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# Court Procedure and the Separation of Powers in Minnesota

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## COURT PROCEDURE AND THE SEPARATION OF POWERS IN MINNESOTA

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## INTRODUCTION

*The judiciary . . . members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes . . . judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy. . . . And this is done with no ill intention. The views of the present members are perfectly upright. When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come.*<sup>1</sup>

Thomas Jefferson

*Notes on the State of Virginia*

The doctrine of the separation of powers is a well-known and fundamental principle in American government.<sup>2</sup> It is implied in the federal constitution and explicitly provided for in the constitutions of most states.<sup>3</sup> But in the development of the doctrine during the past two hundred years, there has rarely been any calm in the recurrent storm of debate over how

1. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA, Query XIII, at 120-21 (W. Peden ed. 1954) (1787).

2. According to the doctrine of separated powers, tyranny is best prevented if the ability to make, execute and administer the laws is divided between three branches of government: legislative, executive and judicial. This separation is designed to prevent the excessive accumulation of power by one person or group. The related concept of checks and balances creates a limited interdependence between the branches; each is allowed a certain amount of restraint or control over the actions of the other two, thereby preventing the usurpation of power and creating the need for compromise.

3. There are at least thirty-four states that have explicit provisions in their constitutions calling for separated powers. See Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. Rev. 407, 474-77 (1985) (appendix contains a list of the states and their constitutional provisions).

this fundamental principle should operate. Article III of the Minnesota Constitution states:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.<sup>4</sup>

This simple statement of the doctrine, however, is little help in determining which powers properly belong to each of the departments of government and the determination is made more difficult when the powers to be exercised are not mentioned in the document.

One of the powers of government not mentioned in the state constitution has recently been cause for considerable confusion and debate: it is not settled in Minnesota whether court procedural rulemaking is a power of the judicial or legislative branch, or some combination of the two. The power of procedural rulemaking is the ability to decide and control the procedural rules or laws under which the courts will operate.<sup>5</sup> Procedural rules are those which govern the methods of pleading, process and evidence in court. Creating and controlling these procedural rules is a substantial power: they govern a wide range of subjects. Rules of the Minnesota Supreme Court govern civil procedure, appellate procedure, criminal procedure, evidence, juvenile procedure and family court procedure.<sup>6</sup>

When the Minnesota Constitution was written in 1857, the power to determine court procedure was explicitly vested in the legislative branch: "Legal pleadings and proceedings in the courts of this state shall be under the direction of the legislature."<sup>7</sup> But one hundred years later that section was removed during the process of amending the judiciary article and the

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4. MINN. CONST. art. III, § 1.

5. Rulemaking without the "procedural" modifier can also be defined to include the power over judicial administration and legal practice. Court administrative rules are those concerning the court's internal administrative matters and practice rules are those governing the conduct and practice of attorneys and judges. These subjects are beyond the scope of this article.

6. See generally MINNESOTA RULES OF COURT (1988) (West Publishing Company's annual "Desk Copy"). As this article goes to print, uniform probate procedures are also in the process of being adopted by the court.

7. MINN. CONST. art. VI, § 14 (1857, repealed 1957).

constitution of Minnesota is now silent on which branch of government should control procedural rulemaking.

In Minnesota, both the legislature and the supreme court—by statute and court rule—provide procedures that are to be followed in court proceedings. Each branch of government also presumes that its rule will prevail when both branches pass differing rules on the same subject. In other words, both the legislature and judiciary claim to have the *ultimate* power over the procedural rules of court. This controversy over the rulemaking power has led to conflict and tension between the judiciary and legislature; it has also resulted in confusion and debate among legislators and members of the bar over the separation of powers and proper methods of rulemaking. In addition, some people have taken advantage of the two processes so that changes are made in their favor: when the rules of one branch of government are not to their liking, they turn to the other branch for relief.

Which branch of government is the source of power over court procedures in Minnesota—the legislature, judiciary, or both? If the two branches of government pass conflicting rules on the same subject, which should prevail? Are there any principles that can be gleaned from Minnesota's history of rulemaking or from the state's "silent" constitution? There are also differences between the branches in their methods and abilities to establish rules: Is one branch better equipped to decide the rules of court? In response to these questions and others, we shall argue in this article that—for constitutional and policy reasons—rulemaking is an inherent power of the courts in Minnesota. The legislature should not function as a separate and conflicting procedure-making body. If, however, the legislature passes statutes in those areas not already governed by a promulgated rule, the court, as a matter of comity, may let them stand.

This article will approach the topic of Minnesota's procedural rulemaking in five sections. The first surveys the history of the rulemaking power from pre-territorial times to the present day. Particular emphasis is given to the proposals and changes that have been made from time to time and to the state constitution. From this history, we can see some of the failures and successes of the procedural rule process over the years. We can also derive an explanation for why Minnesota's present constitution is silent on rulemaking. The second sec-

tion explains the doctrine of inherent judicial power, as it relates to rulemaking in Minnesota, and provides a legal basis for our position as explained above. The third section describes the present process of rulemaking by the court. The fourth section recommends suggestions for improving the court's rulemaking process. And finally, the fifth section of this article describes a recent controversy surrounding the rule governing the order of final arguments in a criminal trial. The problems described in this case illustrate many of the disadvantages in determining court procedure by the legislature. This case also illustrates Jefferson's admonition: the legislative branch is often led out of their regular province by "art in others, and inadvertence in themselves."

### I. A HISTORY OF THE POWER OVER COURT PROCEDURE IN MINNESOTA

The history of the power to provide for court procedures in Minnesota follows a pendulum-like pattern similar to that of many other states and the federal government.<sup>8</sup> Over the past 150 years, the power has been exercised by both the legislative and judicial branches, but each have had varying degrees of control. In Minnesota's pre-territorial days, the few courts in operation used the common law and chancery system inherited from England. Under this system, rules were mainly controlled by the courts through judicial decisions. When Minnesota became a territory in the mid-nineteenth century, the power shifted to nearly complete legislative control with the arrival of the Field Code and the popular power of legislative government. The control of court procedure by statute continued in Minnesota for nearly one hundred years, until a nationwide movement began to restore the rulemaking power in the judicial branch. The progress of this movement in Minnesota is nearly complete: the legislature is still involved to a de-

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8. There are a few accounts of the history of rulemaking in other states. See, e.g., Browde & Occhialino, *supra* note 3 and Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 5-27 (1975). The most interesting history of state rulemaking is in New Jersey. In 1949, the state supreme court, under the leadership of Chief Justice Arthur Vanderbilt, declared rulemaking to be an exclusive power of the judicial branch and not to be interfered with by the legislature. See *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406 (1949). For varying criticisms and defenses of the *Winberry* decision, see Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951) and Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952).

gree, but judicially promulgated and controlled rules widely govern court procedure, evidence, and practice.

### A. Early Minnesota and the Arrival of the Field Code

In 1838, two justices of the peace were commissioned to serve the area on the outskirts of the Wisconsin and Iowa territories;<sup>9</sup> thus began the first form of a judicial system in the land that is now Minnesota.<sup>10</sup> These two justices of the peace remained the only form of a judiciary in Minnesota for almost ten years and their power was vast and nearly unaccountable.<sup>11</sup> The legal practice that began in the pre-territorial courts of the 1830s followed the form of the common law and chancery system and made distinctions between actions at law and suits in equity.<sup>12</sup> This was a system that originated in England during

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9. Before the Minnesota Territory was created, its land fell within the extended boundaries of the Wisconsin and Iowa territories. The western border of the Wisconsin Territory, the fifth to be created under the Northwest Ordinance, reached to the Mississippi River. The Iowa Territory, under the Louisiana Purchase, occupied the land that lie west of the river. There are many sources that describe this early pre-territorial history and the land divisions of Minnesota. See, e.g., W. ANDERSON & A. LOBB, *A HISTORY OF THE CONSTITUTION OF MINNESOTA* 4-28 (1921); T. BLEGEN, *MINNESOTA: A HISTORY OF THE STATE* 159-81 (1963); 1 W. FOLWELL, *A HISTORY OF MINNESOTA* 231-65 (rev. ed. 1956); and Haycraft, *Territorial Existence and Constitutional Statehood of Minnesota* (1946), reprinted in 1 MINN. STAT. ANN. 145.

10. According to an article on the legal affairs of Minnesota's frontier days, "[t]he law came to Minnesota literally embodied in two men: Henry Hastings Sibley, and Joseph R. Brown." Sheran & Baland, *The Law, Courts, and Lawyers in the Frontier Days of Minnesota: An Informal Legal History of the Years 1835 to 1865*, 2 WM. MITCHELL L. REV. 1, 6 (1976).

11. According to Sheran and Baland,

The magistrates power in those early days was at least as vast as the territory of his jurisdiction. Sibley remarked how he had matters pretty much under his own control, "there being little chance of an appeal" from his decisions. Brown became literally a one-man government for St. Croix County in 1838 when he was elected county clerk, county commissioner, and clerk of district court. For all their authority and power, both Brown and Sibley seemed to have exercised it in exemplary fashion. No tales have come down of either unjustly abusing his discretion, and both men retained the esteem of their peers.

*Id.* at 7-8 (footnotes omitted). Sibley once remarked, "[S]ome of the simple-minded people around me firmly believed that I had the power of life and death." *Id.* at 7 n.45 (quoting SIBLEY, *Reminiscences of the Early Days of Minnesota*, in 3 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 242, 265-66 (1880)).

12. See 1 B. SHIPMAN, *CIVIL PROCEDURE IN THE DISTRICT AND SUPREME COURTS OF THE STATE OF MINNESOTA* § 1 (1902). See also 1 M. PIRSIG, *PIRSIG ON MINNESOTA PLEADING* 10 (5th ed. 1987). See generally B. SHIPMAN, *COMMON LAW PLEADING* (1923).

For a concise description of common-law procedure and the different forms of action, and for a description of equity procedures, see PIRSIG, *supra*, at 5-7, and 1 D. MCFARLAND & W. KEPPEL, *MINNESOTA CIVIL PRACTICE* §§ 101-104 (1979).

the twelfth and thirteenth centuries and was subsequently adopted throughout the United States during colonization.<sup>13</sup> Minnesota adopted this system of procedure from the Territory of Wisconsin with relatively few changes.<sup>14</sup> The power of providing court procedures in the common law and chancery systems of these early Minnesota courts was assumed primarily by the judges.<sup>15</sup>

After the territories of Iowa and Wisconsin were admitted into the Union in 1846 and 1848, respectively, the people occupying the land adjacent to those boundaries were left without a form of government. Congress, responding to their request for recognition, passed the Organic Act organizing the Territory of Minnesota in 1849.<sup>16</sup> The judicial power was organized into a supreme court, three district courts, probate courts and justices of the peace.<sup>17</sup> The Organic Act also provided that the laws in force in Wisconsin at the time of its admission to the Union would be valid and operate in the Minnesota Territory until altered, modified or repealed by the governor and legislative assembly.<sup>18</sup> Therefore, the same sys-

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13. MCFARLAND & KEPPEL, *supra* note 12, at §§ 101–104. For an account of how the rulemaking power developed in early England and the United States, see Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures*, 22 A.B.A. J. 772 (1936). See also J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 21–61 (1977).

14. Wisconsin had a major influence on the legal system of early Minnesota: From 1836 until 1848, when Wisconsin became a state, Minnesota had been a part of Wisconsin territory. The practice of that period was that of the common law and chancery systems, as derived from England, modified in some respects by statutes and rules of courts. Wisconsin became a state in 1848, and in 1849 Minnesota was declared a separate territory. The common law practice continued, with the addition of such statutes and rules as were needed for better adaptation to the local conditions.

Schochet, *Minnesota's First State Supreme Court (1858–1865), and the Introduction of the Code of Civil Procedure*, 11 MINN. L. REV. 93, 114 (1927).

15. "The rules of pleading at common law were developed primarily by judicial decision as pleading points were raised by the parties, and secondarily, by rules of court and by statute." MCFARLAND & KEPPEL, *supra* note 12, at § 112. See also PIRSIG, *supra* note 12, at § 6.

16. See ANDERSON & LOBB, *supra* note 9, at 23. The Organic Act was the basic charter for the government of the territory until Minnesota became a state nine years later. The government formed by that act called for a governor, a secretary, a legislative assembly, a delegate to Congress, and a judicial branch to be established. For a discussion of the political maneuvering necessary for achieving territorial status, see *id.* at 29–35 and I W. FOLWELL., *supra* note 9, at 231–65.

17. The supreme court consisted of a chief justice and two associate justices, each of whom also presided over one of the district courts. Minn. Organic Act, § 9, *reprinted in* 1 MINN. STAT. at xxxix (1986).

18. Minn. Organic Act, § 12. Professor Anderson's explanation for the decision



tem of pleading and procedure that governed courts before Minnesota became a territory—common-law procedure—was still in effect.<sup>19</sup>

Early in its first term, the new territorial supreme court of Minnesota promulgated its own rules of practice.<sup>20</sup> It is uncertain though how authority for making such rules came about; there was no mention in the Organic Act of which branch of government should govern the rules of court. It is likely that the court believed it was their inherent power and a necessity that they promulgate rules. The lawyers and judges in the new territory came from various legal backgrounds and experiences. This was cause for a great deal of confusion over the proper rules of practice. The court's promulgated rules were probably just an attempt at uniformity by the justices.<sup>21</sup> It is also possible that the court found support for their decision to promulgate rules in a 1836 statute passed by the legislative assembly of the Wisconsin Territory. This law, directing the Wisconsin territorial supreme court to promulgate rules for

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that Wisconsin's laws would remain in effect instead of Iowa's was that most of the inhabitants of the Minnesota territory resided east of the Mississippi at the time of the Organic Act. Because Wisconsin's laws had governed them before the creation of the Territory of Minnesota, it was only natural that they continue in effect. ANDERSON & LOBB, *supra* note 9, at 35.

19. See Schochet, *supra* note 14, at 114.

20. See RULES OF PRACTICE FOR THE SUPREME, DISTRICT, AND CHANCERY COURTS OF THE TERRITORY OF MINNESOTA (1850). See also R. GUNDERSON, A HISTORY OF THE MINNESOTA SUPREME COURT, § II, at 7 (1937).

21. In Gunderson's history of the Minnesota Supreme Court he described the situation as follows:

In the meantime changes were taking place in the courts of Minnesota. [Procedural rules] were quickly dropped, others survived, and it largely became a matter of trial and error. In this connection it must be understood that the judges and lawyers in the territory had been drawn from almost every state in the Union, and each had brought with him certain ideas and practices favored in his native state, and ones which he himself had come to consider as being the most approved. Consequently, no two courts in the territory were conducted in exactly the same manner, and likewise no two attorneys conducted litigation along parallel lines.

*Id.* at § IV, at 7-8. J. Fletcher Williams, in his A HISTORY OF THE CITY OF SAINT PAUL TO 1875, explains further:

[Chief Justice] Goodhue says: "The roll of attorneys is large for a new country. About 20, of the lankest and hungriest description, were in attendance." The term lasted six days. "The proceedings," says the *Chronicle and Register*, "were for the first two or three days somewhat crude, owing to the assembling of a bar composed of persons from nearly every State. But, by the urbanity, conciliatory firmness, and harmonious course taken by the Court, matters were in a great measure systematized."

J. F. WILLIAMS, THE HISTORY OF THE CITY OF SAINT PAUL TO 1875 at 234 (1876).

both the supreme court and the district courts, was in force in Minnesota by virtue of the Organic Act.<sup>22</sup>

Judicially promulgated rules did not remain the only form of written rules in the new territory for long, however, nor did the influence of Wisconsin's laws and the common law methods of procedure survive. A system of "code pleading" was sweeping the states.<sup>23</sup> The code system of procedure radically altered the methods of pleading and procedure, while, at the same time, essentially shifted the power to prescribe court procedures to the legislative branch. The first state to pass such laws regulating procedure in the courts was New York in 1848. Known as the Field Code—so named after its main proponent David Dudley Field—this new method of procedure was intended to simplify and accelerate court proceedings.<sup>24</sup> Lawrence M. Friedman, describing the Code, said:

Stylistically, no greater affront to the common-law tradition can be imagined than the 1848 code. It was couched in brief, gnomic, Napoleonic sections, tightly worded and skeletal; there was no trace of the elaborate redundancy, the voluptuous heaping on of synonyms, so characteristic of Anglo-American statutes. . . . Taken literally, this was the death sentence of common-law pleading.<sup>25</sup>

The Field Code was indeed a revolutionary development: it

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22. 1836 Wis. Laws 35 (codified in MINN. REV. STAT. ch. 69, § 6 (1852) (repealed 1866)). This statute reached Minnesota by way of a "domino" effect. Minnesota was once a part of two great land divisions in the United States: the Northwest Territory and the Louisiana Territory. The boundary line that divided the two land areas was the Mississippi River: the Northwest Territory extended east of the river and the Louisiana Territory to the west. From each land mass, Congress carved new territories and states. The first territory and state to be carved from the Northwest Territory was Ohio in 1802, followed by Indiana in 1807, Illinois in 1818, Michigan in 1837, Wisconsin in 1848 and Minnesota in 1849. In 1820, the territorial legislature of Michigan enacted a statute granting their supreme court full power to prescribe rules of procedure and practice. When the Wisconsin Territory was carved from the Michigan Territory in 1836, this same statute remained in effect through the organic act of Congress that established Wisconsin. (Essentially, this was the same judicial rulemaking principle that was applied to the organization of the Minnesota Territory.) Michigan eventually adopted this statute in their constitution of 1850. See *infra* note 149. In Wisconsin and Minnesota, it remained only a statute.

These events are described in an article by Edmund M. Morgan in 1918. See Morgan, *Judicial Regulation of Court Procedure*, 2 MINN. L. REV. 81, 94-95 (1918). Morgan's purpose for writing was to encourage re-vesting the rulemaking power in the judicial branch.

23. See FRIEDMAN, *A HISTORY OF AMERICAN LAW* 391-411 (2d ed. 1985).

24. See *id.* at 392-93; Schochet, *supra* note 14, at 113.

25. FRIEDMAN, *supra* note 23, at 391-92.

abolished the distinction between actions at law and suits in equity; it abolished the forms of actions such as trespass, trespass on the case and replevin, and substituted a single action for all civil proceedings; and it abolished the complicated common-law pleading and fictions, reducing pleading to a simple statement of facts by the parties of their cause of action and defense.<sup>26</sup>

The Field Code, which was only an element of a much larger nationwide movement intent on codifying all of the common law, quickly became popular in other states.<sup>27</sup> In 1851, the Minnesota Territorial Legislature took the first step in adopting its version of the Code. The common-law system of forms of actions was abolished and united into one form of action known as a "civil suit."<sup>28</sup> Suits at chancery and equity remained distinguished from actions at law in the 1851 Code, but in 1853, this distinction was also abolished and thereafter all suits were conducted as civil actions.<sup>29</sup> "After this enactment, the two civil codes, those of Minnesota and New York, were fundamentally the same."<sup>30</sup>

In addition to improvements over common-law procedure, the legislature's adoption of the Code represented a shift in power over court procedures. The legislature was now very much in control, though some early common-law rules of

26. See PIRSIG, *supra* note 12, at 17-19; Schochet, *supra* note 14, at 114. See also MCFARLAND & KEPPEL, *supra* note 12, at § 121-122.

27. See PRESSER & ZAINALDIN, *LAW AND AMERICAN HISTORY* 385-428 (1980) and FRIEDMAN, *supra* note 23, at 403-11.

Nearly all of the mid-western states, including Minnesota, had adopted some version of the Field Code before the outbreak of the Civil War. Though originating in New York, the Field Code was much more popular in the west. This has been attributed to the spirit and open-mindedness of the young lawyers and judges of the western states; they were supposedly less adverse to change and more eclectic than the established eastern shore. *Id.* at 394-95.

28. See MINN. REV. STAT. ch. 70 (1851). The statute explained:

The distinction between the forms of actions at law, heretofore existing, are abolished; and there shall be in this territory hereafter, but one form of action at law, to be called a civil action, for the enforcement or protection of private rights, and the redress of private wrongs; except as otherwise expressly provided by statute.

*Id.* at ch. 70, § 1.

29. See MINN. REV. STAT., ch. 69 (1853). See also 1 W. FOLWELL, *supra* note 9, at 263-64.

30. Schochet, *supra* note 14, at 122. Schochet's article contains a thorough description of court procedure during this period and the events surrounding the adoption of the Field Code in Minnesota, including subsequent revisions and additions. See *id.* at 112-25.

pleading continued to be recognized for the sake of convenience and necessity.<sup>31</sup> The legislature also provided that the supreme court would have the power to “provide general rules for its own conduct,” but expressly stated that “no legal rule or statutory provision [was] to be violated or abrogated thereby.”<sup>32</sup> The judiciary’s rulemaking role was reduced during this period of the procedural code to promulgating rules concerning mainly internal procedures and court administrative matters.<sup>33</sup>

When Minnesota became a state in 1858, the civil code was still in effect. The new constitution provided that all the laws of the territory would continue unless they were repugnant to the constitution.<sup>34</sup> Minnesota’s new system of court procedure by statute, however, was not universally popular. For example, during the 1859–60 session of the legislature an attempt was made to revert back to the common law system of procedure, but the bill was “[t]abled, postponed several times . . . finally tabled again, and heard of no more.”<sup>35</sup>

The shift of power from the courts to the legislature was reinforced in 1857 when the constitution of Minnesota was drafted. The legislative branch was expressly given power over court procedures in a provision of the constitution that remained in the document for the next one hundred years. Section fourteen of the judiciary article read in part: “Legal pleadings and proceedings in the Courts of this State shall be

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31. “In some instances the objectionable features, as well as those that were desirable, were taken from the former system. The conservatism of the bench stimulated the tendency to look to the former rules and principles. . . .” MCFARLAND & KEPPEL, *supra* note 12, at § 122.

32. MINN. COLL. TERR. STAT., ch. 9, § 11 (1853).

33. In 1905, for instance, the Minnesota Legislature enacted the following statute:

[The supreme court] shall have all the authority necessary for carrying into execution its judgments and determinations, and for the exercise of its jurisdiction as the supreme judicial tribunal of the state, agreeable to the usages and principles of law; also to prescribe, and from time to time amend and modify, rules of practice therein, not inconsistent with the law, and to provide for the publication thereof at the cost of the state.

