

1985

# A Practitioner's Guide to Bringing an Appeal In the Minnesota Court of Appeals

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## Recommended Citation

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## A PRACTITIONER'S GUIDE TO BRINGING AN APPEAL IN THE MINNESOTA COURT OF APPEALS

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*The Minnesota Court of Appeals is an integral part of the appellate process and has demonstrated that it can deal efficiently and effectively with its enormous caseload. In this Article, Judge Popovich and Mr. Niles provide a detailed guide for an attorney practicing before the appellate court. The authors examine the role of the court, include a statistical analysis of its first year, and conclude that the court of appeals is thus far a success.*

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The authors wish to thank Jeff Arrigoni and Cynthia Lehr, Staff Attorneys, Minnesota Court of Appeals, for advice and assistance in preparing this Article.

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## INTRODUCTION

The Minnesota Court of Appeals is fulfilling an important role in Minnesota appellate court process after only one year of existence. Appeals in Minnesota now receive more thorough attention. Most parties are provided the opportunity for oral argument, and written decisions inform the parties of the court's rationale. Most importantly, the time between the filing of an appeal and a decision has been reduced.<sup>1</sup>

In order to handle its heavy caseload, the new court is requiring stricter compliance with appellate procedures. Compliance with the Minnesota Rules of Civil Appellate Procedure and other appellate procedures is necessary if the court is to continue the refund tradition of "effective and timely review."<sup>2</sup>

The practitioner must be aware of several recent developments in appellate practice to effectively represent a client before the Minnesota Court of Appeals. Many appellate procedures were modified in preparation for the implementation of the court of appeals.<sup>3</sup> Likewise, the court is beginning to

1. See generally *infra* notes 22-35 and accompanying text.

2. Magnuson & Herr, *Handling a Civil Case in the Minnesota Court of Appeals*, BENCH & B. MINN., Sept. 1984, at 17.

3. See Larson & Johnson, *Highlights of Proposed Rules for Appellate Practice*, BENCH & B. MINN., May 19, 1983, at 3 (special ed.).

develop a body of case law dealing with appellate practice.<sup>4</sup>

## I. THE ROLE OF THE COURT OF APPEALS

An advocate in any forum must have an understanding of the audience. This understanding enables the advocate to communicate more effectively with the audience.<sup>5</sup> The Minnesota appellate practitioner should have a basic understanding of the role of the court of appeals. This includes an understanding of the historical developments leading to the court's creation, the court's view of its role, and the court's actual operating capabilities.

### A. *The Historical Perspective*

The two main purposes of an appellate court are to review the decisions of lower courts and to develop the law.<sup>6</sup> The Minnesota Court of Appeals was created to alleviate the burdensome workload encountered by the Minnesota Supreme Court.<sup>7</sup> At the same time, the new court was expected to ensure high quality appellate justice, speed the appellate process, improve the geographical accessibility of the appellate courts, and permit more litigants to appeal.<sup>8</sup>

The court was granted broad jurisdiction so that most appeals would be heard in the court of appeals.<sup>9</sup> As a result, the Minnesota Supreme Court could then devote its efforts to

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4. As of the time of the writing of this Article, the Minnesota Court of Appeals has decided 224 cases addressing some aspect of appellate procedure.

5. One commentator states:

Regardless of whether he is performing in a great lecture hall, from the pulpit of a small church, in a university classroom, in front of a jury, on the Broadway stage, or before a nine-judge appellate panel, the speaker's goal is the same: *He must bind himself to his audience.*

M. HOUTS & W. ROGOSHESKE, *ART OF ADVOCACY—APPEALS* § 41.01 (1984) (emphasis in original); see also *id.* § 2.02. These remarks are equally applicable to the written advocacy of an appellate brief.

6. ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, *STANDARDS RELATING TO COURT ORGANIZATION* § 1.13 (1974).

7. See Harmon & Lang, *A Needs Analysis of an Intermediate Appellate Court*, 7 WM. MITCHELL L. REV. 51, 84-85 (1981).

8. See *id.* at 79.

9. See Larson, *Jurisdiction of the Minnesota Court of Appeals*, 10 WM. MITCHELL L. REV. 627, 633 (1984). More than 90% of these matters are expected to be terminated in the court of appeals. See Amdahl, *Appeals to the New Minnesota Court—Foreword*, 10 WM. MITCHELL L. REV. 623, 624 (1984).

cases of greater significance.<sup>10</sup> The primary role of the court of appeals would be to correct lower court error, and the primary role of the supreme court would be the orderly development of Minnesota law.<sup>11</sup>

### B. *The Internal Perspective*

The court's perspective of its role is consistent with legislative intent. This is amply demonstrated in the introduction to the Minnesota Court of Appeals Internal Rules:

The Court of Appeals is an intermediate appellate court. It is primarily decisional and error correcting rather than a legislative or doctrinal court. Its primary function is the correction of error by application of legal principles. Its task is to find the law, to state it and to apply it to the facts. Only when there are no statutory or judicial precedents to follow will the Court of Appeals make new law.<sup>12</sup>

Although the court's role centers around its error correcting function, the court of appeals' broad jurisdiction necessarily requires it to serve other functions. For example, the court of appeals is beginning to create its own body of case law. This case law is frequently relied upon by the appellate court in reaching subsequent decisions. The supreme court is able to direct the development of Minnesota case law more systematically than the court of appeals,<sup>13</sup> but the development of a body of case law in the court of appeals is an inherent part of its rendering decisions.<sup>14</sup>

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10. See MINN. R. CIV. APP. P. 117, 118; see also MINN. STAT. § 480A.10, subds. 1, 2 (1984).

11. See Harmon & Lang, *supra* note 7, at 81.

12. MINN. CT. APP. INTERNAL R. 1. The rule continues:

The purpose of these rules is informational. They are complementary to the appellate rules. Every lawyer should be familiar with those new rules. These rules may be subject to change with experience and without prior notice. The internal rules enable lawyers to understand the mechanics of the Court's procedure; provide a basis for evaluation and improvement of the administration of the court; and promote public understanding of the judicial deliberative process.

*Id.*

13. In addition to this weighty responsibility, the supreme court is also entrusted with many important administrative functions. See, e.g., MINN. STAT. § 480.05 (Minnesota Supreme Court prescribes and modifies rules governing examination, admission, practice, and conduct of attorneys).

14. The creation of precedent is a natural and necessary component of the common law tradition. The court of appeals must "break new ground or else fail to decide the case that [is] before it." Leflar, *The Task of the Appellate Court*, 33 NOTRE DAME LAW. 548, 549 (1958). Another commentator states:

The court of appeals is also vested with jurisdiction over matters of great public importance. The court has the power to decide significant questions of law;<sup>15</sup> to order extraordinary relief;<sup>16</sup> and to construe statutes and rule them unconstitutional.<sup>17</sup> In short, the court of appeals has most of the powers usually attributed to an appellate court.<sup>18</sup>

The role of the Minnesota Court of Appeals is best illustrated by the breadth of its opinions. The court has decided many cases of first impression in many different legal contexts.<sup>19</sup> On the other hand, the court attempts to exercise its authority in a manner which minimizes any perceived risk of usurping the supreme court's function of controlling the development of Minnesota law. For example, the new court will

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Until a point has been settled by the higher court it is the function of the inferior tribunal to render *its* decision on the point involved; to express *its* best thinking for the appraisal of the higher court. It is not, in my view, an adequate judicial service simply to anticipate the thinking of the higher court—to substitute prediction for independent creative thought—in an effort to avoid reversal.

Merrill, *Some Reflections on the Business of Judging*, 40 CAL. ST. B.J. 811, 813 (1965) (emphasis in original).

15. See MINN. STAT. § 480A.06.

16. See MINN. R. CIV. APP. P. 120, 121; see also MINN. STAT. § 480A.06, subd. 5.

17. To date, the court has not struck down any statute as unconstitutional. Instead, the court of appeals has certified important constitutional questions to the Minnesota Supreme Court. See *Bernthal v. City of St. Paul*, 361 N.W.2d 146, 148 (Minn. Ct. App. 1985); *O'Brien v. Mercy Hosp.*, 356 N.W.2d 367, 370 (Minn. Ct. App. 1984); see also *Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984).

On the other hand, the court of appeals has upheld the constitutionality of statutes on several occasions. See, e.g., *Highland Chateau, Inc. v. Minnesota Dept. of Pub. Welfare*, 356 N.W.2d 804 (Minn. Ct. App. 1984); *In re Welfare of A.K.K.*, 356 N.W.2d 337 (Minn. Ct. App. 1984); *In re Martenies*, 350 N.W.2d 470 (Minn. Ct. App. 1984); *State v. Munnell*, 344 N.W.2d 883 (Minn. Ct. App. 1984).

18. See generally *M. HOUTS & W. ROGOSHESKE*, *supra* note 5, §§ 2.01, 6.01-02 (listing typical characteristics of intermediate appellate courts).

