN 55123.

280. See, e.g., *State v. Salazar*, 494 N.W.2d 485 (Minn. 1993) (remanding a Minnesota Court of Appeals unpublished decision); *Brown v. Allstate Ins. Co.*, 481 N.W.2d 17 (Minn. 1992) (affirming a Minnesota Court of Appeals unpublished opinion); *St. Paul Fire & Marine Ins. Co. v. D.H.L.*, 459 N.W.2d 704 (Minn. 1990) (remanding a Minnesota Court of Appeals unpublished opinion); *Flooring Removal, Inc. v. Ryerson*, 447 N.W.2d 429 (Minn. 1989) (reversing a Minnesota Court of Appeals unpublished decision).

C. Limitations of Present System

Despite the statutory mandate that unpublished decisions will not carry precedential value, federal courts in Minnesota have looked to unpublished decisions as having some precedential value in determining Minnesota law.²⁸¹ In a recent case, *Nelson's Distributing, Inc. v. Stewart-Warner Industrial Balances*,²⁸² the court viewed an unpublished court of appeals decision as extending the *Superwood*²⁸³ doctrine.²⁸⁴ Nonetheless, there are numerous unpublished cases that do not appear to follow clear, published precedent.²⁸⁵

D. Non-publication and Stare Decisis

Two significant problems exist due to Minnesota's non-publication scheme. First, the system may be fundamentally unfair. Non-published opinions may be cited to the court in specific circumstances. Minnesota law allows an unpublished opinion to be used if a copy of the opinion is provided to the court and all other parties at least forty-eight hours before the hearing or if a copy is attached to the applicable brief.²⁸⁶

The use of these decisions, however, creates a second body of "hidden" precedent that may only be available to those parties having the resources to find the unpublished opinion. Because unpublished decisions are not published, not indexed, and not included in Shepards or other finding aids, these opinions are inherently more difficult to locate than published opinions. The use of unpublished opinions also creates difficulties for advocates in establishing the proper weight of unpublished opinions, in determining subsequent history on

281. See, e.g., *Modern Computer Sys. v. Modern Banking Sys.*, 871 F.2d 734, 736 (8th Cir. 1989) (citing a Minnesota district court's unpublished opinion); *Cuthbertson v. Uhley*, 509 F.2d 225, 226 (8th Cir. 1975) (looking to a Minnesota district court's unpublished decision); *B & J Mfg. v. Solar Indus.*, 483 F.2d 594, 595 (8th Cir. 1973) (referring to a Minnesota district court's unpublished decision).

282. 808 F. Supp. 684 (D. Minn. 1992).

283. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981) (holding that economic losses which arise out of commercial transactions, except those involving personal injury or damage to property, are not recoverable under tort theories of negligence or strict products liability).

284. *Nelson's Distributing, Inc.*, 808 F. Supp. at 686 (citing *ETM Graphics v. H.B. Fuller Co.*, 1992 WL 61394 (Minn. Ct. App. March 25, 1992)).

285. See generally Jennifer K. Anderson, *The Minnesota Court of Appeals: A Court Without Precedent?*, 19 WM. MITCHELL L. REV. 743 (1993).

286. See MINN. STAT. § 480A.08(3)(b) (1992).

remand or retrial, and in analyzing whether later developments in other cases have cast doubt on the holding of the unpublished decision.

Second, Minnesota's process provides no mechanism for review of the publication decision. The court of appeals' rules prohibit motions for reconsideration or rehearing,²⁸⁷ and no formal mechanism allows any input from the parties on the question of publication. Parties cannot seek to have a decision "depublished" as is permitted in other jurisdictions,²⁸⁸ nor can parties seek publication of a case originally not designated for publication.

IX. ROLE OF AMICI CURIAE

In many appeals, "amici curiae"²⁸⁹ play an important role in the presentation of the issues. Amici may offer viewpoints and information not known to the parties or not meaningfully presented by the parties. Amici are best used to help inform the court about issues and perspectives not otherwise before the court.²⁹⁰ Amici are neither lobbyists nor surrogate advocates for a party.²⁹¹ In many cases, amici may take positions not directly in agreement with the positions of any party. Indeed, mere cheerleading for one or the other of the parties serves little purpose for the appellate court. Courts do recognize, however, that amici often play a role of advocacy rather than neutrality.²⁹² The views of amici may be particularly wel-

287. MINN. R. CIV. APP. P. 140.01.

288. See, e.g., *Marshall v. Commonwealth*, No. 90-SC-185-MR, 1992 WL 5686, (Ky. Jan. 16, 1992) (holding opinion depublished on denial of petition for rehearing and modification); *People v. Dee*, 272 Cal. Rptr. 208, 209-10 (Cal. Ct. App. 1990) (referring to *People v. Laury*, 257 Cal. Rptr. 480 (Cal. Ct. App. 1989) which was subsequently depublished); *Fireman's Fund Ins. Co. v. Murchison Const. Co.*, 796 P.2d 995 (Haw. 1989) (reversing and depublishing a Hawaii Supreme Court memorandum opinion).

289. An "amicus curiae" is

literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.

BLACK'S LAW DICTIONARY 82 (6th ed. 1990).

290. See *State v. Finley*, 242 Minn. 288, 294, 64 N.W.2d 769, 773 (1954) (stating specifically that the purpose of an amicus curiae brief is not to repeat arguments of parties).

291. But see Samuel Rosenthal, *Amicus Curiae: Judicial Lobbyist Wields Power in Appellate Courts*, NAT'L L.J., Dec. 5, 1988, at 22 (categorizing amici as judicial lobbyists).

292. See MARSHALL HOUTS ET AL., *supra* note 130, § 39.01[1] (1993).

come in cases where the court must establish a rule or standard that will have broad application. For example, in the leading cases on sanctions against lawyers under Rule 11²⁹³ and its statutory counterpart,²⁹⁴ the Minnesota Supreme Court crafted a standard for imposition of sanctions that relied, in part, on the views of various amici.²⁹⁵ Amicus participation may be useful in cases presenting constitutional issues.²⁹⁶

Amici in the court of appeals need to be careful if they desire to participate in further review in the supreme court. Rule 117 was amended in 1992 and requires a party seeking to participate as amicus—even conditionally in the event a petition for further review is granted—to file the petition to participate in the supreme court by the time the respondent's reply to the petition for further review is due.²⁹⁷ Failure to file the petition to participate as amicus by that time should result in denial of the petition, particularly where the amicus was a party to the appeal in the court of appeals.

X. CONCLUSION

The court of appeals has accomplished its purposes of making appellate review available in all cases and in all counties. The court has achieved noteworthy efficiency in rendering decisions promptly after oral argument. Although no mechanism exists to resolve conflicts between panels of the court, no great inconsistency in its decisions persists. The non-publication of some court of appeals decisions raises fundamental questions about stare decisis and the role of the court, but the publication practices do not appear to have created any specific problems for litigants. The combined effect of limited review in the supreme court and no rehearing in the court of appeals is probably the most pervasive problem in the courts' current rules. Although limited review creates problems in a relatively small percentage of cases, the problems arising in these cases are worthy of consideration. Notably, the Minnesota appellate courts are user-friendly and have, for the most part, provided parties with meaningful appellate review where it is needed.

293. MINN. R. CIV. P. 11.

294. MINN. STAT. § 549.21 (1992).

295. See *Uselman v. Uselman*, 464 N.W.2d 130, 139-45 (Minn. 1990).

296. See, e.g., *Erie Mining v. Commissioner*, 343 N.W.2d 261, 262 (Minn. 1984).

297. MINN. R. CIV. APP. P. 117(6).