MINN. REV. STAT., ch. 5, § 73 (1905). The Minnesota Supreme Court periodically published such rules. See, e.g., MINNESOTA COURT RULES (1926) (rules concerning such matters as court clerk duties and filing procedures for the supreme court and district courts).

34. MINN. CONST., Schedule § 2 (1857).

35. Schochet, *supra* note 14, at 118.

under the direction of the Legislature.”<sup>36</sup>

The framers’ inclusion of this explicit provision is not surprising when considered in light of the political sentiments of the mid-nineteenth century. During the period when Minnesota’s constitution was written, there was an unyielding faith in the omniscience of the elected representative and a lasting suspicion of judicial officials and their “unchecked” powers.<sup>37</sup> This is evident from the debates at Minnesota’s first constitutional convention.<sup>38</sup> There is no evidence, however, of any discussion by members of the convention regarding article six, section fourteen. It is likely that some of the drafters of the constitution considered court procedure to be a fundamental power of the judicial branch. Therefore, this express provision was necessary so that there would not be a violation of the express separation of powers and no question of the legislature’s ability to enact codes of procedure.<sup>39</sup> This legislative control over court procedure continued in Minnesota—and in other states adopting the Field Code—for at least three quarters of a century, before the power reverted back to the courts.

36. MINN. CONST. art. VI, § 14 (1857, repealed 1957).

37. Roscoe Pound explained:

Along with the rigid analytical separation of powers there went for a time an idea of omniscience of the legislature. . . . It is an echo of an idea that goes back to the beginnings of our polity. Despite our constitutional theory of coordinate and coequal departments of government, the legislative department claimed the hegemony and in large part maintained it down to the Civil War. As representatives of the sovereign people, legislators assumed that all the powers of the people were devolved upon them.

Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 34–35 (1952).

Consider also the statement of Anderson and Lobb describing the distrust of the executive branch:

Just as the English royal colonies in America before the Revolution, having suffered from the excesses of powerful, appointed governors, reacted against a continuance of “one man rule” when they drew up their first state constitutions, even so did some of the new states in the west whose experience under powerful territorial governors had been none too happy, create for themselves executives much weakened as compared to the territorial governors.

ANDERSON & LOBB, *supra* note 9, at 33.

38. For example, when the Democrats took up debate on the judiciary article of their proposed constitution, the convention members discussed at length the question of whether to require supreme court justices to face elections. See THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 493–517 (Goodrich pr. 1857). See also FRIEDMAN, *supra* note 23, at 371–84 (discussing the trend throughout the country of electing judges).

39. See also *infra* note 63.

### B. *Procedural Reform and the Judicial Rulemaking Movement*

In the early twentieth century, control over court procedure by the legislative branch and particularly the Field Code model of procedure were increasingly coming under attack.<sup>40</sup> This assault on legislative control over procedure—led primarily by members of the academia and the American Bar Association—was due to a discontent in the legal profession over the legislature's disinterestedness and lack of competence in procedural reform and the resulting general inefficiency of court procedure. It was also felt that a lawyerly balance needed to be struck between the fictionalized pleadings of the common-law courts and the Code's simplistic and layman-like pleadings and presentation of the issues.<sup>41</sup>

The nationwide movement for court procedural reform achieved its first success at the federal level. In 1934, Congress passed an enabling act granting authority to the United States Supreme Court to determine the rules of civil procedure for the federal courts. When state courts have undertaken to adopt rules of procedure they have followed the example set on the federal level. For instance, the Minnesota Legislature passed a similar act in 1947. This section will review this movement for procedural reform and the rise of the judicial rulemaking power at the federal level and in Minnesota.

#### 1. *The Federal Enabling Act of 1934*

In 1873, as part of the general overhaul of the English judicial system, Parliament included a provision that the newly created Supreme Court would have the power to promulgate rules of procedure. Little notice of this was taken in the United States prior to the beginning of the twentieth century. In 1906, Dean Roscoe Pound gave his famous address in St. Paul, Minnesota entitled, "The Causes of Popular Dissatisfaction with the Administration of Justice," in which brief mention of the subject was made.<sup>42</sup>

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40. See FRIEDMAN, *supra* note 23, at 393-403.

41. See PIRSIG, *supra* note 12, at 6-7.

42. "A modern practice act lays down the general principles of practice and leaves details to rules of court." 29 A.B.A. RPTS. 395, 413 (1906). Dean Pound later changed his views on the role of the legislature. For a discussion of Pound's rulemaking approach, see Browde & Occhialino, *supra* note 3, at 421-25. Pound also wrote several articles regarding rulemaking: Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388 (1910); Pound, *Regulation of Judicial Procedure by Rules of Court*,

Shortly thereafter, the American Bar Association took up the subject. It evidently concluded that the broader procedural reforms suggested by the Pound address could only be achieved through court rules and not by legislation. It decided also that it would focus on obtaining such authority for the United States Supreme Court in civil actions. It created the Committee on Uniform Judicial Procedure, headed by Mr. Thomas W. Shelton, to promote the necessary legislation.

Mr. Shelton devoted his energies for the next twenty years to attempting to get favorable congressional action on the bills he perennially sponsored that would give the Court rulemaking power. All of his efforts failed. His principal opponent was Senator Thomas J. Walsh, Chairman of the Senate Judiciary Committee, who once remarked, "Such reverses neither discourage nor deter the principal proponent of the measure. It defies death."<sup>43</sup>

Senator Walsh's principal arguments were that under the Conformity Act of 1872, under which procedure in civil cases was to conform, "as near as may be," to the procedure of the state in which the federal trial took place, lawyers needed to know but one procedure, that of the state. If the United States Supreme Court should issue new rules for federal courts it would result in lawyers having to get acquainted with two distinct systems of procedure. He argued further that the Supreme Court was in no position to take on the added burden that would be entailed if it had to prepare a system of procedural rules.

The proponents replied that under the Conformity Act there were so many exceptions to following state procedures that there was in fact no common system between the state and federal courts. They urged further that a legislative body was not competent to deal with problems of court procedure, that statutory provisions were rigid and difficult to change and that courts were more competent to understand the problems of procedure and by rules provide the necessary remedies. They

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10 ILL. L. REV. 163 (1915); Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926); Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J. 12 (1927); and Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952).

43. Address before the Tri-State Bar Association, 1926, reproduced in 55 A.B.A. RPTS. 525. See also Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 6 OR. L. REV. 1 (1926).

contended further that the simplified rules adopted by the court would be adopted also by the several states and hence provide a common procedure for both federal and state courts.<sup>44</sup>

In 1930, efforts to secure the rulemaking authority came to an end with Mr. Shelton's death. His successors, not equally dedicated, recommended to the association that the attempt to secure the rulemaking authority for the court be discontinued. The recommendation was adopted. It has generally been assumed that the failure to secure the desired legislation was attributable to Senator Walsh. It seems fair to say that while he was the leader of the opposition he could not have succeeded without the support of his congressional colleagues.

The 1932 election brought in a new administration and a new Congress, and with them, a new climate of change and reform that was not directed only to the then distressed economy. In a 1934 address to the American Bar Association the new attorney general announced that, with the approval of the President, he was asking Congress to enact legislation giving rulemaking power to the United States Supreme Court along the lines that the Association had so long advocated.<sup>45</sup> The proposed Act was enacted June 19, 1934.<sup>46</sup> On June 3, 1935, the Supreme Court appointed a fourteen member advisory committee to make recommendations to the Court on rules of civil procedure. William D. Mitchell, a name familiar to Minnesotans, was appointed its chairman and Dean Charles E. Clark of Yale University Law School its reporter.<sup>47</sup>

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44. The literature advocating these views was extensive. There were numerous articles in the legal journals during the twenties and thirties debating the merits of whether to vest the judicial branch with more rulemaking power or to maintain the legislature's control. See, e.g., *The Rule-Making Power: A Bibliography*, 16 A.B.A. J. 199, 200 (1930); *Symposium*, 6 OR. L. REV. 1 (1926); and *Symposium*, 13 A.B.A. J. 1 (Supp. 1927). For a historical account of the dispute, see Clark & Moore, *A New Federal Civil Procedure—I. The Background*, 44 YALE L. JOUR. 387 (1935); Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934). For an earlier Minnesota article that argued for restoring the rulemaking power in the judicial branch, see Morgan, *supra* note 22, at 81.

45. See Cummings, *Immediate Problems for the Bar*, 20 A.B.A. J. 212, 213 (1934). The Attorney General notes that three prior presidents, Taft, Wilson and Coolidge had also approved this legislation.

46. 48 Stat. 1064, ch. 651.

47. Professor Wilbur H. Cherry of the University of Minnesota Law School and Professor Edmund Morgan, then formerly of the University of Minnesota Law School, were also members of the advisory committee. The author Pirsig succeeded



In 1935, the Committee submitted its first draft of the rules to the profession for comment, suggestions and criticism. As Dean Clark observed:

Now we come to one of the most interesting and important of the various steps in cooperative effort at law reform—for the entire bar and bench of the country in effect is invited to scrutinize and to criticize the preliminary draft of the rules which the Committee has prepared.<sup>48</sup>

On December 20, 1937, the final revised draft was submitted to the Court which laid the rules before Congress. The rules became effective because Congress failed to take action within the time specified by the Act.

The question occurs, why was enabling legislation deemed necessary? The procedure by which litigation is presented is vital to a court's proper performance of its duties. Control over that procedure is necessary if the court is to perform its judicial functions with maximum efficiency and effectiveness. For similar reasons, courts have uniformly held that the constitution grants them inherent control over the legal profession.<sup>49</sup> The legislature consists primarily of laymen not familiar with court procedures or the problems they present. The Field Code of Civil Procedure was a clear example of rigid statutory provisions which invited litigation over the meaning of its terms and constant attempts at statutory changes.

Why did the original proponents of court rulemaking power not invoke the inherent power of the courts to control their own procedures rather than vainly seek legislative authorization? The reasons may be found in an article written by Dean Pound.<sup>50</sup> He made a persuasive case for the position that when the United States Constitution established the United States Supreme Court, it was intended that the Court should have those powers then exercised by similar courts in England. At that time, the King's Bench Court had full rulemaking power not only for proceedings before it but also for lower courts as well. Hence, Dean Pound maintained, the United States Supreme Court equally has these powers without the necessity of legislative action.

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Professor Cherry on the committee. A complete list of the membership of the original advisory committee is listed in 21 A.B.A. J. 398 (1935).

48. Clark, *The Proposed Rules of Civil Procedure*, 22 A.B.A. J. 447 (1936).

49. See *infra* note 167.

50. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926).

Nevertheless, Dean Pound recognized the realities of the situation then existing. Beginning in the early and middle part of the nineteenth century, and subsequently when Dean Pound wrote, court procedure was governed almost entirely by statute. The Field Code of Civil Procedure, adopted in over twenty states, was an example.<sup>51</sup> To hold that the power to provide for court procedure constitutionally resided exclusively in the courts to the exclusion of the legislature would have invalidated this extensive legislation. No court rules being in existence, this would have left a major procedural vacuum throughout the country. Hence, Dean Pound wrote:

It is a misfortune that American courts ever gave up their control of procedure. It may be that today, after seventy-five years of codes and practice acts and prolific procedural legislation, we can't go so far as to pronounce such legislative interference with the operations of a coordinate department to be unconstitutional. Perhaps the ground is so far debatable that the courts could not have resisted legislative annexation of that domain. Today, possibly, we must concede that the legislature may enact codes of procedure and detailed practice acts. Equally, however, we should insist that the legislature ought not to do such things, not merely on grounds of expediency and for the sake of a better and more effective administration of justice, but as a matter of due regard for the constitutional system of separation of powers.<sup>52</sup>

Recognizing the prospect of otherwise creating a chaotic situation, the advocates of rulemaking authority accepted the assumption that statutory provisions on court procedures were valid and that, as incident thereto, it was necessary to obtain legislative approval before courts could exercise their rulemaking function. Many states thereafter followed the example and enacted enabling legislation without considering the conditions which originally made it necessary.

## 2. *The Minnesota Enabling Act of 1947*

In response to the federal movement for court and procedural reform, the members of the Minnesota State Bar Association appointed a committee at their annual convention in 1936 for the purpose of considering two propositions:

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51. See *supra* note 27.

52. Pound, *supra* note 50, at 601.

(1) The feasibility and advisability of conferring general rule-making power in matters of practice and procedure in the district courts of this state upon the supreme court of this state under appropriate enactments.

(2) The feasibility and advisability of conforming the Minnesota system of practice and procedure in the district courts to the system eventually to be prescribed by the Supreme Court of the United States to the federal district court, to the end that the evident advantages of such uniformity may be secured. . . .<sup>53</sup>

The group appointed for this purpose was called the "Committee on Rule-Making Power of Courts—Conformity of Minnesota and Federal Practice." Its membership included Professor Wilbur H. Cherry, an original member of the federal advisory committee on rules of civil procedure.

In 1937, following a long and insistent effort by the bench and bar of Minnesota, the legislature created a Judicial Council for the purpose of the "continuous study of the organization, rules and methods of procedure and practice of the judicial system of the state, and of all matters relating to the administration of said system and its several departments."<sup>54</sup> This Council was composed primarily of prominent members from Minnesota's legal establishment. In early 1938, the Council appointed a committee for the purpose of conducting a study of the proposed federal rules of civil procedure and "ascertaining which of them might be recommended for adoption in this state."<sup>55</sup> This committee of the Judicial Council worked in cooperation on this project with the bar association's Committee on Rule-Making Power of Courts.<sup>56</sup>

Throughout the remaining year, these two committees held joint meetings each week, during which the new federal rules were examined and debated. In December of 1938, the final report of the committees and their draft of the rules as proposed for Minnesota were submitted to the Judicial Council. Several thousand copies of the proposed rules were then mailed by the Council to every lawyer and judge in Minnesota

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53. Proceedings of the Minnesota State Bar Association, July 10, 1936, *reprinted in* 21 MINN. L. REV. at 124 (Supp. 1936).

54. 1937 Minn. Laws ch. 467, sec. 1.

55. THE JUDICIAL COUNCIL OF THE STATE OF MINNESOTA, FIRST REPORT 19 (1939) [hereinafter COUNCIL I].

56. *Id.*

for the benefit of their comments and review. The rules were also published in an appendix to the Judicial Council's first report to the legislature in 1939. In addition, this council report included a recommendation that—subject to examination of the proposed procedures by the bench and bar—the rules be adopted *by statute* in Minnesota.<sup>57</sup> No action, however, on this recommendation was taken during the following session of the legislature.<sup>58</sup>

In their second report, issued in 1941, the Judicial Council summarized the legal profession's reaction to the proposed rules. The response being mainly in favor of the rules, the Council again recommended that the legislature make changes to Minnesota's procedural code so that practice in Minnesota would conform more closely with that of the federal courts.<sup>59</sup> In addition, the Council published the results of a Hennepin County Bar Association poll concerning the proposed rules and the rulemaking power. Members of the county bar were asked if they preferred the supreme court or the legislature to have the power over court procedures and the poll revealed overwhelming support in favor of vesting the rulemaking power in the judicial branch.<sup>60</sup>

In 1942, the Judicial Council submitted two separate recommendations to the legislature regarding the rulemaking power.

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57. The Council also explained that “[f]rom numerous sources has come the request that the Council consider the desirability of giving the Supreme Court power to make rules. . . .” *Id.* at 22. The Council commented, however, in a brief section on the topic, that the subject had “not received the attention or study necessary” to take any action or make any recommendation. *Id.*

58. The bar association's Committee On Rule-Making Power of Courts reported as follows:

A majority of this committee believed it unwise to introduce a bill at the 1941 general session of the Legislature. One reason was that lawyers differ so decidedly on the proposed changes recommended by the Judicial Council that a bill adopting those changes would have little chance of passage. Another reason was that such a bill might injure other then pending bills recommended by this bar association. . . .

*The trend of opinion appears in favor of an act placing the rule making power in the Supreme Court as the best means of accomplishing the desired object—better than statutory detailed legislation.*

Report of the Committee on Rule Making Power of Courts—Conformity of Minnesota and Federal Practice (1941) (emphasis added).

59. THE JUDICIAL COUNCIL OF THE STATE OF MINNESOTA, SECOND REPORT 29 (1941) [hereinafter COUNCIL II].

60. The question posed to members of the bar was, “Do you favor giving the supreme [*sic*] court general power to make all rules governing proceedings in civil actions rather than by legislative enactment?” *Id.* at 26–27. The result showed that 215 members voted “yes” and only 25 voted “no.” *Id.*

The first recommendation, published in the Council's third report, was that a statute be passed to enable the supreme court to promulgate its own rules of civil procedure.<sup>61</sup> The enabling statute recommended by the Council was very similar to the statute passed by Congress in 1934.<sup>62</sup> The Council explained some of the rulemaking advantages of the judiciary:

The making of procedural rules is a highly technical process and should be in the hands of those with the widest experience and in most direct contact with their operation. It is not a subject for anyone without legal training. . . . The court is in constant session and is always available to make the needed changes.

It is no criticism of the Legislature to say that the subject is not one suited to the legislative process. The Legislature is usually engaged in the consideration of a great number of important public questions calling for immediate consideration. It is not, therefore, in a position to give the time and attention called for in considering numerous changes that may be needed in the details of practice and procedure. . . .

It is sound policy, it is believed, to place the burden and responsibility for the procedure in our courts upon the courts themselves. When defects in the administration of justice are complained of it is the courts who are blamed. The courts, therefore, should have the responsibility and the ability to meet such criticism by such corrections of procedure as may be necessary.<sup>63</sup>

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61. THE JUDICIAL COUNCIL OF THE STATE OF MINNESOTA, THIRD REPORT 12 (1942) [hereinafter COUNCIL III].

62. *Id.* at 12 (proposed statute reproduced).

63. *Id.* at 16. The Council also explained the following with regard to the constitutional ability of the legislature to delegate the rulemaking power to the court:

There is no constitutional difficulty in conferring the recommended rule-making power upon our Supreme Court. Art. 6, Sec. 14, provides: "Legal pleadings and proceedings in the courts of this State shall be under the direction of the Legislature." This is merely an enabling clause and not a restrictive one. It gives the Legislature power to legislate on the subject. It does not purport to say that the power of the Legislature on the subject shall be exclusive. Art. 3, Sec. 1, provides: "The power of government shall be divided into three distinct departments . . . legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, *except in the instances expressly provided in this constitution.*" [Italics in original.] *Art. 6, Sec. 14, was deemed necessary in order to enable the Legislature to deal with the subject, and is thus a recognition that prescribing rules of practice and procedure is fundamentally a judicial function.* The Legislature may, therefore, direct the court to prescribe these rules within the foregoing constitutional provisions.

*Id.* at 17 (latter emphasis added).

When the bill was submitted in the 1943 session of the legislature it failed in the senate by a vote of thirty-four to twenty-eight.<sup>64</sup> The bar association committee on rulemaking reported that “[t]he objections . . . apparently came partly from misunderstanding and partly from differences of view respecting the form of the bill.”<sup>65</sup>

The second proposal of the Judicial Council in 1942 was more sweeping in scope: the Council’s Committee on the Unification of the Courts recommended an entire revision of the judiciary article in Minnesota’s Constitution. The purpose was to reorganize and modernize the court system, eliminate the election of judges, and confer directly on the courts the rulemaking power.<sup>66</sup> The proposed amendment would have conferred full and unchecked rulemaking power on the supreme court.<sup>67</sup> The Committee referred to the 1857 provision of the Minnesota Constitution granting the legislature the power over court procedure as “archaic” and of “an earlier day having a simpler civilization.”<sup>68</sup>

Under the [proposed amendment, any statutes then in exist-

64. The following was explained later in a bar association committee report: It was reported to pass by the Senate Judiciary Committee February 8th, went on general orders, but on February 15th was defeated by a vote of thirty-four against twenty-eight. On February 17th a motion to reconsider was lost by a vote of twenty-four to thirty-six.

In the committee meetings of the House and Senate the measure was explained and supported by Federal Judge John B. Sanborn, by Wilbur H. Cherry and John F.D.Meighen, . . . and by Ex-Justice Maynard E. Pirsig, with others. No substantial opposition developed at either committee hearing.

Report of Committee on Rule-Making Power of Courts—Conformity of Minnesota and Federal Practice (1943).

65. Report of the Committee on Rule-Making Power of Courts—Conformity of Minnesota and Federal Practice (1944).

66. See REPORT OF THE COMMITTEE ON THE UNIFICATION OF THE COURTS TO THE JUDICIAL COUNCIL OF MINNESOTA (1942) [hereinafter COUNCIL IV].

67. “[The supreme court] may prescribe, for all divisions of the general court, *rules of practice and procedure and of evidence*, and may delegate to the other divisions or to the administrative council such rule-making power as its deems expedient.” *Id.* at 11 (quoting from section two of the proposed judiciary article) (emphasis added).

68. The Committee explained:

The explanation of the inadequacy of our present judicial system lies in the fact that it was adopted to meet the needs of an earlier day having a simpler civilization and very different economic and social conditions. It has never adjusted to the tempo of the present day, with all of its economic and social complexities. . . . Our Constitution was adopted from other Constitutions of still earlier adoption. It is not very surprising, therefore, that some of its provisions should seem rather archaic to us of today. For example, it is now agreed on all sides that the rule-making power belongs in the courts. Yet we find in our Constitution a provision (Section 14 of Article VI), of undetermined import, declaring that: “Legal pleadings and proceedings in the

ence and inconsistent with the court's rules would be superseded by court promulgated rules. It is doubtful that the legislature, under this amendment, would have had the power to pass any statutes concerning court procedure.<sup>69</sup> Although the Committee's effort was nationally praised as an "outstanding contribution to the science of judicial administration,"<sup>70</sup> the recommendation was never adopted in Minnesota. "In the state it received a cold, if not hostile reception, and no action, legislative or otherwise, was taken on it."<sup>71</sup>

In June of 1944, the Judicial Council published a special thirty-two page pamphlet titled "Revised Report on the Rule

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courts of the State shall be under the direction of the legislature." It is time that our whole judicial structure should be overhauled and modernized.

*Id.* at 7-8.

69. "All rules of the supreme court and of the administrative council adopted pursuant to the authority conferred by this article . . . shall have the force and effect of law and shall supersede all statutes and laws inconsistent therewith." *Id.* at 15 (quoting section ten of the proposed amendment).