19. To date, the court of appeals has labeled 16 cases matters of first impression. *Hill v. Hill*, 356 N.W.2d 49, 54 (Minn. Ct. App. 1984); *State v. Noreen*, 354 N.W.2d 77, 78 (Minn. Ct. App. 1984); *Mulroy v. Mulroy*, 354 N.W.2d 66, 68 (Minn. Ct. App. 1984); *March v. Crockarell*, 354 N.W.2d 42, 45 (Minn. Ct. App. 1984); *State v. Hinkel*, 353 N.W.2d 617, 620 (Minn. Ct. App. 1984); *Hawkinson v. Geyer*, 352 N.W.2d 784, 788 (Minn. Ct. App. 1984); *Cook v. Connolly*, 353 N.W.2d 184, 188 (Minn. Ct. App. 1984) (Leslie, J., concurring); *Moll v. State*, 351 N.W.2d 639, 643 (Minn. Ct. App. 1984); *State v. Kornexl*, 351 N.W.2d 26, 27 (Minn. Ct. App. 1984); *Sturgeon v. Commissioner of Pub. Safety*, 350 N.W.2d 487, 488 (Minn. Ct. App. 1984); *Lea v. Pieper*, 345 N.W.2d 267, 270 (Minn. Ct. App. 1984); *State v. Corbin*, 343 N.W.2d 874, 874 (Minn. Ct. App. 1984); *In re Florance*, 343 N.W.2d 297, 301 (Minn. Ct. App. 1984); *Marriage of Haynes*, 343 N.W.2d 679, 681 (Minn. Ct. App. 1984); *State ex rel. Waste Mgmt. Bd. v. Brueshoff*, 343 N.W.2d 292, 294 (Minn. Ct. App. 1984); *City of Chicago City v. Poulter*, 342 N.W.2d 167, 168 (Minn. Ct. App. 1984).

seldom address remaining issues after a dispositive issue has been decided. Generally, opinions are drafted so that only the dispositive issue or issues are analyzed.<sup>20</sup> This avoids the unnecessary creation of precedent. The court of appeals also certifies pending matters for accelerated review in the supreme court when the issues presented are sufficiently important.<sup>21</sup>

### C. *A Statistical Analysis of the Court's First Full Year of Operation*

The court of appeals is aggressively attempting to fulfill its mandate to improve the appellate process in Minnesota, and this fact is reflected by the large number of cases decided. By the end of 1984, 2713 appeals were filed in the court of appeals.<sup>22</sup> Six hundred seventy-nine cases were filed in 1983<sup>23</sup> and 2034 in 1984.<sup>24</sup> Of these 2713 matters, 72% (1946) have been disposed.<sup>25</sup> The court of appeals began operation with an initial caseload of 353 cases<sup>26</sup> because appeals could be filed in the new court before the court actually began operation on November 2, 1983.<sup>27</sup> Filings exceeded dispositions in all but one month until July 1984, when the court's caseload reached 887 cases.<sup>28</sup> The court of appeals' dispositions exceeded filings after July 1984, and the caseload had been reduced to 767 as of January 1, 1985.<sup>29</sup>

The primary type of disposition used by the court of appeals is the signed opinion. Fifty-three percent of all matters are disposed of by a full written opinion.<sup>30</sup> Another 1% are released using a memorandum or summary opinion.<sup>31</sup> The next most

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20. The court of appeals attempts to avoid moot questions and advisory opinions. For a good general discussion of mootness on appeal, see Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955).

21. See, e.g., *Bernthal*, 361 N.W.2d at 148-49; *O'Brien*, 356 N.W.2d at 367; *Cox*, 355 N.W.2d at 401.

22. The statistics cited in this Article were prepared by the State Judicial Information System. OFFICE OF THE STATE COURT ADM'R, THE NEW MINNESOTA APPELLATE COURT SYSTEM REPORT ON THE FIRST FULL YEAR OF OPERATION 29 (1985) [hereinafter cited as APPELLATE COURT SYSTEM REPORT].

23. *Id.*

24. *Id.*

25. *Id.* at 28.

26. *Id.*

27. See Minn. R. Civ. App. P. 147 (1983).

28. APPELLATE COURT SYSTEM REPORT, *supra* note 22, at 28.

29. *Id.*

30. *Id.* at 29.

31. *Id.* A memorandum opinion is used when a procedural issue is involved, and a summary opinion is used when the case is of limited application.

common type of disposition has been dismissal. The court has dismissed 35% of all appeals filed.<sup>32</sup> Denial of petitions for discretionary review and other forms of discharge concluded nearly 9% of all appeals.<sup>33</sup> The court has certified or transferred 1.1% of its cases to the Minnesota Supreme Court.<sup>34</sup>

The average time from the filing of the appeal until disposition for oral matters is currently 200 days. Nonoral matters are disposed of in 158 days on the average. Appeals considered in special term are concluded in fifty-five days on the average. When all appeals are categorized, the average time from the filing of an appeal to disposition is 123 days.<sup>35</sup>

These statistics demonstrate that the court of appeals is successfully handling its caseload. The court is beginning to reduce its initial caseload, most cases are disposed of by written decisions or orders with stated reasons, and matters are decided expeditiously.

## II. PRESERVING ISSUES FOR APPEAL

Bringing and perfecting an appeal in the court of appeals does not ensure that the issues a party wishes to raise on appeal will be considered. In practice, the attorney must anticipate the possibility of appeal while the matter is at trial and

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32. *Id.* These dismissals include: (1) joint stipulations of dismissal by the parties because of settlement; (2) dismissals of appeals from nonappealable orders or for lack of jurisdiction; (3) dismissals for failure to serve all parties; and (4) dismissals due to a failure to follow other applicable rules.

33. *Id.* The court of appeals rarely grants discretionary review, but will grant it in matters of great importance or because of judicial economy and efficiency.

34. *Id.* These are usually the cases of such importance that the ultimate doctrinal court of this state should rule. See *supra* note 21 and accompanying text.

35. It should be noted that there are inherent structural limits on the minimum time it takes to process a fully considered appeal with oral argument. After filing an appeal, an appellant has 10 days to order the trial transcript. MINN. R. CIV. APP. P. 110.02, subd. 1. The court reporter then has 60 days to deliver the trial transcript. *Id.*, subd. 2. The appellant then has 30 days to prepare, serve, and file a brief and appendix. *Id.* 131.01. Respondent then has 30 days to prepare a brief. *Id.* The case will be scheduled on the court's calendar after the respondent's brief is filed. *Id.* 133.02.

The court notifies attorneys approximately 30 days prior to scheduling oral argument. MINN. CT. APP. INTERNAL R. 2.2. The court of appeals is required to issue an opinion within 90 days after oral argument or submission of briefs or memoranda, whichever is later. MINN. STAT. § 480A.08, subd. 3. The court, however, often issues a decision within 60 days of submission. See APPELLATE COURT SYSTEM REPORT, *supra* note 22, at 11. Thus, the inherent minimum time for the processing of an appeal is 220 days, or about seven months.



must preserve issues for appeal.<sup>36</sup> The two most frequently overlooked requirements for preserving issues for appeal are the timely objection and the motion for a new trial.

### A. *The Necessity of an Objection*

One of the most basic rules of appellate practice is that a party cannot raise an issue for the first time on appeal.<sup>37</sup> This rule applies to almost every aspect of the proceedings at the trial court level. This rule is so basic that repeating it seems unnecessary. Nevertheless, many issues brought before the court of appeals are not considered because the issue was not raised below.<sup>38</sup>

The simplicity of this rule is a trap for the unwary. Some practitioners may be unaware of the wide scope of this requirement. Every attorney knows that a timely objection and offer of proof is necessary to preserve evidentiary issues.<sup>39</sup> A timely objection is also required, however, for issues of law,<sup>40</sup> misconduct of counsel,<sup>41</sup> improper jury instructions,<sup>42</sup> and virtually

36. See generally J. SONSTENG, R. HAYDOCK & J. BOYD, *THE TRIALBOOK—A TOTAL SYSTEM FOR THE PREPARATION AND PRESENTATION OF A CASE* §§ 11.6-.7 (1984).

37. See, e.g., *Morton v. Board of Comm'rs*, 301 Minn. 415, 427, 223 N.W.2d 764, 771 (1974).

It is settled law in all jurisdictions that except for jurisdictional challenges, no claimed trial court error may be raised and acted upon at the appellate level if it was not raised and acted upon during trial, or in a post-trial motion. A failure to ask the trial court to correct the claimed error amounts to its waiver upon appeal.

M. HOUTS & W. ROGOSHESKE, *supra* note 5, § 1.09. The court will, however, consider issues which were not raised by an objection if those issues involve fundamental or constitutional rights. See, e.g., *Hyduke v. Grant*, 351 N.W.2d 675, 677 (Minn. Ct. App. 1984) (citing *Singleton v. Wulff*, 428 U.S. 106 (1976)).

38. See, e.g., *Virsen v. Rosso, Beutel, Johnson, Rosso & Ebersold*, 356 N.W.2d 333, 335 (Minn. Ct. App. 1984); *State v. Propotnik*, 355 N.W.2d 195, 199 (Minn. Ct. App. 1984); *Schatz v. Davis*, 354 N.W.2d 522, 524 (Minn. Ct. App. 1984); *Hyduke*, 351 N.W.2d at 677.

39. See MINN. R. EVID. 103; see also MINN. R. CRIM. P. 26.03, subd. 14.

40. See *Virsen*, 356 N.W.2d at 335; *Schatz*, 354 N.W.2d at 524; see also *Thayer v. American Fin. Advisors, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982); *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 68 n.2 (Minn. 1979).

41. See *Winter v. Holmes City Farmers Mut. Ins. Co.*, 294 Minn. 526, 527-28, 200 N.W.2d 438, 439-40 (1972).

42. See MINN. R. CIV. P. 51; see also MINN. R. CRIM. P. 26.03, subd. 18(3). See generally *Wolner v. Mahaska Indus.*, 325 N.W.2d 39, 42 (Minn. 1982); *Bebeau v. Mart*, 310 N.W.2d 465, 469 (Minn. 1981); *Duchene v. Wolstan*, 258 N.W.2d 601, 606 (Minn. 1977).

any irregularity occurring in the trial court.<sup>43</sup> A timely objection is necessary to create a record for appeal and to give the trial court an opportunity to correct any error.<sup>44</sup> The court of appeals will "limit itself to a consideration of only those issues that the record shows were presented and considered by the trial court in deciding the matter before it."<sup>45</sup>

### B. *The Necessity of a Motion for a New Trial*

In addition to a timely objection, a motion for a new trial or for judgment notwithstanding the verdict must be made to preserve issues for appeal.<sup>46</sup> Where the appropriate post-trial motion is not made before appeal, the scope of review<sup>47</sup> on appeal is very limited. In *Gruenhagen v. Larson*,<sup>48</sup> the Minnesota Supreme Court formulated this oft-repeated rule: "on appeal from a judgment where there has been no motion for a new trial the only questions for review are whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment."<sup>49</sup> This scope of review applies when an appropriate post-trial motion is not made in the trial court before appeal.<sup>50</sup>

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43. See M. HOUTS & W. ROGOSHESKE, *supra* note 5, § 1.09[1] (listing common irregularities at trial).

44. See *Teas v. Minneapolis St. Ry.*, 244 Minn. 427, 431-32, 70 N.W.2d 358, 361-62 (1955).

45. *Thayer*, 322 N.W.2d at 604 (citing *Thompson v. Barnes*, 294 Minn. 528, 200 N.W.2d 291 (1972)).

46. See MINN. R. CIV. P. 50.02, 59; MINN. R. CRIM. P. 26.04.

A post-trial motion for amended findings of fact and conclusions of law may also be sufficient to preserve issues for appeal. See *Kordosky v. Conway Fire & Safety, Inc.*, 304 N.W.2d 616, 618 (Minn. 1981) (motion for amended findings of fact and conclusions of law sufficient to preserve negligence issues on appeal). The authors recommend always making a motion for new trial if an appeal is contemplated. A motion for judgment notwithstanding the verdict or for amended findings may be made with the motion for new trial. See MINN. R. CIV. P. 50.02, 52.02.

47. Scope of review is a principle governing the extent to which an appellate court will consider issues raised on appeal. See generally *infra* notes 151-60 and accompanying text.

48. 310 Minn. 454, 246 N.W.2d 565 (1976).

49. *Id.* at 458, 246 N.W.2d at 569 (citing *Potvin v. Potvin*, 177 Minn. 53, 224 N.W.2d 461 (1929); *Meiners v. Kennedy*, 221 Minn. 6, 20 N.W.2d 539 (1945); *Laabs v. Hagen*, 221 Minn. 89, 21 N.W.2d 91 (1945)); see also *Schatz*, 354 N.W.2d at 524; *Tonka Tours, Inc. v. Chadima*, 354 N.W.2d 519, 521 (Minn. Ct. App. 1984).

50. *Johnsrud v. Tri-State Sales, Inc.*, 353 N.W.2d 255, 257 (Minn. Ct. App. 1984); *Hartman v. Blanding's, Inc.*, 288 Minn. 415, 423, 181 N.W.2d 466, 470 (1970); *Kilty v. Mutual of Omaha Ins. Co.*, 287 Minn. 403, 404, 178 N.W.2d 734, 736 (1970).

The purpose of requiring these post-trial motions "is to permit the correction of errors by the trial court before automatically incurring the expense and inconvenience associated with an appeal."<sup>51</sup> Although Minnesota Rule of Civil Appellate Procedure 103.04 permits the court of appeals to "review any other matter as the interest of justice may require,"<sup>52</sup> the court has consistently limited its scope of review where the appropriate post-trial motions have not been made.<sup>53</sup> "[M]atters involving trial procedure and evidentiary rulings, objections to instructions and the like are not subject to review unless there was a motion for a new trial in which such matters were assigned as error."<sup>54</sup>

### III. PRESERVING A FAVORABLE JUDGMENT—CLOSING THE DOOR ON AN OPPONENT'S APPEAL

An attorney may protect a favorable judgment or order from appeal by taking the steps necessary to commence the time period in which a judgment or order must be appealed. An appeal must be filed within the time limits prescribed by Minnesota Rule of Civil Appellate Procedure 104.01, which provides, "An appeal may be taken from a judgment within 90 days after its entry, and from an order within 30 days after service by the adverse party of written notice of filing unless a different time is provided by law."<sup>55</sup> The ninety- and thirty-day limits are well-known. What is often not realized, however, are the steps needed to commence the running of these time periods.

The ninety-day period for appealing from judgments commences upon entry of the judgment.<sup>56</sup> If a judgment is not entered by the clerk of court, the time to appeal could run indefinitely. The risks posed to a favorable judgment by the failure to have the judgment entered are readily apparent.

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51. *Pierce v. National Farmers Union Property & Casualty Co.*, 351 N.W.2d 366, 368 (Minn. Ct. App. 1984) (citing *Phelan v. Carey*, 222 Minn. 1, 3, 23 N.W.2d 10, 12 (1946)).

52. MINN. R. CIV. APP. P. 103.04.

53. *See, e.g., Schatz*, 354 N.W.2d at 524; *Tonka Tours, Inc.*, 354 N.W.2d at 521; *Pierce*, 351 N.W.2d at 368-69.

54. 3 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE 54 (Supp. 1983) (citing *Antonson v. Ekvall*, 289 Minn. 536, 186 N.W.2d 187 (1971); *Hartman*, 288 Minn. at 415, 181 N.W.2d at 466)).

55. MINN. R. CIV. APP. P. 104.01.

56. *Id.*

The failure to have a judgment entered may occur when the order for judgment stays the entry of judgment. The clerk of court may simply fail to enter the judgment. More often, the clerk may not know that a judgment is to be entered.<sup>57</sup> Whatever reason causes the judgment not to be entered, a careful attorney should be aware of the date the judgment is to be entered and make sure entry of judgment is completed.<sup>58</sup>

The thirty-day period for appealing from orders commences upon service by the adverse party of written notice of the filing of the order.<sup>59</sup> Like appeal from a judgment, the time to appeal from an order may run indefinitely if the correct procedures are not followed.<sup>60</sup> An adverse party is any party adverse in the action, and not necessarily someone who is adverse to the specific order.<sup>61</sup> Notice of the filing of the order must be in writing.<sup>62</sup>

The clerk of court's notice of the filing of the order does not satisfy rule 104.01.<sup>63</sup> Thus, a party who has actual notice of the filing of an order is not precluded from appealing the order until thirty days after service of notice of filing by the adverse party.<sup>64</sup> Since the court of appeals cannot extend the time for appeal in most cases,<sup>65</sup> the wise attorney will make

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57. This often occurs, for example, with orders for summary judgment.

58. *See, e.g.,* *Servin v. Servin*, 345 N.W.2d 754, 757 (Minn. 1984); *O'Brien v. Wendt*, 295 N.W.2d 367, 369-70 (Minn. 1980) (appellants allowed to appeal order six months after its filing due to error by respondents); *Loram Maintenance of Way v. Consolidated Rail Corp.*, 354 N.W.2d 111, 113 (Minn. Ct. App. 1984).

Even in the absence of a direct court order to do so, the clerk has a duty to enter judgment. *See* *Erickson v. Nelson*, 275 Minn. 561, 562, 146 N.W.2d 768, 770 (1966).

59. MINN. R. CIV. APP. P. 104.01.

60. *See supra* note 58 and accompanying text.

61. *See O'Brien*, 295 N.W.2d at 370 (citing *Olson v. Burt*, 307 Minn. 142, 239 N.W.2d 212 (1976); *Malcomson v. Goodhue County Nat'l Bank*, 198 Minn. 562, 272 N.W. 157 (1936)).

62. MINN. R. CIV. APP. P. 104.01. Rule 104.01 specifically requires "written notice" of the filing of the order. *Id.* The court of appeals has indicated it will carefully scrutinize "notice that begins a countdown on valuable rights." *Swanson v. Swanson*, 352 N.W.2d 508, 510 (Minn. Ct. App. 1984). The written notice requirement encourages "certainty, judicial economy, and the avoidance of contentious arguments." *Id.*

63. *See O'Brien*, 295 N.W.2d at 370.

64. *See supra* note 58 and accompanying text.