70. See *Minnesota Plans Thoroughly Modern Court System*, 26 JOUR. AMER. JUD. SOC. 133 (1943). The Society commented:

Whether or not it is ever adopted by the people, the mere formulation of the plan is an outstanding contribution to the science of judicial administration. The significance of the statement that it brings together the best thinking and experience on a variety of topics is revealed by an examination of its text. . . . Section two [of the proposed amendment] adds Minnesota to the growing list of states wherein the supreme court exercises full rule-making power.

*Id.* at 133.

71. Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 816 (1956).

Part of the hostility toward the recommendation came from Professor William Anderson, a noted political scientist from the University of Minnesota and author of *THE HISTORY OF THE CONSTITUTION OF MINNESOTA*. Anderson was opposed to the full and unchecked rulemaking power that would have been granted to the courts. He was also of the opinion—possibly because of the 1857 provision—that court procedure was a "legislative matter." He suggested "limited" legislative involvement with rulemaking, as it operates on the federal level, where the judicial branch decides the rules of procedure and, after a certain time period, if they are not disapproved by a majority in each house, the rules have the effect of law. Anderson explained:

The ways of democracy are a little slow and cumbersome—but it is not necessary to push them aside so completely to achieve most or all of the result that is now desired. *It is not essential to destroy the principle of legislative supremacy in legislative matters*, and some day when the present wave of judicial reform has given way to other tendencies even the leaders of the bench and bar may be thankful to have left in the hands of the people's chosen legislators the power to correct the archaic rules of practice, procedure, and evidence that then prevail.

Anderson, *Reorganizing Minnesota's Judiciary, A Layman's View*, 27 MINN. L. REV. 383, 389 (1943) (emphasis added).

Making Power of the Supreme Court.”<sup>72</sup> This report, intended to persuade the Minnesota Legislature to confer rulemaking on the supreme court, presented an extensive digest of the rulemaking power in other states.<sup>73</sup> No proposal for an enabling act was submitted, however, in the 1945 session of the legislature.<sup>74</sup> But in 1947, eleven years after the bar association first took up the issue, the legislature finally passed an enabling act which allowed the supreme court to promulgate rules of civil procedure.<sup>75</sup>

The provisions contained in the act were nearly identical to the first enabling act of Congress and the legislation recommended by the Minnesota Judicial Council in their 1942 report. The enabling act authorized the supreme court “to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts” of the state, provided that the rules did not “abridge, enlarge, or modify the substantive rights of any litigant.”<sup>76</sup> The court was directed to appoint an advisory committee “consisting of eight members of the bar of the state and at least two judges of the district courts and one judge of a municipal court to assist” the supreme court “in considering and preparing such rules as” they may adopt.<sup>77</sup> The legislature also provided the following provision:

All present laws relating to pleading, practice, and procedure, excepting those applying to probate courts, shall be effective as rules of court until modified or superseded by subsequent court rule, and upon the adoption of any rule pursuant to this act such laws, in so far as they are in conflict therewith, shall thereafter be of no further force and effect.<sup>78</sup>

However, the legislators reserved the following right: “This act shall not abridge the right of the legislature to enact, modify, or repeal any statute or modify or repeal any rule of the

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72. THE JUDICIAL COUNCIL OF THE STATE OF MINNESOTA: REVISED REPORT ON THE RULE MAKING POWER OF THE SUPREME COURT (1944).

73. *Id.* at 14–32.

74. The bar association committee explained that “[t]o avoid overloading the legislature with Bar Association bills, it was determined not to press for such legislation at the session just ended [1945].” Report of the Committee on Rule Making Power of Courts and Conformity of Minnesota and Federal Practice (1945).

75. 1947 Minn. Laws, ch. 498, secs. 1-8 (approved April 23, 1947).

76. 1947 Minn. Laws, ch. 498, sec. 1.

77. 1947 Minn. Laws, ch. 498, sec. 2.

78. 1947 Minn. Laws, ch. 498, sec. 6.



supreme court adopted pursuant thereto.”<sup>79</sup>

Following the passage of the enabling act, the Minnesota Supreme Court immediately formed an advisory committee to prepare a draft of the civil rules. After more than two years of work by the committee, these rules were submitted to the court in 1950 and circulated among the bench and bar for comments and debate. Subsequently, revisions were made by the committee and an open hearing was held by the court the following year for the purpose of receiving public testimony on the rules. The Rules of Civil Procedure were eventually adopted by the court in 1951, effective January 1, 1952.<sup>80</sup>

In addition to the procedures, the court published two appendices regarding the statutes then in effect. Appendix A listed statutory and special proceedings that were not governed by the new rules if inconsistent with or in conflict with the procedure of such statutes. And Appendix B provided cross-reference lists of those statutes that were superceded by the rules.<sup>81</sup> In the interests of uniformity of practice, the new Minnesota rules bore a strong resemblance to the federal rules of civil procedure—even the numbering was similar.<sup>82</sup> In later years, as explained below, the Minnesota Legislature followed the same enabling method in the areas of criminal procedure,

79. 1947 Minn. Laws, ch. 498, sec. 8.

80. For a short summary of this history, see 1 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE: RULES OF CIVIL PROCEDURE ANNOTATED at iii-vi (1970).

81. In 1959, the supreme court amended Rule 81.01(3) (formerly Rule 86.02) to explicitly provide that *all* statutes, with the exception of those listed in Appendix A, were superceded by the rules. According to the Advisory Committee notes, “For the convenience of the bench and bar the Advisory Committee undertook to list superceded statutes in Appendix B, but since it cannot give assurance that all are included it recommends this amendment to prevent possible misunderstandings as to the non-exclusive character of Appendix B.” G. YOUNGQUIST & B. BALCIK, MINNESOTA RULES PRACTICE 115 (Supp. 1968). The following year the court ruled that Appendix B was not an exclusive list of all statutes superceded by the rules. *State v. Roban*, 259 Minn. 88, 90, 107 N.W.2d 51, 53 (1960). See also *infra* notes 170-75 and accompanying text.

82. As the author commented sometime later, however,

[t]he federal rules, and hence the Minnesota rules of procedure, have as their starting point the best to be found in the Field Code and much of the procedure under them varies little from the code. The difference between the practice under the rules and that under the former Code is not as great as lawyers experienced when states shifted from the old common law and separate equity procedure to the Field Code.

PIRSIG, *supra* note 12, at 4.

For a collection of articles published at the time the rules were first promulgated, see *Symposium: Minnesota Rules of Civil Procedure*, 36 MINN. L. REV. 565 (1952).

evidence and juvenile procedure.<sup>83</sup>

### C. *The First Constitutional Commission*

In 1947, a Constitutional Commission was formed by the Minnesota Legislature to study the state's constitution and to recommend changes, "if any," that were necessary to improve the document.<sup>84</sup> The Constitutional Commission formed a Judiciary Committee for the purpose of considering any revisions necessary to the constitution's judiciary article. In 1948, the Judiciary Committee published a draft of their proposed amendment, which included an annotated commentary.<sup>85</sup> The purpose of publishing the committee's work was to survey and solicit comments from the bench, bar, and others on the proposed amendment.

The Committee's draft of the judiciary article recommended that the original constitutional provision granting the power over court procedure to the legislature be removed.<sup>86</sup> It further recommended that complete rulemaking power be vested in the supreme court.<sup>87</sup> The proposed constitutional language read as follows: "After public notice and opportunity for hearing thereon, [the supreme court] may prescribe rules of practice, procedure, and evidence for all courts, which rules may not change any substantive right. It may delegate to other courts appropriate rule-making power as to the practice and procedure therein."<sup>88</sup> The annotation, however, explained, "The Committee is in doubt whether the rule-making power conferred upon the court should apply to *evidence*, and desires the reaction of the bench and bar and others interested."<sup>89</sup>

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83. See *infra* notes 107-47 and accompanying text.

84. REPORT OF THE CONSTITUTIONAL COMMISSION OF MINNESOTA 9 (1948) [hereinafter COMMISSION REPORT I]. The commission was divided into committees to discuss the constitution in subject categories. After each committee had completed its preliminary investigation, it issued a report to the commission as a whole with their recommendations for reform. The whole commission, after considering the various committee reports, then issued a final report to the governor. *Id.*

85. Pirsig, *Preliminary Report on Revision of the Judiciary Article of the Minnesota State Constitution*, 32 MINN. L. REV. 458 (1948).

86. *Id.* at 460.

87. *Id.*

88. *Id.*

89. *Id.* (emphasis in original). The committee members questioned granting rulemaking authority on evidence because the nature of rules on evidence are sometimes more substantive than procedural. See *infra* notes 178-79 and accompanying text.

The response this received from the bench and bar was almost completely in favor of vesting the rulemaking power—including rules on evidence—in the supreme court.<sup>90</sup>

When the Judiciary Committee submitted their final report to the full commission, they mysteriously omitted the rulemaking provision. While at first they seemed committed to recommending that the supreme court have full rulemaking power, they now rejected the provision entirely and with no apparent explanation.<sup>91</sup> The full commission, upon receipt of the Judiciary Committee's report, included a provision recommending that, "[r]ules of practice, procedure, and evidence for all courts shall be made *as provided by law*."<sup>92</sup> In other words, court procedure would remain under the ultimate control of the law-making body: the legislature. It is likely that this phrase would have left the rulemaking power in the proposed constitution essentially the same as it was in the original document.<sup>93</sup> The Commission's suggestions for amendments, however, did not receive the approval of the legislature and were not submitted to the voters. The failure of the Commission's suggestions to receive approval was probably due more to opposition to other amendment suggestions than to the judiciary article itself.<sup>94</sup>

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90. The comments of lawyer Charles H. Richter were typical of most:

It is my belief that the men on the bench are best qualified to determine the probative value of specific types of evidence. They are much more experienced in that respect than are the men in the legislature. The lawyers in the legislature are naturally the best qualified of that group, but it often happens that we have lawyers in the legislature who are not skilled trial lawyers, and who have much less experience with the probative force of evidentiary facts of different kinds. Give the justices the power to establish, after public notice and opportunity for hearing, and we should have the best rules of evidence.

Letter from Charles H. Richter to Hon. Leroy E. Matson, Chairman of the Judiciary Committee, May 14, 1948 (original on file with the Minnesota Historical Society, Manuscripts Division).

91. FINAL REPORT ON REVISION OF JUDICIARY ARTICLE OF MINNESOTA STATE CONSTITUTION (1948). It is possible that the Committee decided the rulemaking provision was no longer entirely necessary since the legislature had recently passed an enabling act allowing the supreme court to promulgate rules of civil procedure.

92. COMMISSION REPORT I, *supra* note 84, at 42 (emphasis added).

93. The consultant to the Commission's Judiciary Committee wrote ten years later that, "[a]rticle VI, as it appeared in the final report of the Commission, eliminated many of the more liberal features of the preliminary draft and reduced to a corresponding degree the changes it would effect in the existing judiciary article." Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 816-17 (1956).

94. *Id.* at 817.

*D. The Minnesota Bar Association and the 1956 Amendment of the Judiciary Article*

Despite the rejection of the wide scope of the first Constitutional Commission's recommendations, many of the constitutional changes the Commission suggested were eventually adopted by individual amendment.<sup>95</sup> In 1955, under the guiding hand of the Minnesota Bar Association, the legislature finally passed a revision of the judiciary article in the Minnesota Constitution. The draft of the judiciary article that was introduced in the legislature was in many respects a duplicate of the 1946 Constitutional Commission's efforts. In fact, Minnesota Supreme Court Justice Leroy E. Matson, a member of the bar association committee that was responsible for the proposal, had been chairman for the Judiciary Committee of the Constitutional Commission in the 1940s. On at least one important point, the bar association's proposed judiciary article was an exact duplicate of Matson's earlier commission report: the rulemaking power was not mentioned.<sup>96</sup>

There is no evidence of any discussion of the court's rulemaking power by the bar association when it prepared its amendment proposal for the legislature.<sup>97</sup> There is also no indication that the bar association's proposal received much public debate by the legislators that approved the amendment.<sup>98</sup> In fact, the passage of the amendment through the legislature appears to have been a sort of silent compromise: at

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95. See Mitau, *Constitutional Change by Amendment: Recommendations of the Minnesota Constitutional Commission in Ten Years' Perspective*, 44 MINN. L. REV. 461 (1960).

96. For a copy of the judiciary article as proposed by the bar association, see Report of the Constitutional Revision Committee of the Minnesota State Bar Association, reprinted in BENCH & B. MINN., May 1954, at 92-94.

The chairman of the bar association committee responsible for the amendment of the judiciary article was Charles B. Howard. Mr. Howard wrote an article outlining the changes in the judiciary article after the amendment was approved by the legislature but before its approval by the voters in 1956. According to Howard, "The Committee on Constitutional Revision of the Minnesota Bar Association adopted the proposal of the Constitutional Commission with a few minor changes. . . ." BENCH & B. MINN., Feb. 1956, at 13. Howard then described the changes in the new judiciary article but made no mention of the rulemaking power.

97. See Convention Proceedings of the Minnesota State Bar Association (1954) (copy on file with the Minnesota State Bar Association; the Constitutional Revision Committee discussion can be found on pp. 136-43).

98. See Minnesota House Judiciary Committee Journal, April 1955 (only copy is stored at the Minnesota Historical Society, Manuscript Division). The Senate Judiciary Committee Journal for that session has been missing for years.

the risk of losing all support for the bill, few suggestions for changes were publicly proposed.<sup>99</sup>

Following the passage of the bill by the legislature, it was approved by the voters of Minnesota in the fall of 1956.<sup>100</sup> Its success was no doubt encouraged by a special committee formed by the bar association "to conduct an active campaign for the approval of the amendment."<sup>101</sup> There has not been any constitutional change in the rulemaking power since that year and, as a result, rulemaking remains unmentioned in today's judiciary article. While this legislative compromise may have been politically convenient and expedient in 1955, the long term effect of omitting the rulemaking provision was to create the debate that exists today over which branch has the ultimate authority.

### *E. The Second Constitutional Commission*

In the seventies, another commission was formed to study

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99. At the time of the amendment, Associate Justice Lawrence Yetka of the Minnesota Supreme Court was Chairman of the House Judiciary Committee. He recalls that the omission of the rulemaking provision was a compromise of sorts between those forces that felt it should be under the court's control and those that felt it should remain with the legislature. Justice Yetka also commented that the Minnesota Bar Association—the sponsor of the bill to amend the judiciary article—was very much opposed to any changes being made to their carefully drafted bill. The main controversy at the time, however, was not the rulemaking power, instead the debate involved the elimination of the justices of the peace and judicial redistricting. Telephone interview with Lawrence Yetka, Associate Justice of the Minnesota Supreme Court (Oct. 13, 1987).

The late Professor G. Theodore Mitau of Macalester College, in a 1960 analysis of the first constitutional commission's proposals and their eventual acceptance, seemed to agree that the omission of the rulemaking provision was a compromise:

There is something in the very nature of the amendment process, namely, that it is difficult to debate selected aspects of a proposed amendment without endangering its passage and thus forfeiting the many real reforms latent in the measure as a whole. Critics of the judiciary article, for example, may well have felt concern over the extent to which rules of evidence and procedure might pass out of the hands of the judiciary, and they may have feared loss of the independence of the judiciary from other branches of government; and yet the benefits of the proposed amendment so far outweighed these misgivings that many of them voted for it notwithstanding.

Mitau, *supra* note 95, at 480.

100. In the general election on 6 November 1956, 939,957 voted "yes" and 307,178 voted "no" on the amendment.

101. Proceedings of the Minnesota State Bar Association, June 24, 1955, *reprinted in* BENCH & B. MINN., Sept. 1955, at 36. This committee was formed on the recommendation of Charles B. Howard and the bar association's Constitutional Revision Committee.

possible revisions to the state constitution.<sup>102</sup> The rulemaking power was considered by this commission, as it was by the first constitutional commission over twenty years before. The organization of this second commission—composed primarily of legislators—was similar to the commission of the forties in that committees were formed to complete the preliminary research and report to the commission as a whole. In the Judicial Branch Committee Report of 1972, the members recommended that the following provision be adopted in Minnesota's Constitution: "The supreme court shall adopt rules governing the administration, admissibility of evidence, practice and procedure in all courts. These rules may be changed by the Legislature by a two thirds vote of the members elected to each house."<sup>103</sup> The members of the Committee commented, "The legislature has gradually recognized that this is really a function which is better served by the courts themselves."<sup>104</sup>

The Commission as a whole, with slight changes to the wording, agreed.<sup>105</sup> The Commission explained:

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102. "The Constitutional Study Commission of 1972 was authorized by Chapter 806, Laws of Minnesota 1971, adopted by the Legislature on June 4, 1971. The statute provided for a commission of 21 members. . . ." MINNESOTA CONSTITUTIONAL STUDY COMMISSION, FINAL REPORT 6 (1973) [hereinafter COMMISSION REPORT II].

103. MINNESOTA CONSTITUTIONAL STUDY COMMISSION, JUDICIAL BRANCH COMMITTEE REPORT 9 (1972).

104. *Id.* The full comments of the committee were as follows:

This provision is entirely new. In the past, the legislature has provided for these matters by law. At one time, the legislature passed detailed codes of procedure for criminal and civil cases and rules for the administration of courts, setting term dates, etc. The legislature has gradually recognized that this is really a function which is better served by the courts themselves. Accordingly, it has delegated substantial control over court administration to the Judicial Council (see MS 483.01-483.04) and the power to adopt rules for civil and criminal cases to the supreme court (see MS 480.05-480.059).

The provision proposed here would have double impact. The ability of the supreme court to adopt rules for judicial administration would assist the court in the implementation of a unified judicial system. The unified court should promote the efficient utilization of judicial manpower.

By ad hoc decisions the supreme court has, in effect, adopted rules of evidence. The authority granted in the proposed section would permit the adoption of an integrated, comprehensive code of evidence. In either case, the legislature could, by extraordinary majority, override the rules made by the supreme court. The ultimate responsibility of the legislature is thus recognized, but the section also acknowledges that the familiarity and competence of the judiciary in these areas should be given great weight.

*Id.* at 9-10.

105. The final report of the Constitutional Commission, issued in 1973, suggested the following phraseology: "The Supreme Court *should* adopt rules governing the administration, admissibility of evidence, practice and procedure in all courts. These

This proposed change would promote uniformity in lower courts and provide guidance to the bench and bar through a readily accessible code. It would permit adoption of integrated and comprehensive rules of evidence now accomplished on a case-by-case basis by the Supreme Court. The Legislature could, by a two-thirds majority, override a Supreme Court decision with respect to rules of evidence, practice and procedure. *The change thus recognizes the prevailing competence of the judiciary in these areas and its fundamental constitutional responsibility, but permits the Legislature to discharge its duty of responding to the needs of the citizens they represent in a democratic manner.*<sup>106</sup>

The Commission's suggested amendment does not seem to have found any favor or attention in the legislature since the publication of the Commission's report.

#### F. *Recent Rulemaking by the Minnesota Supreme Court*

Since 1951, when the Rules of Civil Procedure were first adopted in Minnesota, the state supreme court has developed procedural rules in a number of areas and continues to actively make revisions and reforms. In almost all instances, the court was acting out of need when it adopted a uniform set of rules: the procedure in the area was often ambiguous—a concoction of lower court rules, statutes and court decisions—and practicing attorneys were sometimes unsure of the proper rules to follow. The supreme court's rules helped to clear up this confusion and promote uniformity; they also provided a certain degree of consistency with federal rules.

In most areas of procedure, the court did not adopt rules until an enabling act was passed by the legislature. In Justice Scott's words, the court "stepped gingerly" when developing rules and tried to respect and comport with the desires of the legislative branch of government.<sup>107</sup> In a few areas, however, namely, appellate procedures and family court procedures, the court appears to have developed rules based on their inherent rulemaking power. This section will briefly describe each of the areas in which supreme court rules are presently in place.

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rules *should* be subject to change by the Legislature by a two-thirds vote of each house." COMMISSION REPORT II, *supra* note 102, at 23 (emphasis denotes change).

106. *Id.* (emphasis added).

107. Scott, *Rules Changes in Minnesota: How the Rule Making Process Work* 18 CRIM. JUS. INST., MINN. C.L.E. 491, 495 (1983).

*Civil Procedure.* Since the Rules of Civil Procedure were first adopted by the court in 1952, numerous revisions have occurred:

Significant amendments were made to the [rules] in 1959 and in 1968. These amendments corrected errors, resolved ambiguities, and again restored substantial conformity between the Minnesota rules and the federal rules. . . . Extensive amendments to the rules were adopted by the [supreme court] in 1975 and in 1985. These changes resolved some conflicts and incorporated some, not all, of the changes to the Federal Rules of Civil Procedure. . . .<sup>108</sup>

The most recent amendments to the rules were considered by the court in June of 1988.<sup>109</sup> In each instance in which the court was considering changes, an advisory committee was appointed for the purpose of studying revisions, comparing the federal rules, and recommending amendments.<sup>110</sup>

*Appellate Court Procedure.* The Rules of Appellate Procedure were first adopted by the supreme court in 1967, after several years of study by the court's advisory committee.<sup>111</sup> The rules were patterned after the Proposed Federal Rules of Appellate Procedure and were designed to govern all civil appeals in the state of Minnesota.<sup>112</sup> These rules were apparently promulgated by the court based on their inherent powers; and adopted in the absence of an explicit prior legislative enabling act allowing the court to promulgate rules that would supercede legislative statutes.<sup>113</sup> These appellate rules

108. 1 D. HERR & R. HAYDOCK, MINNESOTA PRACTICE: CIVIL RULES ANNOTATED vii-viii (2d ed. 1985).

109. See also *infra* note 202.

110. See, e.g., Order of the Supreme Court, Appointments to the Supreme Court Advisory Committee on Civil Procedure, October 7, 1983, reprinted in Minn. Rep. 339-343 N.W.2d xxix (1983). Apparently, this Committee was appointed by the court for a pre-determined term: "IT IS ORDERED that effective November 1, 1983, the following persons be, and hereby are, appointed to membership on the Supreme Court Advisory Committee on Civil Procedure for terms expiring December 31, 1987." *Id.*

111. See Adamson, *The New Appeal Rules*, BENCH & BAR MINN., Jan. 1968, at 5. See also Order of Supreme Court Prescribing and Promulgating New Rules of Civil Appellate Procedure in the Supreme Court, December 7, 1967 (issued by then Chief Justice Oscar Knutson), reprinted in 277 Minn. i (1967).

112. Under the current rules, an appeal in a criminal case is governed by the Rules of Civil Appellate Procedure except as otherwise provided in the Rules of Criminal Procedure. See MINN. R. CRIM. P. 28.01, subd 2.