65. The Minnesota Rules of Criminal Procedure permit the court of appeals to extend the time for appeals in criminal matters:

For good cause the trial court or a judge of the Court of Appeals may, before or after the time for appeal has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to ex-

sure a favorable judgment is entered on time and that written notice of a favorable order is served on each adverse party.

#### IV. APPEAL FROM AN APPEALABLE ORDER OR JUDGMENT

Despite numerous decisions and commentary on the issue of appealability,<sup>66</sup> many appeals continue to be brought from nonappealable orders.<sup>67</sup> A common mistake leading to dismissal of the appeal is appealing from an order for judgment.<sup>68</sup> Orders for judgment are not appealable.<sup>69</sup> This includes orders for summary judgment,<sup>70</sup> orders for partial summary judgment,<sup>71</sup> orders of dismissal without prejudice,<sup>72</sup> and orders amending findings.<sup>73</sup> In each of these instances, the appeal should be brought from the judgment itself and not the order for judgment.<sup>74</sup>

An appeal from an order for judgment was appealable between 1979 and August 1, 1983.<sup>75</sup> A comment to the current

ceed 30 days from the expiration of the time otherwise prescribed herein for appeal.

MINN. R. CRIM. P. 28.02, subd. 4; *see infra* notes 85-88 and accompanying text.

66. *See generally* 3 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE 267-331 (1970); 4 D. MCFARLAND & W. KEPPEL, MINNESOTA CIVIL PRACTICE §§ 2711-2721 (1979). For the most recent discussion of the appealability of family court orders, see *Angelos v. Angelos*, No. C9-84-281 (Minn. May 17, 1985).

67. This is a large factor in the court's 36% dismissal rate. *See supra* notes 22-35 and accompanying text.

68. *See, e.g.*, *Swicker v. Ryan*, 346 N.W.2d 367, 368 (Minn. Ct. App. 1984); *Montgomery v. American Hoist & Derrick Co.*, 343 N.W.2d 49, 49 (Minn. Ct. App. 1984). Numerous other appeals have been dismissed for the same reason through unpublished orders.

69. MINN. R. CIV. APP. P. 103.03 comment; *see also Swicker*, 346 N.W.2d at 368.

70. *See Montgomery*, 343 N.W.2d at 49.

71. An order for partial summary judgment may be appealed if the trial court "makes an express determination that there is no just reason for delay and expressly directs the entry of a final judgment." MINN. R. CIV. APP. P. 104.01; *see also* MINN. R. CIV. P. 54.02. *See generally* *Pederson v. Rose Coop. Creamery Ass'n*, 326 N.W.2d 657 (Minn. 1982); *Erickson v. General United Life Ins. Co.*, 256 N.W.2d 255 (Minn. 1977); *Financial Relations Bd. v. Pawnee Corp.*, 308 Minn. 109, 240 N.W.2d 565 (1976).

72. *See Fischer v. Perisian*, 251 Minn. 166, 170, 86 N.W.2d 737, 740 (1957). *But see Bulau v. Bulau*, 208 Minn. 529, 530, 294 N.W. 845, 846 (1940) (order dismissing plaintiff's cause of action without prejudice for lack of jurisdiction was final as to plaintiff's right to bring cause of action; supreme court granted discretionary review).

73. *Swicker*, 346 N.W.2d at 368; *see also Kirby v. Kirby*, 348 N.W.2d 392, 393 (Minn. Ct. App. 1984) (order amending judgment is not final and is therefore not appealable).

74. *See* 3 E. MAGNUSON, D. HERR & R. HAYDOCK, MINNESOTA PRACTICE § 103.6 (2d ed. 1985).

75. *See id.*

Minnesota Rules of Civil Appellate Procedure, however, leaves no doubt that an order for judgment is not appealable:

An order for judgment is not an appealable order. There is a right of appeal only from a judgment or an order enumerated in Rule 103.03. An appeal from any order not specifically included in Rule 103.03 is discretionary, and permission must be sought by petition as provided in Rule 105.

. . . The deletion from clause (a) of 'order for judgment' marks a return to former practice: a judgment is appealable; an order for judgment is not appealable.<sup>76</sup>

The filing of an erroneous appeal does not stay the time for appealing from the appealable order.<sup>77</sup> The court of appeals has indicated that it will apply the rules strictly and dismiss appeals from nonappealable orders even if the time for filing a proper appeal has run.<sup>78</sup> Although the court attempts to prescreen appeals to determine whether the appeal is from an appealable order or judgment, the court cannot guarantee that an appeal from a nonappealable order will be discovered in time to permit the perfection of a proper appeal.

The court will seldom grant discretionary review pursuant to Minnesota Rule of Civil Appellate Procedure 105.<sup>79</sup> Likewise, the court does not have the power to extend the time limits for filing an appeal.<sup>80</sup> Therefore, practitioners should be sure the order or judgment being appealed from is appealable before filing the appeal.

## V. FILING A TIMELY APPEAL

The time for filing an appeal is provided by Minnesota Rule of Civil Appellate Procedure 104.01. An appeal must be filed within ninety days of the entry of a judgment, thirty days after service of the notice of a filing of an order by an adverse party, or a different time if provided by law.<sup>81</sup> The court of appeals

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76. MINN. R. CIV. APP. P. 103.03 comment.

77. See, e.g., *Davis v. Minnesota Dept. of Human Rights*, 352 N.W.2d 852, 854 (Minn. Ct. App. 1984) (court of appeals is "powerless to extend time for an appeal in order to grant jurisdiction in an administrative agency appeal").

78. See *Swicker*, 346 N.W.2d at 368. Other appeals have been dismissed by court order.

79. See *supra* note 33.

80. MINN. R. CIV. APP. P. 126.02; see *infra* notes 85-86 and accompanying text.

81. MINN. R. CIV. APP. P. 104.01. Appeals are filed at the clerk of appellate courts' office and not at the court of appeals.

has strictly applied the deadlines for filing the notice of appeal.<sup>82</sup>

Late appeals are routinely dismissed.<sup>83</sup> In fact, the court of appeals regards timely filing of the notice of appeal as a jurisdictional requirement.<sup>84</sup> The court has the power to suspend the rules of appellate procedure, but generally may not extend the time for the filing of an appeal.<sup>85</sup> Minnesota Rule of Civil Appellate Procedure 126.02 states, "The appellate court may not extend or limit the time for filing the notice of appeal or the time prescribed by law for securing review of a decision or an order of a court or an administrative agency, board, commission or officer, except as specifically authorized by law."<sup>86</sup> The court's strict interpretation of rule 126.02 is consistent with its role as an intermediate court of appeals.<sup>87</sup>

The main exception to the court of appeals' inability to extend the time for bringing an appeal is found in Minnesota Rule of Criminal Procedure 28.02, subdivision 4. This rule permits the trial court or the court of appeals to "extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for appeal."<sup>88</sup>

Various statutes and rules provide times for appeal different than the ninety-day/thirty-day rule set out in Minnesota Rule of Civil Appellate Procedure 104.01. For example, different

82. See, e.g., *Davis*, 352 N.W.2d 852; see *supra* note 77.

83. Motions may be disposed of by the commissioner, chief attorney, chief judge, or the court or a panel thereof, at the discretion of the chief judge. MINN. CT. APP. INTERNAL R. 5.2. Late appeals are usually dismissed by an order of the chief judge.

84. See *Davis*, 352 N.W.2d at 854; *Petersen v. Petersen*, 352 N.W.2d 797, 797 (Minn. Ct. App. 1984).

The Minnesota Supreme Court has stated, on the other hand, that these time limits may not be jurisdictional: "The rules of this court are designed to effectuate the orderly administration of justice and do not control its jurisdiction, for it retains the constitutional power to hear and determine, as a matter of discretion, any appeal in the interest of justice." *E.C.I. Corp. v. G.G.C. Co.*, 306 Minn. 433, 435, 237 N.W.2d 627, 629 (1976). The supreme court has followed this position and has occasionally considered matters filed after the time limit for filing the notice of appeal had expired. See, e.g., *Thurman v. Pepsi-Cola Bottling Co.*, 289 N.W.2d 141, 142 n.1 (Minn. 1980) (appeal filed one day late heard due to extenuating circumstances).

85. MINN. R. CIV. APP. P. 102 (court may suspend requirements of rules for good cause, except as provided in rule 126.02), 126.02 (court may not extend time limit for filing notice of appeal).

86. *Id.* 126.02.

87. See generally *supra* notes 12-21 and accompanying text.

88. MINN. R. CRIM. P. 28.02, subd. 4(3).

time limits are set by the Minnesota Rules of Criminal Procedure.<sup>89</sup> Many statutes, however, were modified in 1983 in an attempt to bring uniformity to the appellate process.<sup>90</sup> The specific time limits for an appeal should be determined as soon as possible to avoid missing a deadline and having the appeal dismissed.

## VI. PERFECTING THE APPEAL

An appeal is perfected by completing several important procedural requirements. There are basically two initial components of a perfected appeal: (1) filing the notice of appeal and accompanying documents as required by Minnesota Rule of Civil Appellate Procedure 103.01; and (2) ordering the transcript and filing and serving a transcript certificate.

### A. *The Requirements of Rule 103.01*

Minnesota Rule of Civil Appellate Procedure 103.01 lists the first steps required to perfect an appeal.<sup>91</sup> In addition to the written notice of appeal,<sup>92</sup> a party must file: (1) "a certified copy of the judgment or order from which the appeal is taken,"<sup>93</sup> (2) "a statement of the case required by rule 133.03,"<sup>94</sup> and (3) "a filing fee of \$50"<sup>95</sup> with the clerk of appellate courts. Several items must also be filed with the trial court from which the appeal is taken. These include: (1) "a copy of the notice of appeal,"<sup>96</sup> (2) "the cost bond required by Rule 107, or written waiver of it,"<sup>97</sup> (3) "a supersedeas bond, if any, required by Rule 108,"<sup>98</sup> and (4) "a filing fee of \$10."<sup>99</sup>

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89. See *id.* 28.01, subd. 4(3), 28.04, subd. 2(2), 28.05, subd. 1(1). Some time limits are purposely short to discourage appeals. See, e.g., *id.* 28.02, subd. 4(3) (ten days to appeal from misdemeanor conviction), 28.04, subd. 2(2) (five days for prosecutor to file appeal from pretrial order).

90. See Act of June 1, 1983, ch. 247, 1983 Minn. Laws 852.

91. MINN. R. CIV. APP. P. 103.01, subd. 1. For a list of the necessary steps in bringing an appeal, see E. MAGNUSON, D. HERR & R. HAYDOCK, *supra* note 74, § 103.3. Decisions reviewable by certiorari are not separately discussed in this Article. These appeals are governed by Minn. R. Civ. App. P. 115 and applicable case law. See, e.g., *Henry v. Minnesota Pub. Util. Comm'n*, 365 N.W.2d 770 (Minn. 1985).

92. MINN. R. CIV. APP. P. 103.01, subd. 1(d)(1).

93. *Id.*, subd. 1(d)(2).

94. *Id.*, subd. 1(d)(3).

95. *Id.*, subd. 1(d)(4).

96. *Id.*, subd. 1(d)(5).

97. *Id.*, subd. 1(d)(6).

98. *Id.*, subd. 1(d)(7).



The filing of a timely notice of appeal is the only requirement the court of appeals has interpreted as jurisdictional.<sup>100</sup> The clerk of appellate courts, however, will not accept an appeal which does not include a statement of the case.<sup>101</sup> If the appeal is filed close to the deadline for filing a timely appeal, it may not be possible to prepare a statement of the case in time. Consequently, the right to appeal may be lost.

The other requirements of rule 103.03 are not jurisdictional,<sup>102</sup> and failure to fulfill one of these requirements does not automatically prejudice the appeal. If one of these requirements is not satisfied, the court may dismiss the appeal for failure to comply with the rules.<sup>103</sup>

### B. *Appellant's Duties Regarding the Record on Appeal*

The second major aspect of perfecting the appeal is providing the record on appeal. Appellant's responsibility for ordering the trial transcript or providing for an alternative record on appeal is governed by Minnesota Rule of Civil Appellate Procedure 110. The appellant must make arrangements for the

99. *Id.*, subd. 1(d)(8).

100. *Petersen*, 352 N.W.2d at 797.

101. This policy became effective August 1, 1984, after notice to the bar. The notice states:

Effective August 1, 1984, the Clerk of the Appellate Courts will no longer accept for filing a Notice of Appeal or Petition for Writ of Certiorari in non-criminal matters which does not include a statement of the case as required by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure. A Notice of Appeal or Petition for Writ of Certiorari filed in non-criminal matters which is not accompanied by a statement of the case will be returned to the sender, postage due. The date of the filing of a Notice of Appeal or Petition for Writ of Certiorari which fails to comply with the requirements of these rules shall not be preserved for purposes of computing the time for taking an appeal or petitioning for a writ of certiorari. Pursuant to Rule 7 of the Minnesota Court of Appeals Internal Rules, a statement of the case, as prescribed by Rule 133.03, must be filed in all appeals taken under Rule 28, Minnesota Rules of Criminal Procedure.

Notice to Attorneys and Litigants (on file at William Mitchell Law Review Office).

102. *See, e.g.*, *Boom v. Boom*, 361 N.W.2d 34, 35 (Minn. 1985) (failure to file proper transcript certificate does not affect jurisdiction of court of appeals).

103. *See, e.g.*, *Setter v. Mauritz*, 351 N.W.2d 396, 398 (Minn. Ct. App. 1984); *Fladland v. Northway Constr., Inc.*, 343 N.W.2d 687, 688 (Minn. Ct. App. 1984).

Recent decisions by the Minnesota Supreme Court, however, make dismissal of an appeal for nonjurisdictional defects less likely. Motions to dismiss an appeal and motions to reinstate an appeal after dismissal are decided using the factors described in *Boom*, 361 N.W.2d at 36. *See also* *Progressive Casualty Ins. Co. v. Kraayenbrink*, 365 N.W.2d 229, 230 (Minn. 1985); MINN. R. CIV. APP. P. 142.02. Moreover, the court of appeals must liberally construe a notice of appeal in favor of its sufficiency. *See State v. Herem*, 365 N.W.2d 771, 772 (Minn. 1985).

record on appeal within ten days of filing the notice of appeal.<sup>104</sup> An appellant may select one of several types of record on appeal, including a full transcript,<sup>105</sup> a partial transcript,<sup>106</sup> an agreed statement of the record,<sup>107</sup> a statement of the proceedings if a transcript is unavailable,<sup>108</sup> or no transcript.<sup>109</sup>

In most cases, the appellant will request a full transcript of the proceedings.<sup>110</sup> If the appellant does not order a transcript or make other arrangements for a record on appeal within ten days after filing the notice of appeal, the appeal may be dismissed.<sup>111</sup> After the transcript is ordered, a transcript certificate must be prepared by the appellant's attorney and filed with the clerk of appellate courts.<sup>112</sup> The appellant's attorney and the court reporter must sign the transcript certificate.<sup>113</sup> Copies of the transcript certificate must be sent to all counsel of record and the trial court within ten days of the date the transcript was ordered.<sup>114</sup>

The main reason given for failure to abide by the provisions of rule 110 has been unfamiliarity with the rule. The current version of rule 110 differs from the former rule.<sup>115</sup> The ten-day limit for ordering the transcript now begins to run when the notice of appeal is filed.<sup>116</sup> Formerly, the transcript was not required to be ordered until "[w]ithin 10 days after receiving notice from the prehearing conference judge."<sup>117</sup> The re-

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104. MINN. R. CIV. APP. P. 110.02, subd. 1(a).

105. *See id.*, subd. 1.

106. *See id.*

107. *Id.* 110.04.

108. *Id.* 110.03.

109. *Id.* 110.02, subd. 1(c).

110. Indeed, this is often necessary to conduct an adequate review of the lower court action.

111. The court of appeals usually issues an order requiring an appellant to cure any technical defect within 10 days before dismissing an appeal.

112. MINN. R. CIV. APP. P. 110.02, subd. 2.

113. *Id.*

114. *Id.*

115. *Compare* MINN. R. CIV. APP. P. 110.02 *with* Minn. R. Civ. App. P. 110.02 (1983).

116. MINN. R. CIV. APP. P. 110.02, subd. 1.

117. Minn. R. Civ. App. P. 110.02(1) (1983). The prehearing conference is almost never held in the court of appeals. This practice reflects the changes in rule 133 and is effective August 1, 1983. *Compare* MINN. R. CIV. APP. P. 133.01 *with* Minn. R. Civ. App. P. 133.02 (1983). "Prehearing conferences are still authorized by [rule 133.01], but it is anticipated that they will be held in very few cases and will be governed by internal operating procedures established by each of the appellate courts." MINN. R. CIV. APP. P. 133.01 comment.

quirement that appellant's attorney be responsible for and sign the transcript certificate is also new.<sup>118</sup>

Nevertheless, the court of appeals has not looked favorably upon attorney inadvertance as an excuse for not ordering a transcript or filing the required transcript certificate. In *Swicker v. Ryan*,<sup>119</sup> for example, the court of appeals dismissed an appeal for failure to order a transcript or file a transcript certificate,<sup>120</sup> stating:

The bench and bar had sufficient time since August 1, 1983, the effective date of the new rules, and November 1, 1983, the effective date of the implementation of the Court of Appeals to become aware of the necessity for firm judicial and calendaring administration. Failure of counsel to follow the rules, or to timely make appropriate motions cannot be countenanced. Unfamiliarity with the rules, a heavy workload, or overwork is not good cause. The rules must be viewed as the guideposts for efficient court administration. We intend to apply them firmly and reasonably.<sup>121</sup>

The appellate advocate must ensure that the trial court transcript is ordered and that the transcript certificate is filed and served.<sup>122</sup>

Completing the actions required by Minnesota Rules of Civil Appellate Procedure 103.01 and 110 are the first steps in perfecting an appeal in the Minnesota Court of Appeals. Once these steps are taken, the only remaining action necessary to assure that the matter is placed on the court's calendar is the submission of the appellate brief and appendix.