113. The following statute was in place at the time, but does not mention any power to supercede statutes: "The supreme court shall have all the authority neces-



superceded over one hundred years of legislation in the area and, in particular, the legislature's Civil Appeal Code of 1963.<sup>114</sup> In recent years, another advisory committee was appointed by the court to consider amendments to the Rules of Civil Appellate Procedure. After months of study and an open hearing, the court adopted these amendments in 1983.<sup>115</sup>

*Criminal Procedure.* The first enabling act passed by the legislature after the enabling act for the rules of civil procedure was in 1971. This act prompted the supreme court to create and adopt the present Rules of Criminal Procedure.<sup>116</sup> Before the rules were adopted by the court, criminal procedure in the trial courts of Minnesota was governed by a "hodge-podge of legislation, supreme court decisions, and local court rules and customs."<sup>117</sup> A uniform statewide set of criminal procedures had been a recognized goal for many years.<sup>118</sup> These modern rules today govern the procedure for felonies, gross misdemeanors, misdemeanors and petty misdemeanors in all Minnesota district courts.<sup>119</sup>

When the enabling act for criminal rules was first passed by the legislature, the following precautionary provision was included: "Nothing herein contained shall be deemed to grant

sary for carrying into execution its judgments and determinations. . . . Such court shall prescribe, and from time to time may amend and modify, rules of practice therein. . . ." MINN. STAT. § 480.05 (1986).

The legislature, with the advent of the court of appeals, has also since passed another statute that enables the supreme court and appellate court to promulgate rules governing appellate procedure. *See* 1982 Minn. Laws, ch. 501, § 13 (codified at MINN. STAT. § 480A.11 (1986)).

114. MINN. STAT. §§ 605.01-605.225 (repealed in 1974 Minn. Laws, ch. 394, § 11). *See* 3 E. MAGNUSON, D. HERR & R. HAYDOCK, MINNESOTA PRACTICE: APPELLATE RULES ANNOTATED iv (2d ed. 1985). In the original appellate procedures of 1967, Rule 147.02 provided: "Upon the taking of effect of these rules the statutes listed in Appendix A are superceded with respect to practice and procedure in the Supreme Court." MINN. R. CIVIL APP. P. 147.02 (deleted in 1983). The appendix listing statutes superceded by the rules was not included in the revision of the rules in 1983.

115. *See* Order Promulgating Amendments to the Rules of Civil Appellate Procedure, November 10, 1983 (issued by Chief Justice Douglas Amdahl), *reprinted in* Minn. Rep. 339-343 N.W.2d lxxxix (1983). The Advisory Committee for Civil Appellate Rules has not disbanded, but information is unavailable about any meetings subsequent to 1983.

116. *See* 1971 Minn. Laws, ch. 250.

117. 1 H. McCARR, MINNESOTA PRACTICE: MINNESOTA CRIMINAL LAW AND PROCEDURE § 3 (1976).

118. *See Rules of Criminal Procedure*, BENCH & BAR MINN., June 1955, at 59 (early editorial advocating such rules).

119. MINN. R. CRIM. P. 1.01.

the supreme court power to amend or modify any statute.”<sup>120</sup> Nevertheless, the advisory committee appointed by the court produced a draft of rules that would have resulted in “the modification, amendment or repeal of virtually *all* Minnesota statutes governing criminal procedure.”<sup>121</sup> Considering the extensive work completed by the advisory committee, such revisions were apparently the intention of the court.<sup>122</sup> The actions of the court and its committee also suggest that the court believed it had the inherent authority to exceed the legislative restrictions in the enabling act.<sup>123</sup>

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120. 1972 Minn. Laws, ch. 250, sec. 7. The legislature also reserved the right to “enact, modify, or repeal any statute or modify or repeal any rule of the supreme court. . . .” 1972 Minn. Laws, ch. 250, sec. 8. The latter provision was essentially the same as the right reserved in the civil procedure enabling act of 1947. See *supra* note 79 and accompanying text.

121. Brief of Minnesota Public Defenders Association in Opposition to Adoption of the Rules at 5 (January 21, 1975) (copy on file at the Minnesota Supreme Court) (emphasis in original). The Public Defenders Association protested:

As the very [size of the proposed rules] suggests, the Committee vastly exceeded the authority available to it under § 480.059; their work would both affect numerous substantive rights and result in the modification, amendment or repeal of virtually *all* Minnesota Statutes governing criminal procedure. In at least one instance the Committee flew directly in the face of the clear language of the Constitution: former section 23.116, providing for eleven-twelfths verdicts in gross misdemeanor cases obviously violated Article I Sec. 4, a compromise admittedly insisted upon by prosecutors on the Committee as a prerequisite to their approval of the entire Proposed Rules.

*Id.* The authority cited for the last statement quoted read as follows: “[R]emarks of Committee member [David] Graven at the hearing in February, 1974.” *Id.* at n.4.

122. The advisory committee spent nearly four years working on the proposed rules; extensive studies were completed and compared; a draft of the rules was sent to attorneys and judges; public meetings were held around the state by the committee; and an open hearing was eventually held by the court before the rules were adopted in 1975. For a description of the process used to adopt the criminal rules, see Scott, *An Overview of the Minnesota Rules of Criminal Procedure* (1975) (reprinted in the preliminary material of the Rules of Criminal Procedure in MINNESOTA RULES OF COURT 101 (West 1988)). See also H. McCART, *The New Rules—A Plus for Both the Prosecution and the Defense*, HENNEPIN LAWYER, May-June 1975, at 4.

The advisory committee was also specifically instructed by Chief Justice Knutson to examine the then existing American Bar Association Standards of Criminal Justice with a view to their implementation.

123. A comment in an American Judicature Society’s survey of all the state supreme courts and their rulemaking power also indicates that at least some justices on the Minnesota court may have taken this approach:

The Judicial Article [of the Minnesota Constitution] does not clearly define the locus of the rule-making power. However, at least one provision must be mentioned, for it relates in an indirect way to the status of the state’s rule-making power. That provision vests the judicial power of the state in the Supreme Court, among others. *Minn. Const.* art. VI, § 1. . . . It should be noted that some members of the current Supreme Court would interpret Section 1 as the basis of such inherent judicial power.

The legislature eventually responded to the court by amending the enabling act so that criminal procedural statutes would be superseded by the court's promulgated rules.<sup>124</sup> The legislature stated, however, that a number of statutes were to remain in full force and effect despite the court's rules. These exceptions are listed in the present enabling act.<sup>125</sup>

*Evidence.* In 1977, the Minnesota Supreme Court adopted the present Rules of Evidence.<sup>126</sup> Prior to their adoption, Minnesota did not have a uniform evidence code. "Evidentiary rulings often were totally dependent on the common sense—and sometimes the whim—of the trial judge."<sup>127</sup> In 1975, an enabling act passed by the legislature prompted the court into acting in much the same fashion as they had with the criminal rules.<sup>128</sup> The advisory committee appointed by the court spent the following two years completing their work. In addition to extensive studies, the advisory committee circulated a draft of the rules to the bench and bar, and held two hearings for public debate. Before the rules were adopted, the court also held an open hearing to hear public testimony.<sup>129</sup> The rules eventually adopted by the court were designed with the common

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J. PARNES & C. KORBAKES, A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES 41 (1973). The statement quoted above was footnoted as follows: "This information was obtained from a letter to the American Judicature Society from the Minnesota Supreme Court which is now on file at the Society's main office." *Id.* Efforts to locate that letter have failed.

124. 1974 Minn. Laws, ch. 390, sec. 1.

125. 1974 Minn. Laws, ch. 390, sec. 7 (codified at MINN. STAT. § 480.059 subd. 7 (1986)). These statute exceptions included the following provision: "The supreme court shall not have the power to adopt or promulgate any rule requiring less than unanimous verdicts in criminal cases." MINN. STAT. § 480.059 subd. 7(i) (1986). *See supra* note 121.

126. *See* Thompson, *The New Rules of Evidence*, BENCH & BAR MINN., Sept. 1977, at 31.

127. Keyes, *Foreword* to 2 P. THOMPSON, MINNESOTA PRACTICE: EVIDENCE vi (1979). The desire for a uniform set of rules was even mentioned by the Second Constitutional Commission as an incentive for explicitly granting the rulemaking power to the courts. *See supra* note 106 and accompanying text.

128. *See* MINN. STAT. § 480.0591 (1986). Just as they had done with criminal procedure, the legislature limited the areas in which the court could promulgate rules. The following statutes were listed by the legislature as not within the limits of the court's power: statutes which relate to the competency of witnesses to testify; statutes which establish the prima facie evidence as proof of a fact; statutes which establish a presumption or a burden of proof; statutes which relate to the privacy of communications; and statutes which relate to the admissibility of certain documents. *See* MINN. STAT. § 480.0591, subd. 6 (1986).

129. THOMPSON, *supra* note 126, at 31.

law principles of evidence in mind. They were also modeled on the then newly adopted Federal Rules of Evidence.<sup>130</sup> Recently, in May of 1988, the supreme court formed another advisory committee to reconsider the rules and recommend changes to the court.<sup>131</sup> This committee is now in the process of hearing testimony and holding meetings, as its predecessor did ten years before.<sup>132</sup>

*Juvenile Court Procedure.* The Rules of Procedure for Juvenile Court were adopted by the court in 1983. Prior to 1983, procedure for juvenile proceedings in Minnesota was not governed by a uniform set of rules. "Hennepin County and Ramsey County had Rules that had evolved from their respective court. The remaining outstate courts had available to them the Rules of Procedure for Juvenile Court Proceedings in the Minnesota Probate-Juvenile Courts."<sup>133</sup> As a cure for this confusing array of rules and redundancy, an enabling act was passed in 1980 by the legislature.<sup>134</sup> In response, the supreme court, through its Juvenile Justice Study Commission, appointed a task force for the purpose of drafting a uniform set of rules.<sup>135</sup> After more than two years of work, the proposed rules were presented to the court and a public hearing was held to consider them before adoption. These rules have now been in force since 1983.<sup>136</sup>

*Family Court Procedure.* Prior to 1986, the only formal procedural rules in use for family court dissolution matters were those first adopted by the County Court Judges Association in 1978. There was some question though as to whether the Association's rules applied to the Family Court Divisions of Ramsey and Hennepin counties—those courts being a part of the district court structure.<sup>137</sup> In June of 1985, the Uniform Rules

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130. *Id.*

131. See Order of the Supreme Court Appointing Members to Supreme Court Advisory Committee on Rules of Evidence, C3-84-2138, May 4, 1988, reprinted in Minn. Rep. 420-422 N.W. 2d lxxvii (1988).

132. See *infra* note 192.

133. J. SONSTENG & R. SCOTT, MINNESOTA PRACTICE: JUVENILE LAW AND PRACTICE v (1985).

134. See MINN. STAT. § 480.0595 (1986).

135. See SONSTENG & SCOTT, *supra* note 133, at v.

136. See Order of the Supreme Court, In Re Adopted Rules of Procedure for Juvenile Court, May 1, 1983, reprinted in Minn. Rep. 328-332 N.W.2d xliiii (1983).

137. See *Savoren v. Savoren*, 386 N.W.2d 288, 291 (Minn. Ct. App. 1986). See also N. DAVIDSON, MINNESOTA FAMILY LAW PRACTICE MANUAL § 3.01 (1988).

Committee of the Family Law Section of the Minnesota State Bar Association petitioned the supreme court for the formation of an advisory committee to investigate and draft rules that would be published and implemented statewide.<sup>138</sup>

By order of the court in October of 1985, an advisory committee was formed.<sup>139</sup> After considerable effort, the committee submitted their proposed rules to the court in 1986 and an order was issued for an open hearing to be held. Following that hearing, the present Rules of Family Court Procedure were adopted by the court.<sup>140</sup> There was no enabling act passed by the legislature for family court procedure. It could be assumed that family court procedure was within the bounds of the civil procedure enabling act, but in the court's order for an open hearing a justice of the court explicitly stated that the court "has the inherent power to promulgate Rules of Family Court Procedure."<sup>141</sup>

*Probate Court Procedure.* Probate rules have a unique history. For the past ten years, the rules in place for probate matters were those formed and adopted by the Minnesota County Judges Association in 1978.<sup>142</sup> Those rules, however, were considered insufficient, so the supreme court issued an order in 1984, appointing an advisory committee for the purpose of studying, drafting, and recommending "uniform rules for the handling and disposition of probate matters in the courts of this state."<sup>143</sup> After two years of work, the advisory committee submitted a draft of proposed rules to the court in 1986. An open hearing was held to receive testimony and letters of advice were sent to the court from interested parties around the

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138. See Petition for Formation of Supreme Court Committee for Enactment of Uniform Rules of Procedure for Family Court Dissolution Matters in the State of Minnesota, filed with the court by the Uniform Rules Committee of the Family Law Section of the Minnesota State Bar Association on June 11, 1985 (copy on file with the supreme court).

139. See Order of Minnesota Supreme Court (October 10, 1985) (copy on file at the Minnesota Supreme Court; this order was apparently not reprinted in the MINNESOTA REPORTER).

140. See R. FAMILY C. PRO.

141. Order for Hearing to Adopt Rules of Family Court Procedure (August 7, 1986) (issued by Justice Lawrence Yetka) (copy on file at the Minnesota Supreme Court; this order was apparently not reprinted in the MINNESOTA REPORTER).

142. See PROB. CT. R. (published in MINNESOTA RULES OF COURT (1988)).

143. Order of Supreme Court (January 24, 1984), reprinted in Minn. Rep. 339-343 N.W.2d c (1984).

state.<sup>144</sup> In the end, however, the court refused to adopt the probate rules because the civil rules enabling act of the 1940s explicitly stated that the supreme court's rulemaking power did not include probate courts.<sup>145</sup> The statute therefore was amended in 1987,<sup>146</sup> with little or no controversy in the legislature,<sup>147</sup> and the court scheduled another hearing for January 1989. Thus a constitutional conflict with the legislature was avoided.

## II. THE SOURCE AND SCOPE OF THE PROCEDURAL RULEMAKING POWER IN MINNESOTA

There is considerable variation among the states concerning the source and extent of the rulemaking power.<sup>148</sup> Each state is unique and varies according to its own history, constitutional provisions, statutes, court decisions and customs. For those states with an explicit constitutional provision regarding court procedure, the rulemaking power is usually either: (1) an exclusive power of the judicial branch; or (2) a power shared in some fashion between the branches of government.<sup>149</sup> For

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144. This information is a matter of public record and on file with the Minnesota Supreme Court Administrator's Office.

145. MINN. STAT. § 480.051 (1986). The first provision of the enabling act said, "The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in civil action in all courts of this state, *other than the probate courts*, by rules promulgated by it from time to time." *Id.* (emphasis added).

146. See 1987 Minn. Laws, ch. 377, sec. 5.

147. Telephone interview with the Honorable Melvin J. Peterson, Chairman of the Minnesota Supreme Court Advisory Committee on Probate Rules (Sept. 16, 1988).

148. For a brief description of the source, extent and process of rulemaking in all of the states, see D. PUGH, C. KORBAGES, J. ALFINI & C. GRAU, JUDICIAL RULEMAKING, A COMPENDIUM (1984).

149. According to a recent article there are twenty-eight states with explicit constitutional provisions relating to procedural rulemaking. See Browde and Occhialino, *supra* note 3, at 477-83. This article lists nine states with constitutional provisions that give exclusive authority over procedural rules to the judiciary: Arizona, Colorado, Delaware, Hawaii, Kentucky, Michigan, North Dakota, Pennsylvania, and West Virginia. *Id.* at 477-79. For example, the Michigan Constitution states: "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts." MICH. CONST. art. VI § 5. (For a brief explanation of the origin of Michigan's constitutional provision and how it relates to Minnesota, see *supra* note 22.)

Nineteen states, according to Browde and Occhialino, have constitutions with provisions that share the rulemaking power: Alabama, Alaska, California, Florida, Iowa, Louisiana, Maryland, Missouri, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Vermont, and Wisconsin. See Browde and Occhialino, *supra* note 3, at 480-83. For example, the Florida Consti-

those states without an explicit provision, the source of the rulemaking power has usually been determined to be either: (1) an exclusive power of the judiciary based on their inherent powers; or (2) a power held concurrently by the judiciary and legislature (usually delegated to the judiciary by an enabling act).<sup>150</sup>

#### A. *The Inherent Power of the Court to Promulgate Rules*

As explained above, Minnesota does not have an explicit constitutional provision regarding the procedural rulemaking power. The state constitution, however, has always acknowledged the separation of powers between the three branches of government and provided that the judicial power of the state be vested in the supreme court.<sup>151</sup> Together, these constitutional statements serve as the foundation for the supreme court's inherent powers.

The Minnesota Supreme Court explained the following in *In re Disbarment of Greathouse*:<sup>152</sup>

The judicial power of this court has its origin in the consti-

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tion contains a provision similar to that recommended by the Second Constitutional Commission in Minnesota: "The supreme court shall adopt rules for the practice and procedure in all courts. . . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the Legislature." FLA. CONST. art. V, § 2.

150. Connecticut is an example of a state in which the appellate court has determine procedural rulemaking to be inherent and exclusive power of the judiciary. See *State v. Clemente*, 166 Conn. 522, 290 A.2d 327 (1971)(act of legislature establishing a procedure for the discovery of prosecution witness statements held unconstitutional). For a criticism of *State v. Clemente*, see Kay, *The Rulemaking Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV 1 (1975). For a list of states in which appellate courts have determined rulemaking is an inherent and exclusive power of the judiciary see *infra* note 167.

Kansas is an example of a state that recognizes rulemaking as a concurrent power of the legislature and judiciary: "Responsibility for procedural rulemaking rests in both the legislature and the supreme court. The legislature has adopted codes of criminal and civil procedure. However, it has recognized the inherent power of the court to supplement or amend the codes insofar as they pertain to pleadings, practice or procedure. . . ." JUDICIAL RULEMAKING, A COMPENDIUM, *supra* note 148, at 84.

151. For the complete text of the separation of powers article in Minnesota's Constitution see *supra* note 4 and accompanying text.

Article VI provides: "The judicial power of the state is vested in a supreme court, a court of appeals, if established by the legislature, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish." MINN. CONST. art. VI, § 1.

152. 189 Minn. 51, 248 N.W. 735 (1933) (unethical practices of an attorney subject to the inherent power of the court to discipline).

tution, but when the court came into existence, it came 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.<sup>153</sup>

The Minnesota Supreme Court gave a thorough account of the nature and scope of its inherent powers in the dicta of *In Re Clerk of Court's Compensation for Lyon County v. Lyon County Commissioners*:<sup>154</sup>

Inherent judicial power governs that which is essential to the existence, dignity, and function of a court because it is a court. Its source is the constitutional doctrine of separation of powers as expressed and implied in our constitution. Its scope is the practical necessity of ensuring the free and full exercise of the court's vital function—the disposition of individual cases to deliver remedies for wrongs and “justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws.”<sup>155</sup>

The doctrine of inherent powers is not invoked with much frequency by the Minnesota Supreme Court; its use has been primarily limited to maintaining control over the bar and practice of law.<sup>156</sup> The court has, however, on occasion noted that the ability to determine procedural rules falls within the scope of their inherent powers. For example, the Minnesota

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153. *Id.* at 55, 248 N.W. at 737.

154. 308 Minn. 172, 241 N.W.2d 781 (1976) (a court order to set a clerk's salary unconstitutional when an express constitutional provision provided that the salary would be controlled by the legislature).

155. *Id.* at 176–77, 241 N.W.2d at 784 (citations and footnotes omitted) (quoting MINN. CONST. art. 1, § 8).

156. See the line of case establishing this power: *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973) (court rules govern when a statute conflicts regarding the disposition of bar fees); *In re Petition for Integration of the Bar of Minnesota*, 216 Minn. 195, 12 N.W.2d 515 (1943) (within court's inherent power to order integration of the state bar); *Cowern v. Nelson*, 207 Minn. 642, 290 N.W. 795 (1940) (legislative statute regarding practice of law accepted by the court as a matter of comity); *In re Disbarment of Tracy*, 197 Minn. 35, 266 N.W. 88 (1936) (legislative enactment regarding the statute of limitations governing disbarment proceedings is unconstitutional); *In re Disbarment of Greathouse*, 189 Minn. 51, 248 N.W. 735, (1933) (court is constitutionally empowered to disbar an attorney without legislative authorization). See also Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1976) (criticizing the court's decision in *Sharood v. Hatfield* that the judiciary has exclusive control over the bar and practice of law).

For an account of the various applications of the inherent power of the judicial branch in other states, see J. CRATSLEY, *INHERENT POWERS OF THE COURTS* (1980).



Supreme Court explained that rules of evidence are an inherent power of the court in *State v. Willis*:<sup>157</sup>

Inherently, the courts have the power to establish rules of evidence. *Northern States Power Company v. Esperson*, 274 Minn. 451, 456, 144 N.W.2d 372, 376 (1966). 1 *Wigmore on Evidence* (1982 Supp.), § 7a at 75–76, states that the judicial function constitutionally empowers the courts to make their own rules of procedure, including rules of evidence, and this prerogative of the courts to formulate and alter rules of evidence ought not to be doubted.<sup>158</sup>

The inherent power of the court to establish rules of procedure existed even during the one hundred year period when Minnesota's Constitution explicitly vested the power in the legislative branch. This power, of course, was not to be exercised if procedures were already provided by the legislature.<sup>159</sup> In more recent times, the court has also mentioned its inherent power to determine procedure in various court orders; and the experiences with appellate procedure and family court procedure are apparently examples of its inherent power in use.<sup>160</sup>

157. 332 N.W.2d 181 (Minn. 1983).

158. *Id.* at 184.

159. For example, in *Whaley v. Bayer*, 99 Minn. 397, 109 N.W. 820 (1906), the court explained:

It is true that the legislature has not designated the manner in which [an election contest] shall be heard in the district court, but when jurisdiction over a subject-matter is conferred upon a court, and the details of the procedure are not provided for, the court will establish and adopt such procedure as is necessary to render the grant of jurisdiction effective.

*Id.* at 399, 109 N.W. at 821. See also *Town of Oronoco School District v. Town of Oronoco*, 170 Minn. 49, 212 N.W. 8 (1927).

160. A 1987 court order regarding the use of facsimile transmission explained: "WHEREAS, the Supreme Court has the inherent and statutory authority pursuant to Minn. Stat. § 2.724, subdivision 4; Minn. Stat. §§ 480.05; .051; .0591; and .0595 to regulate pleadings, practice, and procedure in the trial courts of this state. . . ." Order Regarding the Experimental Use of Facsimile Transmission, Sept. 21, 1987, reprinted in MINNESOTA RULES OF COURT ix (1988) (emphasis added).

For another example, consider the following statement in the recent Case Disposition Procedures of the supreme court: "The Minnesota Constitution, in Article VI, § 2, confers upon the Supreme Court original jurisdiction in remedial cases as prescribed by law, appellate jurisdiction in all cases and supervisory jurisdiction over all courts of the state. The court's supervisory jurisdiction includes the authority to regulate procedural and evidentiary matters." Case Disposition Procedures of the Supreme Court, Oct. 19, 1988, reprinted in 429 NORTHWESTERN REPORTER 2D Advance Sheets, No. 3, at lv (emphasis added).

Appellate procedures were first promulgated by the court without an enabling act. See *supra* notes 111–15 and accompanying text. Family court procedures were also promulgated without a specific enabling act. See *supra* notes 137–41 and accompanying text.

Although procedural rulemaking is clearly an inherent power of the Minnesota Supreme Court, it does not follow from this statement that enabling legislation was never necessary for the court to promulgate rules. The first enabling act passed by the legislature in 1947 was a necessity: at the time Minnesota's Constitution required that pleadings and proceedings be under the direction of the legislative body.<sup>161</sup> If the court was to promulgate a complete set of procedural rules that would supercede the legislative statutes, the legislature had to provide the permission and direction through enabling legislation.<sup>162</sup> It is our position, however, that when that provision was removed from the constitution in 1956, the consequence was that the rulemaking power became an implicit and necessary function and responsibility of the inherent judicial power conferred by the constitution in the judicial branch. The enabling acts that have been passed by the legislature since the revision of the constitution have merely served to prompt the judiciary into promulgating otherwise desirable rules.<sup>163</sup>

### B. *The Scope of the Court's Rulemaking Power*

The inherent power of the Minnesota Supreme Court to promulgate procedural rules raises at least two practical issues

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161. As explained above, prior to 1956, the Minnesota Constitution explicitly vested the rulemaking power in the legislative branch.

162. During the first one hundred years of Minnesota's Constitution, this provision left little doubt that the procedural rulemaking power ultimately was under the direction of the legislature. For example, in *Bloom v. American Express Co.*, 222 Minn. 249, 23 N.W.2d 570 (1946), the Minnesota Supreme Court acknowledged this constitutional delegation of power to the legislative branch:

Under that provision [Art. 6, § 14], there can be no doubt that as to procedure the legislature must first act to create the necessary statutory directives. No other department of government has such power. A constitutional grant of power to one of the three departments of government, and thereby so designated, "is a denial to the others."

*Id.* at 256, 23 N.W.2d at 575 (citation omitted).

163. Procedural rulemaking as a fundamental judicial function absent any contrary constitutional provision was recognized by the Minnesota Judicial Council in the 1940s. *See supra* note 63.

Other states have ruled in the manner we are suggesting. The Arkansas Supreme Court, for example, explained the following with regard to their state's enabling legislation in *Miller v. State*, 262 Ark. 223, 555 S.W.2d 563 (1977): "[W]e implicitly reject[ed] the argument advanced here that we had no inherent rule making authority absent an enabling statute. The enabling act here merely recognizes and is harmonious with this court's inherent powers rather than conferring an express power." *Id.* at 226, 555 S.W.2d at 564.

as a consequence. First, the legislature, probably unaware of their doubtful status, will likely continue to enact statutes with provisions that seek to govern court proceedings. This presents to the supreme court the problem of how it should deal with these statutes in the exercise of its inherent power. Second, the issue still remains regarding the scope or limits of the court's inherent power. To what extent should the supreme court promulgate rules? This last issue turns on the distinction between procedural and substantive law. We believe, as described below, that a cooperative relationship should exist between the court and the legislature on both of these issues.

### 1. *The Ultimate Power over Procedure*

It is our position that the legislature, as an incident of the separation of powers, has no constitutional authority in their enabling acts or otherwise to reserve a right to modify or enact statutes that will govern over court rules already in place.<sup>164</sup> When a court promulgated rule conflicts with a legislative statute, the court's rule should prevail—regardless of whether the statute was enacted subsequent to the rule. As stated in the introduction, the legislature should not function as a separate and conflicting procedure-making body. If, however, the legislature does pass statutes in those areas not already governed by a court promulgated rule, the court, as a matter of comity, may let them stand.

The Minnesota Supreme Court's inherent power over the legal profession provides an analogy. The court has permitted statutes directed at attorneys to stand *as a matter of comity* so long as they are not inconsistent with the court's control over the profession. In *Sharood v. Hatfield*,<sup>165</sup> the court explained the following with regard to a legislative act intended to regulate the practice of law:

It is true that this court has acquiesced in legislative acts prescribing administrative procedures for admission and discipline of attorneys as long as such acts did not usurp the right of the court to make the final decision. . . .

We have no doubt but what some of the provisions of c. 638 as they apply to the judiciary were well motivated, and

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164. For an example of such a statute, see MINN. STAT. § 480.058 (1986).

165. 296 Minn. 416, 210 N.W.2d 275 (1973).

upon adequate consideration it is entirely possible that the court may wish to adopt some of the provisions by rule of the court. However, in so doing, we do not concede that their enactment was a permissible legislative prerogative.<sup>166</sup>

Similar comity can properly be extended by the court to statutory provisions on procedure that are not inconsistent with existing court rules. The inherent power over procedure would be retained since the court is free at any time to override or nullify inconsistent provisions.

Cases in other states that have considered the question of which branch should govern in matters of procedure have uniformly held that absent contrary constitutional provisions the judiciary's rule prevails.<sup>167</sup> The Minnesota Supreme Court has never ruled on the constitutionality of a court promulgated rule that conflicts with a subsequently enacted procedural statute. Conflicts have occurred, but the disputes have been resolved on some basis other than the separation of powers. The supreme court has given every indication, however, that its rule will prevail if there is a conflict.<sup>168</sup> The situation involving

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166. *Id.* at 424–25, 210 N.W.2d at 278–80.

167. *See, e.g.*, *Jennings v. State*, 276 Ark. 217, 633 S.W.2d 373 (1982), *cert. denied* 459 U.S. 862 (1982); *State v. Clemente*, 166 Conn. 501, 353 A.2d 723 (1974); *People v. Cox*, 82 Ill.2d 268, 412 N.E.2d 541 (1980); *State v. Bridenhager*, 257 Ind. 699, 279 N.E.2d 794 (1972); *Newell v. State*, 308 So.2d 71 (Miss. 1975); *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950); *Ammerman v. Hubbard Broadcasting Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), *cert. denied*, 436 U.S. 906 (1978) (discussed in *Browde & Occhialino, supra* note 3.); *State v. Smith*, 84 Wash.2d 498, 527 P.2d 674 (1974).

The reason why there has not been a larger number of cases may be that the terms of many of the state constitutions and statutes involved make litigation over the question unlikely. The absence of appellate court cases in these states might also indicate that conflicts between court rules and statutes do not occur frequently or, when they do occur, are not deemed of sufficient import to result in litigation that reaches the appellate courts.

168. The supreme court has been faced with the issue of conflicting statutes and rules, but the problem was resolved on a basis other than the constitutional separation of powers. For example, *State v. Keith*, 325 N.W.2d 641 (Minn. 1982), involved a pretrial appeal from an order removing a county attorney from a gross misdemeanor case and remanding it to the city attorney. The case was ultimately dismissed by the court on the basis of the appellant's failure to timely file a brief, but the court commented in dicta: "We note, however, that in matters of procedure rather than substance the Rules of Criminal Procedure take precedence over statutes to the extent that there is any inconsistency." *Id.* at 642.

*State v. Keith* was used to support a later decision in *State v. Cermak*, 350 N.W.2d 328 (Minn. 1984). In *Cermak*, Rule 24.03 of the MINN. R. CRIM. P. was in conflict with MINN. STAT. § 542.16 on the proper remedy to pursue when a motion to remove a trial judge has been denied. The supreme court noted that the "enabling legislation for the rules of criminal procedure clearly provides that the rules govern

the rule and statute on directed verdicts in the early 1970s is an example.<sup>169</sup>

In 1958, the Minnesota Supreme Court decided, in *McCourtie v. U.S. Steel Corp.*,<sup>170</sup> that it was prejudicial error for a trial court to instruct a jury on the effect of answers to special verdict questions. In 1971, the Minnesota Legislature amended a statute to *require* jury instruction and *permit* comment by counsel on the effect of the special verdict.<sup>171</sup> This statute had been previously listed by the court in the appendix to the civil rules of 1952 as being superceded by the rules, but it had never been repealed by the legislature. It was certainly the intention of the legislature, however, that their 1971 amendment would govern the procedure in trial courts. Nevertheless, the supreme court responded in early 1973 by amending their rule so as to provide for instruction and permit argument, but only in cases of comparative negligence.<sup>172</sup> In addition, the supreme court again declared the legislature's statute to be superceded in the

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as to matters of procedure, notwithstanding a conflicting statute. . . . In matters of procedure rather than of substance, the Rules of Criminal Procedure take precedence over statutes to the extent there is any inconsistency. [citing *State v. Keith*]" *Id.* at 331. The statute that was declared to be superceded in *Cermak* had been amended by the legislature after the court adopted their rule. There was no mention of this in the court's opinion. The court did explain, however, that it found no merit in the appellant's argument that the statute should govern because it was not listed by the court in the appendix to the rules as one that was superceded by the rules. *Id.* See also *State v. Lopez*, 390 N.W.2d 306 (Minn. Ct. App. 1986) (statute was not enacted or amended subsequent to the rule, but the court followed the supreme court's comments in *Keith* and *Cermak* and decided that the rule prevails over a conflicting statute).

169. This conflict example is described in Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, 58 MINN. L. REV. 903 (1974). The author of this note takes the opposite position and concludes that statutes prevail over court rules in Minnesota. The author of the note relied on a passage in Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815 (1956), for this conclusion. The more recent judicial and legislative developments and our analysis support the position taken in the present paper.

170. 253 Minn. 501, 93 N.W.2d 552 (1958).

171. See 1971 Minn. Laws, ch. 715, sec. 1 (codified at MINN. STAT. § 546.14 (repealed 1974, Minn. Laws, ch. 394, sec. 11)). The legislature's amendment read as follows:

The court shall give to the jury such explanations and instructions concerning the matters thus submitted as may be necessary to enable the jury to make its findings upon each issue, and the court *shall* explain to the jury the legal conclusions which will follow from its findings, and counsel *shall* have the right to comment thereon.

*Id.* (emphasis added).

172. See MINN. R. CIV. P. 49.01. The present rule has not been amended since 1973.

appendix to the court rules.<sup>173</sup>

The constitutional validity of the legislature's 1971 amendment was never addressed by the supreme court. In at least one instance, a trial judge followed the procedure of the legislature, but by the time the case reached the supreme court on appeal the court had already amended their rule.<sup>174</sup> The supreme court explained:

Since this court has recently adopted amendments to its Rules of Civil Procedure, specifically Rule 49.01, permitting that which was done in this case, no purpose would be served in commenting on the asserted invalidity of L.1971, c. 715. Further, no purpose would be served in remanding the matter for trial in accordance with our newly adopted rule since the case was tried upon the exact procedures now permitted by our rule.<sup>175</sup>

In 1974, the legislature repealed the statute and the conflict no longer exists with the court's rule.

The approach taken by the court in the case described above illustrates a number of points. First, the court as a matter of comity respects and acknowledges the actions of the legislative branch; they reacted to the statutory amendment and reconsidered their rule (albeit with a slightly different outcome than the statute). Second, the court reasserted that their rule is to prevail by again listing the statute in the appendix as being superceded by the rule. And third, this case illustrates the inevitable fact that the legislature will continue to enact statutes which to some extent deal with court procedure.

These attempts by the legislature to amend court procedural rules negatively affect the administration of justice by creating unnecessary confusion and leaving the court's rules in a problematic state. For example, there are sometimes two differing, but seemingly legitimate, statutes and rules in effect on the same subject. Lawyers, trial judges and others are then put in the predicament of having to decide whether or not these statutes have any validity.<sup>176</sup> The existence of a substantial

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173. See MINN. R. CIV. P., Appendix B(1) & B(2). The court's appendix explicitly states that MINN. STAT. § 546.14 (Laws 1971, Ch. 715) is superceded.

174. See *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841 (1973).

175. *Id.* at 211, 203 N.W.2d at 848.

176. For example, if a defendant is charged with a misdemeanor in Minnesota, he or she is entitled to a jury trial and, if indigent, to court appointed counsel. There is a process, however, that allows the prosecutor to "certify" the offense as a petty mis-

number of such statutes defeats one of the purposes of the court rulemaking process: to permit judges, lawyers and others to look to a single source for the procedural requirements of litigation. The court also does not have any control over the frequency of legislative alterations. The legislature sometimes has a whimsical approach to court procedure: changing the rules each session and creating more confusion. The legislature loses sight of the balance that must be met with regard to the need for revision and the desire for consistency of practice.<sup>177</sup>

## 2. *The Extent of the Court's Power*

A cooperative relationship should also exist between the court and the legislature on the question of the extent to which the court can promulgate rules. The broad line to be drawn is between substantive and procedural provisions: matters of substantive law are part of the legislature's domain and procedural provisions are the judiciary's. The distinction between these two areas, however, is not clear.

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demeanor. In such a case, the state is relieved of the burden of providing a jury trial and counsel to the defendant. The defendant, in turn, receives a lesser charge and is relieved of the threat of incarceration. See R. FRASE, P. HAUGEN, M. COSTELLO, MINNESOTA MISDEMEANORS AND MOVING TRAFFIC VIOLATIONS 11-0 (1988) for a complete explanation. The court rule, promulgated in 1975, regarding the process for certifying an offense as a petty misdemeanor is in conflict with a 1987 statute. The court rule provides for three steps: (1) the prosecuting attorney must certify to the court that in his opinion it is in the interests of justice that the defendant not be incarcerated if convicted; (2) the defendant consents to the certification; and (3) the court approves. MINN. R. CRIM. PRO. 23.04 (1988). The statute is similar, but declares: "The defendant's consent to the certification is not required." MINN. STAT. § 609.131, subd. 1 (1988 supp.). Conflicts such as these—where the legislature has recently enacted a statute in spite of the supreme court's rule—are potential cases for raising the constitutional question of which rule should prevail.

177. Former Associate Justice George Scott described an example of this problem:

Under Minn. R. Crim. P. 27.02, subd. 1, the trial court "has discretion in ordering presentence investigations." . . . Rule 27.02, subd. 1, superseded Minn. Stat. § 609.115, subd. 1 (1974), which also provided that presentence investigations were discretionary. In 1978 the legislature amended § 609.115 in order to make presentence investigations mandatory in felony cases. . . . In 1979 the legislature amended § 609.115 to make presentence investigations discretionary in misdemeanor and gross misdemeanor cases. . . . In 1981 the legislature once again amended § 609.115, this time making presentence investigations discretionary in all cases. . . . These constant changes created much confusion, while Rule 27.02, subd. 1, remained the same throughout the same time period.

Scott, *Rules Changes in Minnesota: How the Rule Making Process Works*, 18th CRIMINAL JUSTICE INSTITUTE 491, 495-96 (1983).

A frequent statement of the distinction is that the defining of rights, duties and privileges are matters of substantive law while the means by which these are enforced are matters of procedural law.<sup>178</sup> In the view of former Minnesota Supreme Court Justice George Scott, when a specific measure can reasonably be viewed as either substantive or procedural, it should be resolved in favor of its substantive character. He states:

Due respect for the coequal branches of government requires the court to exercise great restraint before striking down a statute as unconstitutional, particularly when it involves a determination of what is a legislative and what is a judicial function. *Sharood v. Hatfield*, 296 Minn. 416, 423, 210 N.W.2d 275, 279 (1973).

The statute involved in this case in no way interferes with the judiciary's function of ascertaining facts and applying the law to the facts established. It merely provides a method for enhancing the likelihood that a jury will not impermissibly speculate as to the reason no test results are offered in prosecutions under § 169.121. As a matter of comity we will enforce this statute, since it neither interferes with nor impairs a judicial function.<sup>179</sup>

### III. THE PROCESS OF RULEMAKING BY THE MINNESOTA SUPREME COURT

The process by which the Minnesota Supreme Court conducts rulemaking is not unlike the legislative process of enacting statutes. It is also similar to the rulemaking methods of many other states and resembles the rulemaking procedures

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178. Substantive law "creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *State v. Smith*, 84 Wash. 2d 498, 501, 527 P.2d 674, 677 (1974).

The New Mexico Supreme Court has held that the question of who shall have a privilege against compulsory disclosure of confidential information is one of procedure for the court and, hence, was not available for legislative determination. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), *cert. denied*, 436 U.S. 906 (1978) (discussed in Browde & Occhialino, *supra* note 3). This privilege is a particularly sensitive public issue and, even if the determination is procedural in character, might appropriately have been left to the legislature as a matter of comity. "It is generally acknowledged that many rules of evidence impinge directly and indirectly on substantive rights. Privileges are one obvious area." WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* 73 (1977).

179. *State v. Willis*, 332 N.W.2d 180 (Minn. 1983).



followed by administrative agencies in Minnesota. This process includes the various aspects of committee work; a prior notice to the legal profession of changes that are being considered; the publication of the committee's proposed amendments to the rules; a period of time for public comment; an open hearing before the supreme court; and notice and publication of the rules when finally adopted by the court. Each of these stages is described in more detail below.<sup>180</sup>

The process of rulemaking by the Minnesota Supreme Court varies slightly according to the type of change being proposed and the area of rules under consideration. For instance, the supreme court itself on occasion initiates thorough reforms in an entire set of rules. This type of renovation has occurred once in the area of appellate procedure,<sup>181</sup> every few years in the area of civil procedure<sup>182</sup> and is presently being completed with the rules of evidence.<sup>183</sup> Comprehensive changes such as these allow the court to re-evaluate the rules overall—judging them for their efficiency, effectiveness and fairness. These changes also allow the court to examine recent amendments to the federal rules and consider whether or not to change the Minnesota rules so as to conform.

Rule amendments that are smaller in scope are often initiated by persons or groups outside the court. For example, if a person or group desires a change in procedures or believes there is a problem with a rule, they ordinarily write to the supreme court and petition for an amendment. Such letters or petitions are received from a wide variety of sources, including

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180. There is no single source that describes the Minnesota rulemaking process in detail. The Minnesota Supreme Court apparently has only one written internal procedure regarding rulemaking. This was issued in 1974 and titled "Notice of Promulgation Filing and Record." See 9 MINN. STAT. xvi-xvii (1986) (court's notice is reprinted in this source). This notice is limited to an explanation of the process the court uses to notify the legal community when rules are adopted or when an open hearing is to be held to discuss rule changes. Other sources provide only a summary description of rulemaking in Minnesota. See D. PUGH, C. KORBAKES, J. ALFINI & C. GRAU, JUDICIAL RULEMAKING: A COMPENDIUM 120-24 (1984); 9 MINN. STAT. xv (1986); A. SODERBERG & B. GOLDEN, MINNESOTA LEGAL RESEARCH GUIDE § 441 (1985). There are also older, slightly out-dated accounts of Minnesota's rulemaking process. See C. KORBAKES, J. ALFINI & C. GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS: A COMPENDIUM 102-05 (1978); and J. PARNES & C. KORBAKES, A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES 41 (1973).

181. See *supra* note 115 and accompanying text.

182. See *supra* notes 108-10 and accompanying text.

183. See *supra* notes 131-32 and accompanying text.

attorneys, judges, bar association groups and law professors.<sup>184</sup> When these letters or petitions are received by the court, they are forwarded to the chairperson of the supreme court advisory committee for those rules.<sup>185</sup>

There is a supreme court advisory committee for each area of procedural rules. Committees have ranged in size from twelve to eighteen people and consist of members of the bar, academia and the bench.<sup>186</sup> Committee members are not paid for their work; their time and efforts are volunteered. The court seems to maintain a representational fairness in its membership on the committees: committees include members from the greater Minnesota area and the different backgrounds of all members represent a wide variety of interests.<sup>187</sup> The chief justice also appoints a member of the court to serve as a liaison

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184. The supreme court maintains a file for each of the advisory committees on rules of procedure. These files contain all of such records, including letters, petitions and court orders.

It is interesting to note that the enabling acts of the Minnesota Legislature require the supreme court to act on any petition filed by a bar association or a judicial organization. For example, the enabling act for rules of evidence provides: "The Minnesota state bar association, or a professional judicial organization may file with the court a petition specifying their suggestions concerning any existing or proposed rule and requesting a hearing thereon. The court shall thereupon grant a hearing thereon within six months after the filing of the petition." MINN. STAT. § 480.0591, subd. 4 (1986). The enabling act for criminal procedure is identical and the act for civil procedural rules is similar to the above. See MINN. STAT. §§ 480.059, subd. 4, 480.054 (1986). The enabling acts for juvenile procedure and appellate procedure do not contain any such provision. See MINN. STAT. §§ 480.0595, 480A.11 (1986).

185. There is no standard procedure for receiving proposed amendments in written form. Some are sent directly to the court and others, by court order, are supposed to be sent directly to the chair of the committee. For example, a few years ago a court order regarding civil procedure provided: "IT IS FURTHER ORDERED that the Advisory Committee continue to serve to monitor said rules and amendments and to hear and accept comments for further changes to be submitted to the Court from time to time, and that such proposed amendments be directed in written form to the chairman of the Advisory Committee. . . ." Amended Order Amending Minnesota Rules of Civil Procedure, March 21, 1985, reprinted in MINN. REP. 364-366 N.W.2d xxxi (1985).

186. There is no readily accessible reference for locating the membership of the committees. The names of some members are printed in MINNESOTA RULES OF COURT (1988) (West Publishing's "Desk Copy"). The names of other members can be obtained by contacting the court administrator's office. Volume nine of MINNESOTA STATUTES lists only an advisory committee "contact person." This person is not a member of any advisory committee.