## VII. THE APPELLATE BRIEF AND APPENDIX

### A. Procedural Considerations

Like almost every other aspect of the appeal, the procedural aspects of brief writing are governed by the Minnesota Rules of Court. Civil appeals are governed by the Minnesota Rules

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118. Compare MINN. R. CIV. APP. P. 110.02, subd. 2 with Minn. R. Civ. App. P. 110.02(2) (1983).

119. 346 N.W.2d 367 (Minn. Ct. App. 1984).

120. *Id.* at 369. The court also cited appellant's failure to appeal an appealable order, file a proper notice of appeal, serve and file a brief and appendix, and prejudice to respondent as reasons to dismiss the appeal. *Id.* at 368-69.

121. *Id.* at 369.

122. See MINN. R. CIV. APP. P. 110.02, subd. 2.

of Civil Appellate Procedure,<sup>123</sup> and criminal appeals are governed by the Minnesota Rules of Criminal Procedure.<sup>124</sup> The important procedural considerations at this stage of the appeal are the due date for the brief and appendix, the effect of filing an untimely brief, respondent's notice of review, and the requirement that the attorney general's office be notified when the constitutionality of a statute is challenged.

The time for filing the appellate brief depends upon the type of appeal. In a civil matter, an appellant must submit a brief and appendix within thirty days after delivery of the trial transcript by the court reporter.<sup>125</sup> The respondent then has thirty days to serve and file a brief.<sup>126</sup> An appellant may serve and file a reply brief within ten days after receiving respondent's brief.<sup>127</sup>

The time limits are different, however, for criminal appeals. A defendant who appeals has sixty days to file a brief. After appellant files, the state has forty-five days to file its brief. The appellant then has fifteen additional days to file a reply brief.<sup>128</sup> When the prosecutor appeals a pretrial order or a felony sentence,<sup>129</sup> the time for filing appellate briefs is drastically shortened. The prosecutor has fifteen days to submit a brief, the defendant then has eight days to file a brief, and reply briefs are not permitted.<sup>130</sup> The time limits commence, as in civil matters, with the delivery of the transcript.<sup>131</sup> Briefs in appeals from criminal sentences, however, must be filed with the notice of appeal.<sup>132</sup> A respondent then has ten days to file a brief.<sup>133</sup>

The court of appeals imposes sanctions for failure to file a

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123. *Id.* 101.

124. MINN. R. CRIM. P. 28.01, subd. 1. The Minnesota Rules of Civil Appellate Procedure govern criminal appeals to the extent they are not inconsistent with the criminal rules. See MINN. R. CIV. APP. P. 101; MINN. R. CRIM. P. 28.01, subd. 2.

125. MINN. R. CIV. APP. P. 131.01.

126. *Id.*

127. *Id.*

128. MINN. R. CRIM. P. 28.02, subd. 10.

129. See *id.* 28.04, subd. 1.

130. *Id.* 28.04, subd. 2(3).

131. See MINN. R. CIV. APP. P. 131.01; MINN. R. CRIM. P. 28.02, subd. 10, 28.04, subd. 2(3).

132. MINN. R. CRIM. P. 28.05, subd. 1(1). When the judgment and sentence are appealed together, however, the time limits for briefs contained in Minnesota Rule of Criminal Procedure 28.02 apply. See *id.* 28.05, subd. 1(1).

133. *Id.* 28.05, subd. 1(3).

timely brief and appendix.<sup>134</sup> If an appellant has not filed a brief within the prescribed limit, the court of appeals applies Minnesota Rule of Civil Appellate Procedure 134.01(b) and the appellant waives his right to oral argument.<sup>135</sup> An order is issued directing appellant to file a brief within ten days. If appellant still does not file a brief, the appeal will be dismissed.<sup>136</sup> In addition to waiver of oral argument and dismissal, the court has awarded attorney's fees and costs to opposing parties and sanctioned attorneys for failure to follow the rules of appellate procedure.<sup>137</sup> The court has been reluctant to grant motions to reinstate appeals once they have been dismissed.<sup>138</sup>

The rules treat a default by a respondent less severely. "If the respondent fails or neglects to serve and file his brief, the case shall be determined on the merits."<sup>139</sup> A warning order giving ten days to file a brief is not issued when a respondent's brief is late. Instead, an order is issued stating that the matter will proceed according to rule 142.03.<sup>140</sup> The court has instructed the clerk of appellate courts not to accept a late respondent's brief unless a motion to accept the late brief is

134. Both a brief and an appendix are required under the rules. See MINN. R. CIV. APP. P. 128.02, subd. 2, 130.01. An appeal will not be processed, and may be dismissed, if the required appendix is not submitted with the briefs.

135. See *id.* 134.01(b).

136. See *id.* 142.02; see also *Swicker*, 346 N.W.2d at 368-69; *Montgomery*, 343 N.W.2d at 49-50. The court of appeals will automatically dismiss an appeal 30 days after the due date for the appellant's brief and appendix. A respondent may bring a motion to dismiss for failure to submit a brief and appendix at any time after the brief and appendix were due. MINN. R. CIV. APP. P. 142.02.

137. Costs and fines range from \$50 to \$750 depending upon the nature of the malfeasance. See, e.g., *Genz-Ryan Plumbing & Heating Co. v. McCarthy*, 350 N.W.2d 485, 487 (Minn. Ct. App. 1984). The court will often sanction the attorney who did not comply with the rules and not the party whom the attorney represents. See, e.g., *Dollar Travel Agency v. Northwest Airlines*, 354 N.W.2d 880, 883 (Minn. Ct. App. 1984).

138. In order to have an appeal reinstated, "the appellant must show good cause for failure to comply with the Rules governing the service and filing of briefs, that the appeal is meritorious, and that reinstatement would not substantially prejudice the respondent's rights." MINN. R. CIV. APP. P. 142.02; see also *Boom*, 361 N.W.2d at 36.

139. MINN. R. CIV. APP. P. 142.03.

140. Rule 142.03 provides:

If the respondent fails or neglects to serve and file his brief, the case shall be determined on the merits. If a defaulting respondent has filed a notice of review pursuant to Rule 106, the appellant may serve and file a motion for affirmance of the judgment or order specified in the notice of review or for a dismissal of the respondent's review proceedings.

*Id.*

simultaneously filed and later granted. The court is more likely to accept a late respondent's brief than a late appellant's brief because valuable court time is saved by avoiding duplication of research. A respondent submitting a late brief, however, may be sanctioned for failure to abide by the rules.

Another procedural aspect to consider when preparing a respondent's brief is the requirement of a notice of review.<sup>141</sup> A respondent may not raise new issues for consideration on appeal without filing a notice of review.<sup>142</sup> In the absence of a notice of review, the only issues to be considered on appeal are those raised by the appellant.<sup>143</sup> A respondent's notice of review must specify the matters to be reviewed, contain proof of service on opposing parties, and be filed with the clerk of appellate courts within fifteen days after service of appellant's notice of appeal.<sup>144</sup>

A final important procedural aspect often overlooked by attorneys when writing briefs is Minnesota Rule of Civil Appellate Procedure 144, which states:

When the constitutionality of an act of the legislature is questioned in any appellate proceeding to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general within time to afford him an opportunity to intervene.<sup>145</sup>

The court of appeals will not consider challenges to the constitutionality of a statute unless the attorney general has been notified of the challenge.<sup>146</sup>

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141. *Id.* 106.

142. *Id.*; see *Hunt v. Estate of Hanson*, 356 N.W.2d 323, 328 (Minn. Ct. App. 1984); *Loram Maintenance*, 354 N.W.2d at 113; *Sumner v. Sumner*, 353 N.W.2d 251, 253 (Minn. Ct. App. 1984).

A respondent may clarify or supplement the appellant's statement of the case. See MINN. R. CIV. APP. P. 133.03. Rule 133.03, however, may not be used to circumvent the requirement of a notice of review. Issues not raised by respondent in a notice of review will not be considered on appeal.

The court of appeals recently held that a rule 106 notice of review is the appropriate method for respondents to raise new issues in appeals from agency actions. See *In re Continental Tel. Co.*, 358 N.W.2d 400, 403-04 (Minn. Ct. App. 1984).

143. See *Continental Tel. Co.*, 358 N.W.2d at 403-04; *Hunt*, 356 N.W.2d at 328; *Loram Maintenance*, 354 N.W.2d at 113; *Sumner*, 353 N.W.2d at 253.

144. MINN. R. CIV. APP. P. 106.

145. *Id.* 144. For a statement of the underlying purpose of rule 144, see *In re Welfare of A.K.K.*, 356 N.W.2d 337, 342-43 (Minn. Ct. App. 1984).

146. See *In re Strawberry Commons Apartment Owners Ass'n*, 356 N.W.2d 401,

In *State v. Kager*,<sup>147</sup> the court of appeals interpreted this rule as requiring written notice to the attorney general. In *Kager*, the attorney did not notify the attorney general in writing because someone from the attorney general's office was present in the trial court on an antitrust matter involving the defendant.<sup>148</sup> The court of appeals held this was insufficient notice, stating that "this court will not rule on the constitutionality of a statute unless the attorney general has been notified pursuant to Minn. R. Civ. App. P. 144."<sup>149</sup>

### B. Substantive Considerations

The substantive arguments in an appellate brief are the heart of the appellate process. Although oral argument is very important, the appellate brief is the only place the attorney can comprehensively present each contested issue. The importance of preparing a cogent, concise, reasoned, and well-researched appellate brief cannot be overemphasized.<sup>150</sup>

Initially, the attorney should determine the applicable scope of review and standard of review, if any. Scope of review governs the extent to which the court will consider certain issues.<sup>151</sup> The court of appeals is granted broad powers regarding scope of review under Minnesota Rule of Civil Appellate Procedure 103.04.<sup>152</sup> In practice, however, the court

404 (Minn. Ct. App. 1984); *Underhill v. Knox*, 355 N.W.2d 742, 746 (Minn. Ct. App. 1984); *In re Caldwell*, 355 N.W.2d 486, 489 (Minn. Ct. App. 1984).

147. 357 N.W.2d 369 (Minn. Ct. App. 1984).

148. *Id.* at 370.

149. *Id.*

150. For a complete discussion of appellate brief writing techniques, see generally M. HOUTS & W. ROGOSHESKE, *supra* note 5, §§ 20.01-33.03; see also Amdahl, *Writing the Appellate Brief*, in THE ART OF APPELLATE ADVOCACY 109 (Minn. CLE 1983).

151. One commentator states:

Scope of review deals not with the substantive rules concerning the propriety of the appellate court's resolution of an issue on the merits, but rather with the judicial and extrajudicial rules which determine the propriety of the appellate consideration of any given issue.

E. MAGNUSON, D. HERR & R. HAYDOCK, *supra* note 74, § 103.14.

152. Rule 103.04 states:

The appellate courts may reverse, affirm or modify the judgment or order appealed from or take any other action as the interest of justice may require.

On appeal from or review of an order the appellate courts may review any order affecting the order from which the appeal is taken and on appeal from a judgment may review any order involving the merits or affecting the judgment. They may review any other matter as the interest of justice may require.

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

has limited its scope of review to issues properly preserved for appeal.<sup>153</sup> A timely objection and motion for a new trial<sup>154</sup> are the two most important factors governing the court of appeals' scope of review.<sup>155</sup> The court's scope of review on appeal is usually found in relevant case law, although in some instances the court's scope of review is controlled by statute.<sup>156</sup>

Standard of review relates to principles governing how the court reviews an issue. Generally, a standard of review limits the appellate court's power to overturn a lower court's ruling unless the appellate court finds an error falling within the applicable standard of review. The most familiar standard of review, for example, is contained in Minnesota Rule of Civil Procedure 52.01. Under this standard, a trial court's "[f]indings of fact shall not be set aside unless clearly erroneous."<sup>157</sup> Another frequently cited standard of review is found in Minnesota Statutes section 14.69, which governs appeals from agency actions.<sup>158</sup> Standards of review are found in both statutes<sup>159</sup> and case law.<sup>160</sup>

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153. See *supra* notes 36-54 and accompanying text.

154. See *id.*

155. See *id.*

156. See, e.g., MINN. STAT. § 14.69 (1984).

157. MINN. R. CIV. P. 52.01.

158. Section 14.69 states:

In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Made upon unlawful procedure; or
- (d) Affected by other error of law; or
- (e) Unsupported by substantial evidence in view of the entire record as submitted; or
- (f) Arbitrary or capricious.

MINN. STAT. § 14.69.

Section 14.69 is entitled "Scope of Judicial Review." *Id.* Historically, the courts and legislature have not consistently distinguished the concepts of scope of review and standard of review. The practitioner may not always be able to determine which label applies in a particular instance, and drawing fine lines is probably not necessary. The important aspect to be gleaned from this discussion is that there are two substantive considerations in writing the appellate brief: (1) which issues the court will review, and (2) how the court will analyze the issues actually considered.

159. See, e.g., *id.*

160. See, e.g., *Welfare of A.K.K.*, 356 N.W.2d at 340 (termination of parental rights); *State v. Elmourabit*, 356 N.W.2d 80, 83 (Minn. Ct. App. 1984) (sufficiency of evidence in criminal matter); *Kaste v. Kaste*, 356 N.W.2d 64, 67 (Minn. Ct. App. 1984)



The concepts of scope of review and standard of review, when applicable, should be incorporated into the appellate brief. This focuses the issues for the court. The practitioner should identify the relevant scope of review and explain why that issue should or should not be reviewed on appeal. Identification and application of the correct standard of review is also important.

Another important substantive consideration when writing the appellate brief is formulation of issues. The attorney must decide how many issues to raise on appeal and how to phrase each issue. The number of issues raised on appeal is an important strategic question. The appellate brief should not contain more than five issues, and five is usually too many.<sup>161</sup> The optimum number of issues is three or less.<sup>162</sup>

Issues should be concise and to the point.<sup>163</sup> The phrasing of the issues in the appellate brief is the attorney's best opportunity to educate the court about the nature of the alleged error.<sup>164</sup> The best phrased issues are usually no longer than an

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(marriage dissolution); *Hill v. Hill*, 356 N.W.2d 49, 58 (Minn. Ct. App. 1984) (antenuptial agreements); *Valletta v. Recksiedler*, 355 N.W.2d 314, 316 (Minn. Ct. App. 1984) (summary judgment); *Lydon v. City of N. St. Paul*, 355 N.W.2d 205, 206 (Minn. Ct. App. 1984) (utilities assessment); *James v. Commissioner of Economic Sec.*, 354 N.W.2d 840, 843 (Minn. Ct. App. 1984) (unemployment benefits); *Ostlund v. Independent School Dist. No. 47*, 354 N.W.2d 492, 496 (Minn. Ct. App. 1984) (teacher termination); *T.P.B. Properties v. Coldwell, Banker & Co.*, 354 N.W.2d 102, 105 (Minn. Ct. App. 1984) (rule 41 motion to dismiss); *Antl v. State Dept. of Pub. Safety*, 353 N.W.2d 240, 242 (Minn. Ct. App. 1984) (driver's license revocation); *Broms v. Broms*, 353 N.W.2d 135, 137 (Minn. Ct. App. 1984) (spousal maintenance).

161. An excessive number of issues, or shotgunning, occurs with some frequency. Usually this approach involves restating the same or similar issues in a slightly different manner in the hope that the court will somehow be persuaded by the sheer number of issues raised. Even the most complicated matters usually involve five or fewer issues. Shotgunning is often viewed as an attempt to bolster a weak argument by repetition.

This section would not be complete without some reference to the length of appellate briefs. The average length of briefs in the Minnesota appellate courts is 17 pages. The maximum number of pages permitted in appellate briefs is 50, and this is too lengthy in most instances. See MINN. R. CIV. APP. P. 132.01, subd. 3. The court of appeals does not grant motions to file lengthier briefs.

162. Houts and Rogosheske state, "We keep repeating the controlling fiat about the legal issues: One is better than two; two than three; and if there are more than three, the appellate judge immediately suspects the brief writer of shotgunning." M. HOUTS & W. ROGOSHESKE, *supra* note 5, § 28.01[2] (emphasis omitted).

163. Issues should be phrased in a style similar to that used by the court in its opinions.

164. For an excellent discussion on how to formulate issues for the appeal, see Amdahl, *supra* note 150, at 113-15.

average sentence. Issues the length of a paragraph containing several qualifying statements are less clear.<sup>165</sup> The best place to develop the issues is in the argument section of the brief.

One problem created by the implementation of the Minnesota Court of Appeals is the large volume of authority being generated by the new court.<sup>166</sup> Practitioners sometimes find it difficult to stay current in each area of their practice. On appeal, it is likely that the court has recently decided a related case.<sup>167</sup> Therefore, the appellate attorney must be able to find these recently decided cases quickly and efficiently.

Computer-assisted research is recommended when preparing an appellate brief. As a result of the large number of published opinions, manual research methods may be inadequate or simply inefficient.<sup>168</sup> The Minnesota appellate courts are deciding a large number of appeals<sup>169</sup> using sophisticated computer and word processing equipment. Thus, the only realistic way to keep track of recent developments may be to fight fire with fire by using computer-assisted research.<sup>170</sup> In the final analysis, the most important substantive consideration in writing the appellate brief is to have the controlling case law.

### VIII. MOTION PRACTICE IN THE COURT OF APPEALS

Motion practice in the court of appeals is relatively straightforward, but certain provisions of the rules have frequently been overlooked. Rule 127 of the Minnesota Rules of Civil Appellate Procedure governs motion practice in the court of

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165. Cf. M. HOUTS & W. ROGOSHESKE, *supra* note 5, §§ 21.03[4], 21.04.

166. The court has issued 1046 opinions as of January 2, 1985. APPELLATE COURT SYSTEM REPORT, *supra* note 22, at 29.

167. The precedential value of newly issued court of appeals decisions is often questioned by practitioners because petitions for review are filed with the supreme court. Parties should cite all current authority in their briefs, regardless of whether a petition for review has been filed in the supreme court.

The court of appeals generally will not cite a recent court of appeals opinion if a petition for review is pending or has been granted by the supreme court.