187. For example, the Advisory Committee on Probate Rules included ten members from the non-metro area representing regions such as Alexandria, Aitkin, Warren, Center City and St. Cloud. See Membership List of the Minnesota Supreme Court Advisory Committee on Probate Rules (copy on file at the court administrator's office). Also consider the interests represented on the Advisory Committee on

to each committee.<sup>188</sup>

There is no definite term or uniformly prescribed length of stay for members on the committees. By order of the court, some of the advisory committees are appointed each time the rules need revision. For example, the first advisory committee appointed by the court to study and recommend rules of evidence disbanded after their work was completed. The chief justice of the supreme court recently "re-instituted" the committee to consider changes to the rules.<sup>189</sup> Other committees have remained intact, with most of the original members, since they were first appointed by the court. For example, the Supreme Court Advisory Committee for Rules of Criminal Procedure has been in existence with the same members (except for two replacements) since its inception in 1971.<sup>190</sup>

The frequency of advisory committee meetings depends entirely on the amount of work that needs to be completed. When a committee is formulating a new set of rules or considering comprehensive reforms, meetings are usually quite frequent, often weekly. At other times, the usual work of the

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Rules of Criminal Procedure: the Committee is composed of defense attorneys, prosecutors and judges—three of the main groups interested in criminal procedure.

There have been complaints, however, about the representation on the Advisory Committee for Criminal Rules. For example, in a 1975 brief to the court, before the rules were adopted, the Minnesota Public Defenders Association maintained the following:

It is appropriate to note that the Committee contained no public defender practicing at the Municipal, County or District Court *trial* level, no defense lawyer (public or private) from St. Paul or Ramsey County, Duluth or St. Louis County, Rochester or Olmstead County; no prosecutor from any of these cities or counties; no judge, Municipal or District, from Ramsey or Olmstead Counties; indeed, while fully half of the Committee was from Minneapolis, the other major population centers of this State had no prosecutor or defense lawyer, public or private, upon the Committee at all; the only defense lawyers were from Minneapolis, and none of them a trial-level public defender.

Brief of Minnesota Public Defenders Association in Opposition to Adoption of the Rules at 4 (Jan. 21, 1975) (emphasis in original) (copy on file at the Minnesota Supreme Court).

188. The present liaisons to the committees are as follows: Associate Justice Peter S. Popovich, Advisory Committee on Rules of Criminal Procedure; Associate Justice Lawrence R. Yetka, Advisory Committee on the Rules of Evidence; Chief Justice Douglas K. Amdahl, Advisory Committee on Probate Rules; Associate Justice M. Jeanne Coyne, Advisory Committee on Rules of Civil Procedure and the Advisory Committee on Family Court Procedure; Justice Coyne also chairs the Advisory Committee on Appellate Procedure.

189. See *supra* note 131.

190. See *also infra* note 243 and accompanying text.

committee does not require nearly as much time.<sup>191</sup> There is no public notice of when or where these meetings will be held, however, and their location and accessibility to the public varies. Again, the difference usually depends on the type of changes being considered. Meetings are usually held in the conference room of a law firm or in a judicial conference room. Occasionally, meetings are held at places more accessible to the public—such as law schools—but this is generally the case only when a new set of rules is being formulated or when major reforms are being considered.<sup>192</sup> There is also some difference of opinion between the chairpeople with regard to whether non-members will be admitted into the committee meetings. Some of the chairpeople are very open to the idea of non-members attending;<sup>193</sup> other chairpeople prefer to meet in private.<sup>194</sup>

The advisory committees do not have any written procedures that govern the process of their work. They apparently do not vary much, however, in the manner in which they consider changes to the rules. After research, often completed with the assistance of a reporter, and discussion by members, the usual method of deciding whether or not to recommend a rule amendment to the court is by vote. Therefore, if a majority of the committee members are in agreement on a proposal, a recommendation is made to the court that the rule be changed. Occasionally, minority reports are also filed with the court if some members of the committee disagree with the majority's proposal.<sup>195</sup>

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191. For example, when the advisory committee for the rules of Family Court Procedure was first formulating its rules, the members met every other Friday, from noon until 6:00 or 8:00 p.m., during a six month period in 1986. Since those rules were adopted by the court, the committee has not had occasion for a meeting. Telephone interview with the Honorable Eugene Kubes, Chairman of the Minnesota Supreme Court Advisory Committee on Uniform Rules of Family Court Procedure (Sept. 23, 1988).

192. For example, the advisory committee for the rules of evidence are presently holding their monthly meetings at the Hamline Law School. Telephone interview with Dean Peter Thompson, Chairman of the Minnesota Supreme Court Advisory Committee on Rules of Evidence (Sept. 23, 1988). In addition, the Advisory Committee on Rules of Appellate Procedure held at least some meetings at the William Mitchell College of Law when they considered reforms to the rules in 1983.

193. Telephone interview with James L. Hetland, Jr., Chairman of the Minnesota Supreme Court Advisory Committee on Civil Procedure (Sept. 15, 1988).

194. Telephone interview with Frank Claybourne, Chairman of the Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure (Sept. 8, 1988).

195. See, e.g., Minority Proposed Amendment to Rule 26.01, MINN. REP. 364-366

In those instances where the rule being considered is relatively important or controversial the court usually gives the committee some direction beforehand or at least informs the committee members where they should focus their investigation and time.<sup>196</sup> The justice who serves as a liaison to the committee is a frequent participant in the committee discussion, but he or she does not speak for the court. Generally, the committee meetings are not recorded on tape.<sup>197</sup> At least one person, however, at each of the meetings takes minutes or notes of the proceedings and discussion. These minutes and notes are kept by the committee and are not on file with the supreme court.<sup>198</sup>

The importance of the supreme court advisory committees should not be underestimated: their role and influence is very similar to the committees of the legislature. The supreme court's advisory committees complete all of the preliminary work for the court, including research and drafting the proposed rules. Because of the committee's vital function, the court ordinarily defers to the advice of the committee members and the rules eventually adopted by the court are usually in the form recommended by the committee. When the court does differ, it is usually in those instances where the rule being considered is relatively important or controversial. The committee members also carefully prepare comments that are published with the proposed rules. These comments are not binding on courts interpreting the rules, but they are influential in that they explain the intentions of the committee when drafting the rule.<sup>199</sup>

After the committee has reported its findings and recom-

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N.W.2d lxiii (1984) (regarding discovery practice and filed by six members of the Advisory Committee for Rules of Civil Procedure).

196. Interview with James L. Hetland, Jr., *supra* note 193.

197. There is a least one exception: the advisory committee for rules of appellate procedure recorded some of their meetings in 1983.

198. It is likely that the public has access to these committee minutes or notes under the supreme court's recently adopted Rules of Public Access to Records of the Judicial Branch. See MINNESOTA RULES OF COURT at 755 (1988).

It should be noted that the authors found the court and staff very helpful in researching this article and all of the information in the committee files kept by the court are apparently open to the public.

199. The non-binding nature of the committee comments is often noted in court orders adopting rules. For example, Chief Justice Robert Sheran commented as follows when adopting the rules of evidence: "The inclusion of the Advisory Committee comments is made for convenience and does not necessarily reflect court approval of

mendations, the court announces to the public that changes to the rules are being considered. An internal order of the court, titled "Notice of Promulgation Filing and Record," requires that a public notice be made announcing that the court is considering changes to the rules. This notice announces the date and time for an open hearing to discuss the amendments; explains where written statements concerning the amendments will be received; explains that people wanting to make an oral presentation should give notice to the court by a certain date; and gives instructions for obtaining copies of the proposed rules.<sup>200</sup> This notice is published in the Supreme Court edition of *Finance and Commerce* and the *St. Paul Legal Ledger*. These publications are officially designated as media for notices of the court. The proposed changes to the rules are ordinarily printed in the introductory material of the *Northwestern Reporter 2d Advance Sheets*, West Publishing Company's *Minnesota Session Law Service* and the monthly periodical *Bench and Bar of Minnesota*.<sup>201</sup> In addition, copies are kept in the Office of the Court Administrator.

Attendance at the open hearings naturally varies with the rule being considered. If it is important or controversial, a number of witnesses usually appear to testify.<sup>202</sup> During the

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the comments." Order Promulgating the Rules of Evidence, April 1, 1977, *reprinted in MINNESOTA RULES OF COURT* at 322 (1988).

200. See Supreme Court Rules: Notice of Promulgation Filing and Record (reprinted at 9 MINN. STAT. xvi (1986)). See also A. SODERBERG & B. GOLDEN, MINNESOTA LEGAL RESEARCH GUIDE § 441 (1985).

201. West Publishing Company prints a sort of disclaimer note in the Advance Sheets with each court order, notice and copy of proposed rules: "NOTICE: Court rules and related materials supplied by the courts are included. Since all rules and amendments may not have been supplied, the clerk of the appropriate court should be consulted to determine the current rules."

202. The controversial nature of a change, however, does not always determine the degree of participation in the open hearing. For example, the Minnesota Supreme Court recently held a hearing to consider changes to the rules of civil procedure regarding Minnesota's long standing practice of commencing a civil action by service of the complaint. The Advisory Committee members were evenly split on whether the rule should be amended so as to conform with the federal rule (the federal rule requires filing a complaint with the court for commencement of an action). As a result, no official recommendation was made to the court. Despite the important issues raised, there were relatively few participants in the hearing: "Attendance at the hearing was surprisingly light. Only four individuals other than the advisory committee representatives made oral presentations and observers in the gallery numbered no more than a dozen. Written communications filed with the Court in advance of the hearing numbered 16." *Rule 3 Debate Dominates Civil Rules Hearing*, MSBA In Brief, July 1988, at 5, col. 4.

hearing, the people giving testimony are often questioned by members of the court—in much the same way that appellate oral arguments are conducted. These open hearings are recorded and the tapes are kept on file at the court.

Following the open hearing, the members of the court discuss in private conference the proposed changes to the rules. The liaison justice to the rules committee usually introduces the subject and leads the discussion. The justices then decide by majority vote whether to adopt or reject the proposed amendment.<sup>203</sup> If a procedural rule is adopted or amended by the court, it is printed in the *Northwestern Reporter 2d Advance Sheets* and eventually in the hardbound *Minnesota Reporter*.<sup>204</sup> All of the court's rules are also eventually published in volume nine of the *Minnesota Statutes*, updated annually, and in *Minnesota Rules of Court*, a reference pamphlet published each year by West Publishing Company.

#### IV. CONDITIONS NECESSARY FOR EFFECTIVE RULEMAKING

When a state appellate court has the constitutionally exclusive authority to promulgate rules of procedure, certain obligations and expectations appear to be warranted.

(1) The court, and it alone, should have the responsibility for the procedures that will govern litigation. The objective should be to make litigation as simple and as inexpensive as the requirements of a fair and prompt trial permit. Litigation necessarily is conducted by lawyers and judges; their experiences and views, expressed through their organizations and otherwise, should be considered in the course of the rulemaking process.

(2) Since the court ordinarily cannot itself engage in the often arduous task of preparing the necessary rules, it must depend on others. The court should appoint committees to prepare and submit recommended rules, following the example set by the United States Supreme Court.

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203. The internal method of the supreme court for deciding rules of procedure is quite similar to the usual method of case disposition. See the newly adopted Case Disposition Procedures of the Supreme Court, Oct. 19, 1988, *reprinted in* 429 NORTHWESTERN REPORTER 2D Advance Sheets, No. 3, at liv.

204. Most of the court's orders regarding procedures, advisory committees and other matters are also reprinted in the introductory materials of the MINNESOTA REPORTER. *But see supra* note 201. The MINNESOTA REPORTER is a set of condensed volumes that contain only the Minnesota cases from the NORTHWESTERN REPORTER.

(3) The quality of the recommendations will depend on the ability and commitment of those appointed to the committees. The membership should consist of able experienced practitioners, qualified in the field at hand, and include judges, law professors and lay persons whose activities have given them some understanding of the judicial system. Qualified women and minority persons should not be excluded. Geographical representation should also be a factor in the court's consideration of appointments. Legislative attempts to designate who may or may not be appointed as members of the committees appears clearly beyond the authority of the legislature. The court must have the power to designate those who will provide it with the necessary assistance.<sup>205</sup>

(4) Members should be appointed for limited and staggered terms so that there is a steady input of new members with fresh approaches and that there be public confidence in the currency of the committees. Staggering terms would also help to provide the committee with the proper degree of continuity and change.<sup>206</sup> Following the restructuring of the United States Supreme Court committees by Chief Justice Warren, a four-year term, renewable for an additional four years, appears to be the general policy of the Court.<sup>207</sup>

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205. The Minnesota Legislature has enacted the following statutes designating the composition of the advisory committees: MINN. STAT. § 480.052 (1986); MINN. STAT. § 480.059, subd. 2 (1986); and MINN. STAT. § 480.0591, subd. 2 (1986).

206. Consider the following staggered terms required by the Minnesota Supreme Court's committees for professional rules: RULES OF BOARD ON JUDICIAL STANDARDS 1(b)(2) (no more than two full four-year terms); RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY 4(a)(2) (no more than two three-year terms); RULES OF LAWYER TRUST ACCOUNT BOARD 1 (no more than two three-year terms); MINN. RULES FOR ADMISSION TO THE BAR 1A (staggered three-year terms); RULES OF THE SUP. CT. FOR CONT. LEGAL EDUCATION 2 (staggered three-year terms and no more than two terms); PLAN FOR THE MINN. STATE BOARD OF LEGAL CERTIFICATION 2.03 (staggered three-year terms and no more than two terms); RULES OF THE MINN. CLIENT SECURITY BOARD 1.02 (staggered three terms and no more than two consecutive terms).

207. It may be unwise, in some circumstances, for a court to impose maximum terms of service on present committee members. For example, the Minnesota Supreme Court Advisory Committee for Rules of Criminal Procedure was appointed in 1971. Ten of the twelve originally appointed members remain on the Committee at the present writing. The Committee is currently engaged in examining the recently promulgated Uniform Rules of Criminal Procedure, which, to a large extent, implement the 1980 Second Edition of the American Bar Association's Criminal Justice Standards. The Committee is considering which, if any, of these Rules should be recommended to the Minnesota Supreme Court. In these circumstances, to replace those members who have already served maximum terms would, in effect, create a new committee and be disruptive of the progress already made. Similar disruptions



(5) The court should provide a general sense of direction to each committee. For example, in 1971, Chief Justice Knutson of the Minnesota Supreme Court, on appointing the present committee on Rules of Criminal Procedure, informed it that it should examine the then existing American Bar Association Standards of Criminal Justice with a view to their implementation.<sup>208</sup>

(6) The public and particularly those individuals who have a substantial interest in the rules being drafted should know and have access to the committee members.<sup>209</sup>

(7) Interested and concerned persons and organizations should be notified when important rule proposals or rule changes are being considered. Proposed rules and notices of committee meetings should be sent to all appropriate publications. The court should request that these rules and notices be made available to the publication's subscribers.<sup>210</sup>

(8) Interested and concerned persons and organizations should be given the opportunity to be heard at committee meetings when important rule proposals or rule changes are being considered. (Allowing public participation at the committee level would of course require that committee meetings be held at places accessible to the public.) The opportunity of an open hearing before the court, after the advisory committee has submitted its recommendations, is not sufficient. The time allotted to each participant is of necessity limited. In addition

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may occur when a committee member's term expires in the course of a project in which his or her contribution is so indispensable that the membership should be continued until the project is completed.

208. Consider the order of Chief Justice Hughes on appointing the first Advisory Committee on Federal Rules of Civil Procedure: "It shall be the duty of the Advisory Committee, *subject to the instructions of the Court*, to prepare and submit to the Court a draft of a unified system of rules. . . ." 21 A.B.A. JOUR. 398 (1935) (emphasis added).

Pisig: Another example comes to mind. When Chief Justice Earl Warren first met with the then recently appointed Committee on Federal Rules of Criminal Procedure, he indicated that it was not his intention that the committee should engage in major revisions in the then current Rules of Criminal Procedure.

209. In Minnesota, for example, the names of all the committee members should be published in West Publishing Company's annual pamphlet titled MINNESOTA. RULES OF COURT. The committees, the members, their business addresses and telephone numbers should also be published in the annual bar directory issue of BENCH AND BAR OF MINNESOTA.

210. Some periodicals would obviously not be able to print an extensive set of proposed rules. However, there is no method in place at the present for notification of Advisory Committee meetings in Minnesota. See *supra* note 192 and accompanying text.

to oral presentations, there are usually letters, written statements and documents presented to the court. The committee, however, may not have had sufficient prior opportunity to examine and consider the relevance and merits of the information so presented. In any event, having submitted its recommendations to the court, the committee is now likely to be less inclined to take an objective view of criticisms raised to the recommended rules.

Giving an opportunity to be heard at the committee level to those who have their own recommendations to offer or want to object to the committee's proposed rules leads to better committee recommendations, more effective court hearings, better court rules, and more general satisfaction with those rules and the process by which they were developed and promulgated.<sup>211</sup> Critics of this method of open meetings would likely object on the grounds that the presence of non-members would inhibit discussion and the exploration of ideas. This legitimate concern could be resolved, however, by allowing the committee to go in executive session after receiving public testimony.

(9) The court should publish procedures to govern the rulemaking process. There are a number of areas that require consistent and uniform treatment, particularly with regard to the proceedings of the advisory committees. If published with other court rules, these procedures would also promote public awareness, participation and approval in the rulemaking process.

(10) The court should publish an appendix with each set of promulgated rules that lists the statutes superceded by those rules.<sup>212</sup> The list should be kept current and published annually. Researching and compiling these appendices would require considerable effort, but practitioners and judges would not be left in doubt over which statutes the court has accepted in the interests of comity and which have been superceded by court rule.<sup>213</sup>

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211. See generally WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); Wright, *Book Review*, 9 ST. MARY'S L. JOUR. 652 (1978) (reviewing Weinstein's book); Parness & Manthey, *Public Process in State Court Rulemaking*, 63 JUDICATURE 338 (1980).

212. The Minnesota Supreme Court publishes such lists as appendices to the rules of Civil Procedure and Criminal Procedure. The first version of the Rules of Civil Appellate Procedure in the sixties also contained such a list.

213. For an example of a Minnesota criminal procedural rule that is in conflict with a recent statute, but not listed in the court's appendix, see *supra* note 176.

## V. THE ORDER OF FINAL ARGUMENTS: AN EXAMPLE OF THE PROBLEMS WITH COURT PROCEDURE BY THE LEGISLATURE

The topic of which branch of government should possess the power to ultimately prescribe the procedures governing court proceedings raises many points of policy. The question presented is, Which branch of government is *better able* to prescribe those procedures—the legislature or the courts? There are many logical reasons why the legislature should not be determining court procedures and these policy considerations have been a topic in many of the articles published on the rulemaking power—including those dating back to Pound and Wigmore.<sup>214</sup> The logical disadvantages of the legislature and the problems with Minnesota's present rulemaking system are best illustrated in a recent controversy over the rule governing the order in which final arguments are given in a criminal trial.<sup>215</sup>

This section will describe that controversy and its policy implications in three parts. The first part is historical: the order of final argument has a long and controversial past and this part describes some of the attempts over the past one hundred years to change the procedure. The second part describes the recent successful efforts of county and state attorneys to change the court adopted rule to their favor through the legislative process.<sup>216</sup> The third part briefly describes the hearing

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214. See, e.g., Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J. 12 (Supp. March 1927); Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). See also *supra* note 63 and accompanying text.

Also consider the practical drawbacks to legislative statutes that are meant to preempt duly adopted court rules. See *supra* notes 176–77 and accompanying text.

215. As one commentator has also explained:

[T]his controversy highlights the "little noticed but important constitutional problem now lurking in the Minnesota legal system. . . . [It] raises the question of whether the legislature or the Supreme Court has the authority to promulgate or modify rules of court procedure and if there is a conflict between these two branches of government which prevails. . . . At first blush this may appear to be a mundane matter of little interest but it highlights the continuing tension between branches of government over the issue of which has the final authority to determine and implement important matters of public policy."

Bush, *Court Rulemaking by the Legislature: Who Gets the Last Word?*, MINNESOTA TRIAL LAWYER 24 (Summer 1987).

216. Tietjen: In this section I have used taped legislative testimony extensively in the footnotes to support our position that the legislature, for logical reasons, should not be involved with court procedures. As a result, the footnotes are very lengthy in places. We felt this was necessary, however, so that questions and comments of the

of the Minnesota Supreme Court on the issue of whether to modify the court promulgated rule so as to conform with the legislature's statutory amendment.

*A. A History of the Order of Final Arguments*

In 1875, the Minnesota Legislature passed a statute establishing the order in which final arguments would be given in a criminal trial: the prosecution was to go first and the defense last. The reason the statute was passed with this order of argument is not clear, but it remained unchanged for over one hundred years.<sup>217</sup> Prosecutors, however, were never pleased with the tradition. Over the course of time, they frequently attempted to change the procedure to conform with many of the other courts in the country—both state and federal—in which the prosecution gives the first argument, the defense replies and the prosecution has an opportunity for a rebuttal.

Indeed, the history of the order of final argument shows a constant progression of attempts by Minnesota county attorneys to receive the right to a rebuttal. As early as 1922, in a speech given at the opening session of Minnesota's Crime Commission, Chief Justice Calvin Brown of the Minnesota Supreme Court explained, "Repeated efforts have been made to bring about a change in this state, but without success; the legislature has declined to make it."<sup>218</sup> The Crime Commission Reports of 1927 and 1934 continued to recommend that the prosecution be granted the right to a rebuttal, explaining that the change had been urged by the legislative committee of the Minnesota County Attorneys Association.<sup>219</sup> Floyd B. Olson, former Governor of Minnesota and Hennepin County At-

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legislators and of the people giving testimony are not taken out of context nor given emphasis where none was intended by the speaker.

217. Minnesota, in fact, became the only state in the nation with this particular order of argument. See Kunkel & Geis, *Order of Final Argument in Minnesota Criminal Trials*, 42 MINN. L. REV. 549, 550 (1958). Kunkel and Geis also explained that though Minnesota's order of final argument is unique to the United States, allowing the accused the last word is generally accepted in many European countries as basic "fair play" and as an "essential safeguard." *Id.* at 549. Kunkel and Geis did not explain, however, that there are many other states that allow the defense to speak first and the prosecution last, with no opportunity for a rebuttal. See, e.g., MASS. R. CRIM. P. § 24(a)(1).

218. REPORT OF THE MINNESOTA CRIME COMMISSION 12 (1923).

219. REPORT OF THE MINNESOTA CRIME COMMISSION 34 (1927) and REPORT OF THE MINNESOTA CRIME COMMISSION 47 (1934).

torney, also advocated changing Minnesota's uncommon procedure in his inaugural address of 1931.<sup>220</sup>

In the nineteen fifties, two researchers surveyed all the county attorneys in Minnesota and one randomly selected attorney from each county to determine the support for Minnesota's unique order of final argument.<sup>221</sup> According to the researchers, "The prosecutors and private attorneys split, as might be expected, in their attitude toward the statute; each group tending to support its particular interests."<sup>222</sup> They found that only fourteen percent of the randomly selected attorneys were opposed to the order, while sixty percent of the prosecutors surveyed were against the order of argument.<sup>223</sup>

In the early 1970s, the supreme court's Advisory Committee on the Rules of Criminal Procedure, while preparing a draft of proposed rules for the court, devoted a great deal of time and attention to the rule regarding the order of final argument. The procedural rule eventually proposed by the court's advisory committee in 1975 allowed the defense to argue first, the prosecution to answer in reply, a five minute rebuttal by the defense, and a five minute surrebuttal by the prosecution at the discretion of the court.<sup>224</sup> Before the court promulgated the Rules of Criminal Procedure, briefs from both sides were sub-

220. Governor Olson said,

Minnesota, being the only state in the United States where counsel for the defense has the closing argument to the jury, I recommend that the prosecuting attorney be given the right by law to reply briefly to the argument of the counsel for the defense in conformity with the practice in the Federal courts.

J. McGRATH & J. DELMONT, FLOYD B. OLSON: MINNESOTA'S GREATEST LIBERAL GOVERNOR 181 (1937). Immediately before becoming governor, Floyd B. Olson had spent ten years as the Hennepin County Attorney. *Id.* at 26-30.

221. Kunkel & Geis, *supra* note 217, at 551.

222. *Id.*

223. *Id.* It wasn't entirely accurate, however, for Kunkel and Geis to claim that the two groups supported their own interests since the randomly selected attorneys were not necessarily criminal defense attorneys.

224. The proposed rule read as follows:

At the conclusion of the evidence, the defendant may make a closing argument to the jury. . . . The prosecution may make a closing argument to the jury. The defendant shall then be permitted five minutes to reply in rebuttal and shall raise in rebuttal no new issues of law or fact which were not presented in one or both of the prior arguments. In the discretion of the court the prosecution may be permitted five minutes to reply in rebuttal to the rebuttal argument of the defendant, provided the defendant's rebuttal was improper.

MINNESOTA PROPOSED RULES OF CRIMINAL PROCEDURE AND COMMENTS 149 (1975). The rule first circulated by the committee in 1973 read essentially the same as above,

mitted to the justices and an open hearing was held to consider the issue.<sup>225</sup>

The proposed rule of final argument was vigorously debated by prosecutors and defense attorneys. "No single facet of the Rules evinced the intense emotional response as did the order of final argument."<sup>226</sup> A memorandum from the Office of the Attorney General declared:

It is undisputed that the order of closing arguments often has a significant impact on the determination of juries in criminal cases. The authorities are divided on the issue of whether it is more advantageous to make the first or the last argument to the jury. Some studies have indicated that in the more complex cases, the best position is last, while it is more advantageous to make the first closing argument in cases with few and simple issues. In any event, the proposed Minnesota rule would satisfy both Pangloss and criminal defendants by giving them the "best of all possible worlds."<sup>227</sup>

The court eventually rejected the Advisory Committee's proposal and left the order of final argument essentially the same as the statute written one hundred years before: "The order of a jury trial shall be substantially as follows: . . . At the conclusion of the evidence, the prosecution may make a closing argument to the jury. . . . The defendant may then make a closing argument to the jury. . . . The court shall charge the jury."<sup>228</sup> Nevertheless, county and state attorneys continued to attempt to convince the court to change the rule in their favor.

Since 1975, when the Rules of Criminal Procedure were promulgated by the court, prosecutors have tried at least twice

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but without a time limitation on the rebuttal. See MINNESOTA PROPOSED RULES OF CRIMINAL PROCEDURE AND COMMENTS 29 (1973).

225. See, e.g., Brief of Minnesota Public Defenders Association in Opposition to Adoption of the Rules (January 21, 1975) and Memorandum of the Office of the Attorney General in Opposition to a Proposed Rule of Criminal Procedure (January 28, 1975).

226. 2 H. McCARR, MINNESOTA PRACTICE: MINNESOTA CRIMINAL LAW AND PROCEDURE § 942 (1976).

227. Memorandum of the Attorney General, *supra* note 225, at 3.

228. MINN. R. CRIM. P. 26.03 sub. 11 (MINNESOTA RULES OF COURT (1986)). According to McCarr, the supreme court first countered the proposal of the committee with a tentative amendment that would have allowed the prosecution to argue first, the defense to reply and a five minute rebuttal by the prosecution. The alternative, however, was "vigorously opposed by defense counsel" at the court's open hearing. McCARR, *supra* note 226, at 942.

to change the order of final argument through the prescribed method of the supreme court and its advisory committee.<sup>229</sup> They have also attempted to change the order of argument by statute in the legislature. Each time, however, they failed to convince the court or the legislature that changing the rule was necessary.<sup>230</sup>

Perhaps the most extraordinary feature of this criminal procedural rule was not the uniqueness of the order of argument, but its perseverance. It is remarkable that such an eristical rule, commonly perceived as favoring the criminal defendant, could survive for so long and through so many changes in the political climate.<sup>231</sup>

### B. *The 1987 Session of the Legislature*

In 1987, frustrated prosecutors finally bypassed the judicial branch and convinced the legislature to amend a statute (the modern version of the nineteenth century procedural statute) so as to allow them a rebuttal in closing arguments.<sup>232</sup> The

229. Attorney Phil Bush explained:

In 1975 the Minnesota Supreme Court adopted the Minnesota Rules of Criminal Procedure. Rule 26.03 subd. 11 conformed to Minnesota's long standing order of closing argument despite intense efforts by the prosecution to change the order to prosecution, defense, prosecution. In 1977 and 1983 prosecutors again attempted to change the order of final argument so that they could argue both first and last and the Supreme Court left the order the same.

Bush, *supra* note 215, at 24. See also McCARR, *supra* note 226, at §§ 942-943.

230. A bill was introduced in the Minnesota Senate in 1981 to change the order of final argument. See Senate File No. 780, 72nd Legislature, 1st Sess. (1981). State Senator Marv Hanson (DFL-1st Dist.) was the principal author. The bill evidently received little support and there was no companion bill introduced in the House.

The rule proposed to the court by the advisory committee in 1983 would have created an order of final argument essentially identical to the order proposed in 1975. See *supra* note 224 and accompanying text. The prosecution again opposed this order of argument. Among the memorandums filed on the subject in later years is an extensive brief presented to the court in 1983 by Crow Wing County Attorney Stephen Rathke. See Memorandum of the Crow Wing County Attorney, for the Minnesota County Attorneys Association, Proposing an Amendment to the Order of Final Argument in Criminal Matters (filed February 8, 1983).

231. The issue of the order of final argument was also once raised on appeal. In *State v. Mitchell*, 268 Minn. 513, 130 N.W.2d 128 (1964), cert. denied 380 U.S. 984 (1965), the Minnesota Supreme Court explained: "It does not seem to us that [Minn. Stat.] § 631.07 presents an obstacle to the protection of the state's rights in a criminal trial. . . ." *Id.* at 518, 130 N.W.2d at 131.

232. One participant in the debate described this maneuver as follows:

The [issue] that I think is most troubling, or should be the most troubling for this court, is the whole issue of separation of powers. . . . The problem that we then have is exactly what Justice Yetka pointed out before: every

original bill submitted to the legislature was written by the Hennepin County Attorney's Office.<sup>233</sup> The bill proposed that the statute be amended to grant the prosecution an absolute right to a rebuttal after the defense attorney's argument, with no opportunity for a surrebuttal by the defense.<sup>234</sup> The bill provoked a flurry of opinions on the merits of the proposed changes.<sup>235</sup>

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time either side is annoyed, upset or concerned about a particular rule, they have two avenues, like a child who plays their father first, "Can I go to the prom?" and dad says, "No"; then they play the mother, "Can I go to the prom?" and mom says, "No"; then they go back to dad again, "Well, mom didn't quite say no, maybe she sort of said this," and then back to mom, and back and forth it goes. And that is exactly what the prosecutors have been doing over the last few years. They have essentially looked for anybody to buy their argument, regardless of what procedures this court has carefully established. . . . [T]hose procedures have been cast to the side for a very small goal; and that small goal is the prosecutor's wish list on closing argument.

Comments of Mr. Stephen Cooper at the Minnesota Supreme Court hearing to discuss proposed changes to the rules of criminal procedure, June 25, 1987 (tape on file at the Minnesota Supreme Court).

233. Hennepin County Attorney Tom Johnson's proposal to the 1987 legislature explained:

Clearly an amendment to Minnesota Statute 631.07 allowing the prosecutor a rebuttal is long overdue. This rebuttal would not be an additional chance to argue the case, but would simply allow the prosecution to address any improprieties and inconsistencies suggested by the defense in order to avoid an unjust acquittal based on a mistaken perception of the facts or a misunderstanding of the law. Minnesota should join the rest of the nation and allow the prosecutor the opportunity for rebuttal in the order of closing arguments.

Memorandum of the Office of the Hennepin County Attorney, Closing Argument: Who Ought to Have the "Last Word" With the Jury? at 4 (1987) (unpublished memorandum written by the Hennepin County Attorney's Office as part of their lobbying effort for a rebuttal; copy on file at the office of the William Mitchell Law Review).

234. According to the county attorneys, "The underlying rationale is based on the fact that the right to open and close is not governed by constitutional mandate, but is simply a procedural consideration and, as such, should be given to the party with the burden of proof according to the traditional rules of fairness." *Id.* at 1. The proposed statute read:

When the giving of evidence is concluded in a criminal trial, unless the case is submitted on either or both sides without argument, *the prosecution may make a closing argument to the jury. The defense may then make its closing argument to the jury. The prosecution shall then be permitted to reply in rebuttal, limited to argument which is responsive to defendant's closing argument.*

*Id.* (emphasis in original). The bill eventually adopted by the legislature did not grant an absolute right to a rebuttal. See *infra* note 268.

235. See, e.g., *Don't Let Rule Change Tip Scales of Justice*, St. Paul Pioneer Press and Dispatch, Feb. 28, 1987, at 10A, col. 1 [hereinafter Editorial] (editorial in opposition to the proposed rule changes).

In their original bill, the county attorneys also requested two other changes to criminal procedures. One provision was to increase the number of jury selection peremptory challenges so that county attorneys would have the same number of chal-



The Hennepin County Attorney's Office obtained the chairmen of the judiciary committees—in both the House and the Senate—as authors of the bill.<sup>236</sup> They were a formidable pair, for the bill was naturally referred to their committees for consideration before discussion and vote by each house. There were many allegations that legislators were pressured to pass the county attorneys' bill and some suggested it was even "greased" to pass.<sup>237</sup> There is no evidence, however, of any political impropriety on the part of the sponsors of the legislation.<sup>238</sup> But this case does serve as an example of the tremen-

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lenges as defense attorneys. See Memorandum of the Office of the Hennepin County Attorney, *Selecting a Jury: A Question of "Tilt"* (1987) (unpublished memorandum written by the Hennepin County Attorney's Office as part of their lobbying efforts; copy on file at the office of the William Mitchell Law Review). The other provision of the bill was to give the prosecution a presumption *in favor* of joinder when multiple defendants are charged with the same crime. The then existing rule provided that defendants be tried separately unless the court found it to be in the interest of justice to order a joint trial. See Memorandum of the Office of the Hennepin County Attorney, *Joinder: A Question of One or Several Trials* (1987) (unpublished memorandum written by the Hennepin County Attorney's Office as part of their lobbying efforts; copy on file at the office of the William Mitchell Law Review).

The county attorneys found limited success with the joinder provision; the statute was amended to remove the presumption entirely from the statute. See MINN. STAT. § 631.035 (1987 supp.). On the issue of the number of peremptory challenges, no changes were made to the statute. See generally Bush, *supra* note 215.

236. The chairman of the House Judiciary Committee was Representative Randy Kelly (DLF-Dist. 67A). THE MINNESOTA LEGISLATIVE MANUAL 128 (1987-88). The chairman of the Senate Judiciary Committee was Senator Allan Spear (DFL-Dist. 59). *Id.* at 120.

237. During a session of the House Judiciary Committee, the chairman of the committee, Randy Kelly, became very annoyed with a witness from the Hennepin County Public Defender's Office when he learned that an internal memo written by Hennepin County Public Defender William Kennedy described the bill as "greased." See Remarks of Representative Randy Kelly (DFL-Dist. 67A) at the House Judiciary Committee meeting, February 16, 1987 (tape on file at the Legislative Reference Library).

James Kaster, chairperson of the Criminal Law Section of the Minnesota State Bar Association, commented at the rules hearing of the supreme court that, "if the suggestion is being made . . . that this bill was not spearheaded by the Hennepin County Attorney's Office and the County Attorneys Association, that suggestion is inconsistent with the appearance that I received when I sat through these sessions." Comments of Mr. James Kaster at the Minnesota Supreme Court hearing to discuss proposed changes to the rules of criminal procedure, June 25, 1987 (tape on file at the Minnesota Supreme Court).

238. Many witnesses both in favor of and opposed to the bill appeared before the House and Senate committees. Indeed, there were quite a number of representative from the legal community testifying. Among them were Associate Justice George Scott of the Minnesota Supreme Court (since retired from the court); Professor Maynard E. Pirsig of the William Mitchell College of Law; Professor C. Peter Erlinder of the William Mitchell College of Law; Hennepin County Attorney, Tom Johnson;

dous political force that can be asserted in the legislature. The state and county attorneys were able to create a powerful lobbying force to promote their bill. In addition to the Minnesota County Attorneys Association, this bill also had the support of law enforcement and victim's rights organizations.<sup>239</sup> There were a number of opponents to the bill who testified, but their political clout was probably not comparable to the proponents; defense attorneys are not elected officials and they do not have a significant lobbying force.<sup>240</sup>

Testimony was heard in the legislature on the issue of the separation of powers and the source and scope of the rulemaking authority. One of the most important commentators on this issue was Associate Justice George Scott of the Minnesota Supreme Court. He testified at a Senate subcommittee hearing at the invitation of a legislator and as a representative of the court. He suggested to the legislators that their actions were a violation of the separation of powers. Justice Scott said, "The court has always understood that procedure was an inherent right of the judicial branch of government, procedure meaning the difference from substance."<sup>241</sup>

When the proponents of the bill were asked why they were turning to the legislature rather than the court for rulemaking, there were a few different replies. Hennepin County Attorney Tom Johnson claimed that the legislature has a more "heightened awareness" of the public's concern for the unequal balance of the judicial system in favor of the defendant. He also claimed that there is an increased need for a rebuttal because

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Crow Wing County Attorney, Stephen Rathke; Assistant U.S. Attorney, Tom Hefelinger; private attorney, Ronald Meshbesh; and Director of the Neighborhood Justice Center in St. Paul, Stephen Cooper (since appointed Commissioner of Minnesota Department of Human Rights).

239. This support was also commented on by Hennepin County Attorney Tom Johnson. See Remarks of Tom Johnson during the Senate Criminal Law Division meeting, April 21, 1987 (tape on file at the Legislative Reference Library). See also *supra* note 237 and *infra* notes 245 and 267.

240. This point was apparently recognized by some legislators in the next legislative session. A bill was passed to create a position for a lobbyist who would work on behalf of criminal defense interests. The act passed by the legislature says, in part, "The new position shall include in its duties the provision of counsel on legislative proposals during legislative sessions." 1988 Minn. Laws, ch. 686, art. 1, sec. 4.

241. Remarks of Justice George Scott during the Senate Criminal Law Division meeting, April 21, 1987 (tape on file at the Legislative Reference Library). The co-author of this article, Professor Maynard E. Pirsig, also testified on this point of the separation of powers.

of the rising crime rate and corresponding number of crime victims.<sup>242</sup> The supreme court was evidently unaware of this need. Crow Wing County Attorney Stephen Rathke claimed that the supreme court's Advisory Committee on Rules of Criminal Procedure is biased in favor of defense interests and, as a result, it was necessary for prosecutors to resort to the legislature for the amendment. Rathke said, "The same people that were appointed in 1971, are still on the rules committee, except for two judges, one who died and one who retired, who have been replaced by defense attorneys, by the way."<sup>243</sup>

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242. Consider the following exchange between Representative Kathleen Vellenga (DFL-Dist. 64A) and County Attorney Tom Johnson:

VELLENGA: I would like to ask Mr. Johnson a couple of questions please, Tom? I'm sorry if I missed it in your remarks, did you state to the committee why this proposal did not pass the supreme court rules and why it should be taken out of the supreme court's rule-making and put into the statutes instead?

JOHNSON: I think that I did not speak directly, Representative Vellenga. I knew that County Attorney Rathke was going to, in terms of the difficulties that these changes have had within the supreme court rule-making process. There is no doubt that there have been attempts made and they have failed. Mr. Rathke spoke to the reasons why those attempts have failed [see *infra* note 243 and accompanying text]. There is no doubt, however, but that this legislature can and should act. In other areas, where there has been a need to act, you have done so. Let me just tick some off: the area of the rape shield law, the legislature has acted even though that could have been done through the rule-making authority; in the area of allowing certain out of court statements by child victims to be introduced, the legislature has acted; in the area of domestic abuse law, the legislature has acted. *It is clear that when the legislature has sensed a public concern it has acted. We're here to tell you that there's—and I'm sure you sense as well—a public concern regarding the balance of the existing system.*

VELLENGA: Mr. Chairman, Mr. Johnson, in response to your remarks, of course we always do look at rules and decide whether or not we want to take over statutorily, but I don't believe you've answered—and maybe I didn't hear Mr. Rathke fully—why the supreme court rejected this and why in this particular instance. *Are you responding to me Tom and saying that the reason we should take over from the supreme court is that they aren't understanding the public's position? Is that what you meant by that last remark about public concern?*

JOHNSON: *I'm saying that I believe you have a more heightened awareness about that concern, vis-à-vis that other process, first of all; and secondly, what I did try to do in my remarks was to identify the context in which this should be considered. And that context is different than it was in 1981 or 1975 when it was previously considered [by the court]. And that context is different for two reasons. One, an increased sensitivity for victim's rights, and these proposals do broaden, do affect victim's rights in a positive way. Secondly, because there is a different crime climate within our state now than there has been in the past. Not to say that this is going to have an impact on that crime rate, but that there are more crime victims coming through the system.*

Dialogue between Representative Vellenga and County Attorney Johnson during the House Judiciary Committee meeting, February 3, 1987 (tape on file at the Legislative Reference Library) (emphasis added to illustrate the relevant remarks).

243. Remarks of Stephen Rathke, Crow Wing County Attorney, at the House Judi-

The arguments by the prosecutors for bypassing the court's rulemaking process are without merit. The history of the order of final argument supports this point. Prosecutors repeatedly opposed any rule amendment in recent years that would have allowed them a chance for a rebuttal. These amendments were opposed because they did not also allow the prosecutors the tactical advantages of speaking both first and last.<sup>244</sup> The proponents of the bill were simply turning to the legislature out of frustration because they were not successful with the court.<sup>245</sup> The legislature, in effect, served as an alternative

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ciary Committee meeting on February 3, 1987 (tape on file at the Legislative Reference Library).

Ronald Meshbesh, a member of the Advisory Committee on Rules of Criminal Procedure, responded:

I wish we had five defense votes on that committee as Mr. Rathke indicated. The make-up of that committee was rather—quote, unquote—conservative from the viewpoint of the criminal defense lawyer. We had Judge Odden from Duluth, who was a former prosecutor; Judge Chester Rosengren, who was a former prosecutor; Judge Bruce Stone, who was a former prosecutor; Charles Johnson, who is now a judge and was a prosecutor at the time he was appointed to the committee. And John McGibbon, who is the County Attorney in Sherbourne County, and has been for many years, was on that committee. And George Scott, of the supreme court, was a former prosecutor, and an advisory member of that committee. The only real, true defense lawyers, who did a considerable amount of work, were Paul Jones and myself. Henry Fikman handles an occasional criminal case and David Graven handled perhaps three in this whole career as a lawyer. And Henry McCarr was on the committee, he is a judge now and a former prosecutor. Anyone who would label that committee as a defense oriented committee has had his head in the sand. In fact, I caught hell from most of the members of the criminal defense bar, when the rules came out because they said I was a traitor. How could I be a party to those rules?

Remarks of Mr. Ronald Meshbesh during the House Judiciary Committee meeting, February 3, 1987 (tape on file at the Legislative Reference Library).

244. See *supra* notes 224–30 and accompanying text. Philip Bush also explained this point: "The prosecutors publicly stated 'need' for rebuttal to respond to 'spurious' defense arguments was contradicted by their opposition to getting such a chance for rebuttal. It showed that prosecutors really wanted to have the advantage of being able to argue both first and last." Bush, *supra* note 215, at 26, n.6.

245. County Attorney Stephen Rathke seemed to concede this point later when Justice Lawrence Yetka questioned him at a supreme court hearing that was held to consider the legislative changes:

J. YETKA: It is my understanding these changes came about because of the direct action on behalf of the County Attorneys Association. My question is, why you didn't do your work through the committee and where you're represented?

RATHKE: I guess the straightforward answer is we didn't think it would succeed. So we didn't feel that was the place to go. Please keep in mind that what we did, is simply ask the legislature to amend a statute. We did not ask the legislature to create a statute where none exists that supercedes an existing rule. We asked the legislature to amend two statutes which have, frankly, bedeviled prosecutors for years and years. There was a Crime Commission Report in 1925 that suggested this change. That's what we did.

means of acquiring rule amendments that were advantageous to prosecutors.<sup>246</sup>

Many of the legislators believed that they had legitimately reserved a right in the enabling act to enact or modify statutes that would supercede the court's rules.<sup>247</sup> As a result, the advice of Justice Scott—that the legislators not get involved with court procedure because it was a violation of the separation of powers—was apparently accepted by only two of the six legislators on the senate subcommittee at which he testified.<sup>248</sup>

There were a number of fallacious arguments presented to the legislators as testimony on the bill. For example, promoters of the legislation presented the rule change to the legislators as a "victim's rights" piece of legislation.<sup>249</sup> According to

Also, I don't want to dwell on this, because it's not that important, this was not the County Attorney Association's proposal. However, once it was introduced, we adopted it. So it isn't that we caused this bill to be introduced. Once it was introduced, we, the Association, lobbied for it and supported it.

Remarks of Crow Wing County Attorney Stephen Rathke during the supreme court hearing to discuss proposed changes to the rules of criminal procedure, June 25, 1987 (tape on file at the Minnesota Supreme Court).

246. For an example of another such change see *supra* note 176.

247. Senator Alan Spear, Senate author of the bill, commented:

I think we can proceed and I think we're competent to make a decision on this. I don't think it was the legislature's intention, back in the early seventies—seventy-three, seventy-four, whenever it was, that we gave the courts the right to formulate the rules of evidence and the rules of criminal procedure—that it was ever the intention of the legislature that we would not have, ever have, the opportunity to legislate in this area again. I think the intent was to clearly reserve for ourselves the right, when we saw fit, to legislate in this area. So, with all due respect to Justice Scott and Dean Pirsig, and they are both men for whom I have great respect, I think that we ought to continue and vote on this bill.

Remarks of Senator Alan Spear during the Senate Criminal Law Division meeting, April 21, 1987 (tape on file at the Legislative Reference Library).

248. The testimony of Justice Scott and Professor Pirsig prompted two co-authors of the bill—Senator Ramstad and Senator Marty—to withdraw their support and vote in opposition to passage. Telephone interview with Senator Jim Ramstad (IR-Dist.45), Sept. 9, 1987.

The vote in the Senate division on a motion by Senator Pogemiller to send the bill to the full committee without a recommendation was four in favor and two opposed. (An earlier motion by Senate Spear to send the bill to the full committee "with approval" had failed.) Senator Ramstad commented later, "There was not enough support in the division for approval of the bill, but Spear [Senate sponsor or the bill] being the chairman and Tom Johnson [Hennepin County Attorney] being the force behind this, it was brought before the full committee." *Id.*

249. Consider, for example, the following remarks of a witness before the House Judiciary Committee:

Having worked closely with Randy [Representative Kelly, House sponsor of the bill] for some four years, working with him to really elevate Minnesota from a just-so-state in terms of victim's rights to one of the leading states in

many of the witnesses testifying before the legislature on behalf of the bill, a prosecutorial rebuttal was necessary in order for prosecutors to redeem the integrity of crime victims who are attacked by defense attorneys in their closing arguments.<sup>250</sup> As one editorial explained, however, court procedure should not presume “that the accused is the victimizer and the accusing party the victim.”<sup>251</sup> The proposal before the legislature was certainly not a victim’s rights bill, but the myth was appealing and may have influenced some legislators.<sup>252</sup>

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the nation in terms of victim’s rights; and I can tell you that his interest in these changes have nothing to do with any affinity that he has for prosecutors—that has nothing to do with it—and I think this is being painted as a prosecutor’s bill. This is a victim’s bill and I think that you should all remember that.

Testimony of Dr. William Kosiak, representing the Minnesota Association for Crime Victims, before the House Judiciary Committee, Feb. 10, 1987 (tape on file at the Legislative Reference Library).

As one witness, however, against the bill explained, “Don’t let anybody kid you. . . . This is not a victim’s rights bill. It’s guised in that because that’s the kind of legislation that looks good for the public. These are serious questions. I don’t think they’re frivolous issues, but they ought not to be addressed from the wrong perspective.” Testimony of Ronald Meshbesh, private attorney, before the House Judiciary Committee, Feb. 3, 1987 (tape on file at the Legislative Reference Library). See also *infra* note 252.

250. One representative of crime victims explained the case for allowing prosecutors a rebuttal as follows:

A victim who has heard things about their conduct or about their lifestyle or about their personality and said in front of a jury can have dreams and nightmares about that for a long time and can face the prospect of overcoming that on top of the initial trauma caused by the episode for which the trial is being held.

Statement of Fern Sepler-King, Executive Director of the Crime Victim and Witness Advisory Council and the Crime Victim Reparations Board, before the House Judiciary Committee, Feb. 3, 1987 (tape on file at the Legislative Reference Library).

251. Editorial, *supra* note 235, at 10A, col.1. As explained in the St. Paul Pioneer Press and Dispatch, “Representatives of victims’ interests contend that prosecutors should get in the last word so they can counter lies directed at witnesses against the defendants. Victims deserve sympathy, but court procedures must not presume that the accused is the victimizer and the accusing party the victim.” *Id.*

252. Consider one Representative’s comments: “We keep focusing on that one or two percent, whatever it may be, of the people that may in fact be innocent and innocently accused. But I guess I’m thinking of the other 97, or 98, or 99 percent of the folks that have been victims of crime. . . .” Comment of Representative Marcus Marsh (IR-Dist. 17A) before the House Judiciary Committee, Feb. 16, 1987 (tape on file at the Legislative Reference Library).

Assistant Hennepin County Public Defender Phil Bush commented:

They tried a new argument. They tried calling this a victim’s rights bill, since that is an issue that is on the agenda in the 1980s. And it’s taken the legitimate concern for victim’s rights—the concern to pay attention to victims—and tried to pass on some legislation the prosecutors have wanted all along. They’re attempting to use victim’s rights like a Trojan horse. They’re trying to bring in anything they want and just call it victim’s

A large part of the testimony by the county attorneys was also emotional and anecdotal:<sup>253</sup> the legislators were told of closing arguments in which defense attorneys made egregious comments and the prosecutors had no opportunity for rebuttal.<sup>254</sup> Inappropriate comments in closing argument, however, are not made only by defense attorneys, prosecutors can also be guilty of such tactics.<sup>255</sup> Regardless of which side is responsible, there are court procedures to deal with such remarks. The anecdotes of the legislative witnesses were simply another attempt to appeal to emotion rather than reason.<sup>256</sup> Interest-

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rights. . . . Is it really a victim's rights bill, or is that what they're using to try to sell it? And given how many arguments they've put forward, and how those arguments have collapsed, I feel they're just using that as a way of trying to sell the bill.

Remarks of Assistant Hennepin County Public Defender Phil Bush before the House Judiciary Committee, Feb. 16, 1987 (copy of tape on file at the Legislative Reference Library).

253. The fact that a large part of the testimony was emotional and anecdotal was even commented on at the legislative hearings. See, e.g., Comments of Representative Kathleen Vellenga, before the House Judiciary Committee, Feb. 16, 1987 (tape on file at the Legislative Reference Library).

254. This is one of the many anecdotes repeated to the legislators by promoters of the bill:

For instance, a woman was in a bar. She drank. Her friends left, believing that she had a ride home with someone else in their group. That person also left, believing that she had a ride home with the other part of the group. A man offered her a ride. She accepted that ride. He started out heading in the direction of her home, and then kept going and headed into a quiet residential area. In that area, he stopped, he raped her—he raped her violently. He grabbed the top of her dress, according to her, and ripped it from her body. The dress was put into evidence. The argument by the defense was “Ladies and gentlemen of the jury, can you not see your husband or yourself, in a position where a woman who has accepted a ride from you, and consented to sexual relations, when we both knew what was going to happen, but then later panic, and cry rape?” That is the kind of case where a victim sitting in that courtroom, or the people of the state of Minnesota, should have the opportunity to have a prosecutor and get up and say “Ladies and gentlemen, look at the dress.”

Statements of Karel Moersfelder, Hennepin County Attorney's Office, before the House Judiciary Committee, Feb. 3, 1987 (tape on file at the Legislative Reference Library).

255. For example, in *State v. Williams*, 297 Minn. 76, 210 N.W.2d 21 (1973), the prosecutor's closing argument included comments implying that the defense counsel's role and function are less of an essential component of the administration of criminal justice than the role and function of the prosecutor. The prosecutor also commented that the grand jury's indictment was more than a mere accusation, and he accused the defendant's wife of lying to the jury. All of these comments were found by the appellate court to be prejudicial to the defendant and a new trial was granted. *Id.* at 85–86, 210 N.W.2d at 26–27.

256. Some of the anecdotes were also misleading—or at least did not support the proposition of the person giving testimony. This anecdotal approach was used to persuade the legislators on each of the procedural proposals before the legislative

ingly, this tactic was not repeated when the promoters of the bill later appeared before the Minnesota Supreme Court.<sup>257</sup>

One of the most noticeable characteristics of the committee testimony was the need to “educate” the legislators on judicial procedure.<sup>258</sup> This inexperience and lack of knowledge in matters of court procedure is perhaps the most persuasive argument in favor of leaving procedural rules to the judiciary. Court procedure is a difficult and esoteric area of law and certainly those most familiar with the intricacies are lawyers and

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committees. For example, to support the county attorney’s proposal to create a presumption in favor of joinder of multiple defendants, Attorney Moersfelder explained:

A case has recently occurred where there were six male defendants. They were charged with burglary, rape and robbery. There were four trials. By the time of the third trial—no joinder of defendants—the husband of the raped woman, who was also a victim of himself [sic], got on the stand and told a case that was completely deadpan. . . . A victim cannot sustain the true depth of his or her feelings through multiple trials. To force them to do so, repeatedly, over, and over, and over again, does an injustice to the victim’s rights.

Statements of Ms. Karel Moersfelder, Hennepin County Attorney’s Office, before the House Judiciary Committee, Feb. 3, 1987 (tape on file at the Legislative Reference Library). When asked by Representative David Bishop (IR-Dist.33B) whether joinder had been requested in the case above, the county attorney admitted, “[I]n that particular case I believe there was not.” *Id.* If the court was not even asked to conduct a joint trial, what was the point of using this emotional anecdote to persuade the legislators that joinder is granted too infrequently by judges? Such comments are clearly misleading and not entirely truthful to the legislators.

257. Assistant Hennepin County Public Defender Philip Bush expressed similar sentiments at the supreme court’s hearing:

I think one of the policy questions that is very important, that people have touched on, but I would like to amplify a little bit, is the inherent danger of having two groups make the decision about what should the content of the rules be. Because what’s happened is, the proponents of these changes said one thing in the House, they said another thing in the Senate, and they’ve said a third thing here; and its been very selective, in a number of ways, about what they’ve told different groups.

Comments of Mr. Philip Bush at the Minnesota Supreme Court hearing to review proposed changes to the Minnesota Rules of Criminal Procedure, June 25, 1987 (tape on file at the Minnesota Supreme Court).

258. Stephen Cooper commented at a later supreme court hearing on changes to the criminal rules:

We don’t have—and this is what is of most concern to me—we don’t have experts making the decision. In the legislature, how many fallacious arguments were made—I suggest by the other side and the other side, I’m sure, suggests by us—but in either case, how many arguments were made that didn’t really address the meats of the issue here. And you had people, who had never been in a courtroom in their life, sitting there and deciding the intricacies of procedures. . . . What there was an attempt to do, was use emotional arguments off and off point.

Comments of Mr. Stephen Cooper, at the Minnesota Supreme Court’s hearing to review proposed changes to the Minnesota Rules of Criminal Procedure, June 25, 1987 (tape on file at the Minnesota Supreme Court).



judges. Unfortunately (though some would argue fortunately), the number of attorneys serving in the Minnesota Legislature has been on a steady decline since the early seventies.<sup>259</sup> Today, fewer than fifteen percent of the state legislators are lawyers and fewer than half of the members of the judiciary committees—where procedural issues are first considered—are members of the bar.<sup>260</sup> Even those legislators who are lawyers may not always be the most qualified to judge rules of court procedure.<sup>261</sup>

One lawyer-legislator—a co-author of the bill—acknowledged during the hearings that he did not have an adequate understanding of criminal procedure and withdrew his support for the bill.<sup>262</sup> The unfamiliarity of some legislators with judi-

259. According to a recent article, “[T]he number of lawyer-legislators has declined since the early 1970s. . . . [Fifteen years ago], attorneys commanded around 25 percent of all the seats in the Legislature. Today they number closer to 11 percent. While some have failed in their bids for reelection, many have simply declined to run again.” O’Donnell, *The Lawyer as Legislator*, BENCH AND BAR OF MINNESOTA, March 1986, p.14.

260. Seven of the seventeen members of the Senate Judiciary Committee are attorneys; only one member of the committee’s Criminal Law Division (the subcommittee that considered the bill) is an attorney. Only nine of the twenty-eight members of the House Judiciary Committee are attorneys. See OFFICIAL DIRECTORY OF THE MINNESOTA LEGISLATURE: SEVENTY-FIFTH SESSION 1987-88. The members of the Minnesota Supreme Court, on the other hand, are obviously all learned in the law; and the advisory committees formed by the court to assist them on matters of procedure are also composed of lawyers, judges and law professors—experts in their field. Court procedure does not only occasionally come to their attention, it is a matter of almost daily concern.

261. John Wigmore once explained, “The legislature has an inferior grade of knowledge. Its most qualified group is the judiciary committee; but the members of this committee, though lawyers, are not selected for their special knowledge of procedure. That committee in no sense represents the best knowledge of the bar on procedure.” Wigmore, *supra* note 214, at 278.

John Hart Ely noted the following in a recent book on the role of the U.S. Supreme Court: “[W]hat procedures are needed fairly to make what decisions are the sorts of questions lawyers and judges are good at. (Observe a lawyer on a committee with non-lawyers and see what role he or she ends up playing.)” J.H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 21 (1980).

262. When the bill to change the order of final argument came before a Senate subcommittee, Senator Jim Ramstad, the only lawyer-legislator on the committee, advised his colleagues:

The rules of criminal procedure are an esoteric area and I think properly within the domain of the supreme court. And that’s the threshold issue, that’s the issue I think we have to decide here tonight and, I just don’t think, well, in the time remaining, I just don’t think that we can do these very significant changes—in those rules of criminal procedure—justice. You know, for five years I was in a courtroom everyday, I’ve been away from it now since 1978, albeit in another jurisdiction, and I don’t feel competent to

cial procedure was also clear from their comments and questions during the hearings. Compounding this problem is the fact that criminal procedure is one of the more controversial areas of rulemaking. People have common misperceptions and prejudices about defendants and the criminal justice system.<sup>263</sup>

It is also essential that any changes to court procedures receive adequate attention and thoughtful contemplation by the rule-makers. The legislative process, however, is hurried and the sessions never seem to be long enough to complete the business at hand.<sup>264</sup> The legislators are also rushed and under pressure to complete those items they have time to consider.

make these changes involving joinder, preemptory challenges, order of final argument.

Remarks of Senator Jim Ramstad (IR-Dist 45) before the Senate Criminal Law Division, April 21, 1987 (tape on file at the Legislative Reference Library).

263. The following comment from a legislator serves as an example of prejudice and unfamiliarity with judicial procedure:

First of all I think, Representative Kelly [House sponsor of the bill], this is such a good bill we should vote on it today and move it out. But I think first of all, the committee members, if you look at the book that we got last committee hearing, a couple committee hearings ago, from a group that does the statistics in Minnesota, and I guess the reason for this comment is to rebut a little bit what Mr. Meshbesher [a witness opposed to the bill] said, because if you look in the back of the book for the latest statistics, for example, it says homicide cases: prosecuted, 94; convicted, 75; ten did no time whatsoever; six did one year or less; only 59 out of that original 94 prosecuted did more than one year in jail. Look at the case of sexual assaults: 238 prosecuted; only 180 convicted; 29 did no time whatsoever; 77 did one year or less; and only 74 out of that 180 did more than one year in prison. And it goes on and on. One area that most of the committee members know that I have an interest in is the drug area: 1130 prosecuted; only 762 convicted; 295 out of that 762 convicted did no time whatsoever; 434 did less than one year. Only 33 out of that 762 did more than one year in prison. So I submit to this committee that, in fact, there needs to be a change, simply because it's weighed unfairly in favor of the defendant.

Statements of Representative Marcus Marsh (IR-Dist. 17A) before the House Judiciary Committee, Feb. 3, 1987 (tape on file at the Legislative Reference Library). Ronald Meshbesher, the witness to whom Representative Marsh's statements were directed, responded appropriately, "I appreciate those statistics, but you're comparing apples and oranges." *Id.*

If the Representative's point was that justice is not administered with enough swiftness, certainty or equality, it could be accepted as logically related. He seems more upset, however, that some people are acquitted of the crime with which they are charged and that convicted felons don't spend enough time in prison. Where is the connection between the order of final argument, joinder of defendants, preemptory challenges and the amount of time convicted felons serve in prison? Any connection at all must be remote.

264. By constitutional provision, the legislature is required to be in session for not more than 120 legislative days each biennium (there is a temporary adjournment during the session of the first year and the second year of the biennium). MINN. CONST. art. IV, § 12.

The 1987 session was not an exception. When the bill to change the order of final argument was scheduled for consideration in the Senate Judiciary Committee, the time schedule didn't allow the issue to be taken up until 12:30 a.m. This was on the last day the committee was to hear testimony and after many hours of testimony on other bills. A final vote wasn't taken until nearly 2:00 a.m. and the bill was passed on a vote of nine to eight.<sup>265</sup> Procedural issues simply deserve more time and study than the legislature can generally allow.<sup>266</sup>

Despite the institutional drawbacks of legislatively created court procedures, the bill was eventually approved by both houses of the legislature.<sup>267</sup> Following the passage of the bill and its signature into law by the governor, the rules of criminal procedure were in a precarious condition: a statute was in direct contradiction to a supreme court promulgated rule. The legislature's statute granted the prosecutors a limited right to a rebuttal in final arguments, the court promulgated rule did not.<sup>268</sup>

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265. See Senate Judiciary Minutes, p. 5, April 28, 1987 (regarding the statute to change the order of final argument in a criminal trial). A vote was taken on the bill despite the protests from some legislators that the issue deserved more time for thought. It should be noted, however, that the House Judiciary Committee devoted approximately seven hours of time to testimony on the bill.

266. The judiciary's method of rulemaking, on the other hand, can allow ample time for the debate and contemplation of procedural rules. The court, and especially its advisory committees, are not as restricted as the legislature in the amount of time they can devote to rulemaking. The quantity and quality of the rules produced by the court is alone an indication of the time and thought devoted to rulemaking. The court and advisory committees are also free to meet whenever the need arises. See also *supra* text accompanying note 63.

267. The passage of the bill was not as simply stated. Bush explained: "A close vote on the House floor resulted in the closing argument provision being deleted from the bill but a few weeks later, after vigorous efforts by the prosecution and police lobbies, the provision was reinstated and the bill was sent to the Senate." Bush, *supra* note 215, at 24-25. After substantial amendments in the Senate committees, the full Senate passed the bill and the House approved the Senate version. *Id.*

268. MINN. STAT. § 631.07, as amended by the legislature in 1987, now reads:

When the giving of evidence is concluded in a criminal trial, unless the case is submitted on both sides without argument, the prosecution may make a closing argument to the jury. The defense may then make its closing argument to the jury. *On the motion of the prosecution, the court may permit the prosecution to reply in rebuttal if the court determines that the defense has made in its closing argument a misstatement of law or fact or a statement that is inflammatory or prejudicial. The rebuttal must be limited to a direct response to the misstatement of law or fact or the inflammatory or prejudicial statement.*

MINN. STAT. § 631.07 (Supp. 1987) (emphasis added).

The provision of the bill regarding preemptory challenges was deleted in the

### C. Court Capitulation

If the issue had come up in a case of which final argument rule should prevail the supreme court might have been confronted with the constitutionality of legislative rulemaking. Within a month, however, after passage of the county attorney's bill, the supreme court held an open hearing to consider amendments to the rules of criminal procedure. This hearing had been scheduled well in advance for other purposes, but the court arranged to also consider the issue of the legislature's statutory amendments.

At the hearing, it was clear that at least some of the justices were unhappy with the manner in which the county attorneys received their rebuttal. Justice Yetka commented to one of the proponents of the change:

You had a chance to make all of these arguments before [the advisory committee] over and over again. We've gone to the legislature as a judiciary and as a bar association, telling the legislature that we're better qualified in the profession to set the rules. . . .

[I]f there's something you don't like about the rule, you go into the legislature and get it changed. Now, is that going to persist? If so, what is that going to do to the process that we've been using now in this state for the last thirty-five years? You're riding a law and order crest, supposing that shifts later on and if the defense doesn't like some of the proposed changes on the part of the committee they're going to go to the legislature too. What's the purpose in having a committee of this kind, in which you're all represented to work out your differences, if it's going to be ignored?<sup>269</sup>

Despite the concerns expressed by the justices, following the hearing the supreme court modified its rule to coincide with the legislative statute.<sup>270</sup>

The objectives of the court in adopting the rule that corresponds to the statute are not apparent. The court gave no reasons for its action. It also did not follow its usual procedure of first submitting the question to its Committee on Rules of

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Senate committee, but the provision regarding joinder was approved with certain amendments. The latter also conflicted with the court's promulgated rule.

269. Comments of Justice Lawrence Yetka at the Minnesota Supreme Court hearing to review proposed changes to the Minnesota Rules of Criminal Procedure, June 25, 1987 (tape on file at the Minnesota Supreme Court).

270. See MINN. R. CRIM. P. 26.03 sub. 11 (1988).

Criminal Procedure.<sup>271</sup> The court may have felt that the rule on the order of final argument was not one on which to insist on its inherent power over court procedures. On the other hand, by adopting the new rule, the court may have been indicating to the legislature that, although the new rule conformed to the statute, the court was in fact asserting its inherent and exclusive power over court procedures. But regardless of whatever intentions the court may have had for its actions, the confusion over the rulemaking power remains. As evidenced by the statement of Senator Spear,<sup>272</sup> the legislature, in enacting the statute, assumed that it, rather than the court, has the ultimate control over and responsibility for court procedures.

### CONCLUSION

It is reasonable to anticipate that the issue of a conflicting statute and rule will soon emerge again. Those who dislike a court rule and observe what took place on the order of final argument may seek like nullification by appealing to the legislature. In that event, it is also reasonable to anticipate that the court will reassert its inherent constitutional authority and responsibility on matters of court procedure and will not abandon the position it and appellate courts of other states have uniformly adopted. Our examination of the power over court procedure, including its history, its constitutional status and its practical and realistic aspects, persuades us that this is the position that leads to the most desirable court procedures and best serves the public interest in the fair and efficient administration of justice.

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271. The court had rejected an early recommendation of the committee, see *supra* note 230, which appears to have been the product of compromise within the committee and would probably have been unworkable in practice.

272. See *supra* note 247.