168. Computerized research is more efficient than manual research because it reduces research time and makes finding controlling authority easier. Moreover, computer data banks often contain opinions one or two weeks before the advance sheets.

169. See *supra* note 166.

170. Although installing a legal research computer in every law office is probably not economical, the Minnesota State Law Library system offers computerized research services on a pro rata basis.

appeals.<sup>171</sup> A motion in the court of appeals must be in writing, include the grounds for the motion, and state the relief sought or include a proposed order.<sup>172</sup>

An original and four copies of the motion and proof of service must be filed with the clerk of appellate courts.<sup>173</sup> The requirement of four copies is often overlooked by attorneys. Many attorneys are also unaware of the time limits for filing a response to a motion. The five-day response time is the most frequently overlooked deadline contained in rule 127.<sup>174</sup> The court of appeals usually decides a motion as soon as possible, and a late response memorandum may not be accepted or considered. The moving party has two days after service of any response memorandum to file a reply.<sup>175</sup> The staff attorneys at the court of appeals are available to answer questions concerning motions in the court of appeals.<sup>176</sup>

## IX. ORAL ARGUMENT

### A. Make the Request for Oral Argument

A request for oral argument and the argument's location must be made in the statement of the case.<sup>177</sup> The policy of

171. Rule 127 states:

Unless another form is prescribed by these rules, an application for an order or other relief shall be made by serving and filing a written motion for the order or relief. The motion shall state with particularity the grounds and set forth the order or relief sought. If the motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response within 5 days after service of the motion. Any reply shall be served within 2 days, at which time the motion shall be deemed submitted. The motion and all relative papers may be typewritten. Four copies of all papers shall be filed with proof of service. Oral argument will not be permitted except by order of the appellate court.

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

172. *Id.*

173. *Id.*

174. The five-day period under rule 127 is calculated pursuant to Minnesota Rule of Civil Procedure 6.01. See MINN. R. CIV. APP. P. 126.01. Thus, intermediate weekends and holidays are not included in the five-day period. See MINN. R. CIV. P. 6.01. If the motion is served by mail, however, three days are added to the permissible time for a response. See MINN. R. CIV. APP. P. 125.03. The time period for response thus becomes eight days and intermediate weekends and holidays are included. See 1 E. MAGNUSON, D. HERR & R. HAYDOCK, *supra* note 74, at 145-46; 1 J. HETLAND & O. ADAMSON, *supra* note 66, at 341-42.

175. See MINN. R. CIV. APP. P. 127.

176. The court of appeals staff attorneys can be reached at the following telephone number: (612) 297-1000.

177. See MINN. R. CIV. APP. P. 133.03, 134.01. The court will wait until a minimum of three matters are pending before scheduling oral argument outside of Min-

the court has been to grant oral argument if requested by the appellant.<sup>178</sup> The one strict exception to this policy is that oral argument will not be permitted if either party is proceeding *pro se*.<sup>179</sup> If an appellant does not request oral argument, a respondent's request for oral argument seldom will be granted.<sup>180</sup>

A party may forfeit the right to oral argument after filing the statement of the case by failing to submit a timely brief.<sup>181</sup> The waiver of oral argument because of an appellant's failure to submit a timely brief occurs with some regularity. Additionally, the parties may jointly stipulate to waive oral argument.<sup>182</sup> The court may also deny an appellant's request for oral argument because "the dispositive issue or set of issues has been authoritatively settled"<sup>183</sup> or because "the decisional process would not be significantly aided by oral argument."<sup>184</sup>

If oral argument is denied, the aggrieved party has only five days to file a motion for reconsideration with the court.<sup>185</sup> Motions to reinstate oral argument are seldom granted, especially if the denial of oral argument was based on an attorney's failure to follow the rules.

The court of appeals will notify counsel of the time and place of oral argument "approximately one month in advance of the hearing date."<sup>186</sup> A motion to reschedule an oral argument must be made "immediately upon receipt of the notice of the date of hearing."<sup>187</sup> The court is reluctant to reschedule oral

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neapolis or Saint Paul. Attorneys located elsewhere may expedite their appeals by requesting oral argument in the Twin Cities. *See id.* 134.09, subd. 2.

178. *See* MINN. CT. APP. INTERNAL R. 2.1; *see also* MINN. R. CIV. APP. P. 134.01 (noting exceptions to general rule of allowance of oral argument).

179. *See* MINN. CT. APP. INTERNAL R. 2.9. Rule 2.9 provides: "Members of the Minnesota Bar and specially admitted out-of-state attorneys may argue before the Court. If a litigant is without counsel, the case shall be submitted on briefs without oral arguments by any party, unless the Court orders otherwise." *Id.*

180. *See* MINN. R. CIV. APP. P. 134.01(d)(2).

181. *Id.* 134.01(b).

182. *Id.* 134.01(c). Oral argument may be waived once it has been allowed if both parties and the court consent. *Id.* 134.06, subd. 1.

183. *Id.* 134.01(d)(1).

184. *Id.* 134.01(d)(2); *see, e.g.,* State v. Andren, 350 N.W.2d 404, 405 (Minn. Ct. App. 1984).

185. *See* MINN. R. CIV. APP. P. 134.01.

186. MINN. CT. APP. INTERNAL R. 2.2. Cases are generally placed on the calendar in order of filing. However, certain cases, such as child custody, criminal matters, and unemployment compensation may be given priority. *Id.*

187. MINN. R. CIV. APP. P. 134.02.

argument and requires a showing of "extreme emergency."<sup>188</sup> Stipulation of the parties is not sufficient grounds to reschedule an oral argument.<sup>189</sup>

### B. Time Limits Shorter than Maximum in Rules

The current time limits for oral argument are fifteen minutes for appellant, fifteen minutes for respondent, and five minutes for appellant's rebuttal.<sup>190</sup> Attorneys should plan their presentations accordingly. The thirty-minute and twenty-minute time limits in Minnesota Rule of Civil Appellate Procedure 134.03, subdivision 1, are maximum limits.<sup>191</sup> "Cases [are] scheduled on the assumption that only exceptional cases will require the time allowed by Rule 134.03, subdivision 1 . . . ." <sup>192</sup>

### C. General Suggestions

The shorter time limits for oral argument in the court of appeals necessitate efficient use of time during the oral argument. This section contains several suggestions for making the most effective use of oral argument time.

The attorneys for an oral argument are advised to arrive one-half hour before the oral argument is scheduled to begin. This permits the attorney to be familiar with the composition and disposition of the panel. More importantly, preceding matters may have been removed from the calendar. When this happens, oral arguments can be heard ahead of schedule with diminished time pressures.

The court of appeals operates a "hot bench" court, on which the drafting of opinions is not assigned until after oral argu-

188. MINN. CT. APP. INTERNAL R. 2.3. The court will not reschedule an oral argument more than once. *Id.*

189. There is no provision in rule 2.3 recognizing the stipulation of the parties as adequate grounds to reschedule. *See id.*

190. Rule 134.03 allows a maximum of 30 minutes for appellant and 20 minutes for respondent. These maximum limits are seldom granted by the court due to time constraints. Also, amici are rarely allowed to participate in oral argument, unless one of the parties is willing to surrender a portion of their time. *See* MINN. R. CIV. APP. P. 134.03, subd.1.

191. This interpretation is consistent with rule 134.03, which provides: "In the Court of Appeals, the appellant shall be granted time *not to exceed* 30 minutes and the respondent 20 minutes for oral argument." *Id.* (emphasis added).

192. MINN. CT. APP. INTERNAL R. 2.5.

ment.<sup>193</sup> Since any judge on the three judge panel may be assigned a particular opinion, each judge is prepared on each matter before oral argument. Consequently, certain aspects of the matter which are adequately covered in the briefs need not be repeated at oral argument.

Facts should not be covered in any detail during oral argument, if at all. A complete description wastes valuable time because a short summary of the matter is usually sufficient. The practitioner should proceed directly to the main points of the argument, weaving the facts into the argument as necessary.

Sufficient time should be allocated to each of the arguments raised on appeal. Some issues, because they are adequately dealt with in the brief, may simply be mentioned without further explanation. As with the facts, a complete explanation of the legal argument is usually not required. Moreover, a complete explanation of each legal argument is seldom possible within the time limits. In essence, the oral argument should be used to argue the areas of direct controversy.<sup>194</sup>

## CONCLUSION

The information contained in this Article is not comprehensive, but does include most of the important or troublesome areas of appellate practice. Areas where practitioners have frequently experienced difficulty have been emphasized. The Minnesota Court of Appeals' first full year of operation indicates that the court is meeting the expectations of those who supported its creation. The court has alleviated the fears of those who opposed or had reservations about the establishment of an intermediate appellate court. The continued success of the court will depend upon the acceptance by the practicing bar of a firm adherence to the rules of appellate practice.

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193. The judge who presides over the judicial panel hearing the case will assign a particular judge on the panel to write an opinion. *See id.* 3.1. This assignment generally takes place at the informal conference immediately following the oral argument. *See id.* 3.2.

194. The authors strongly recommend that each attorney read M. Hours & W. ROGOSHESKE, *supra* note 5, §§ 40.01-52.08.

