

# Appellate Practice Law News

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## **In this Issue**

Introduction Bradley G. Clary	1
2002-03 Appellate Practice Law Section Council Officers	1
Motion Practice in the Minnesota Court of Appeals	2
Suggestions for Effective Motion Practice in the Minnesota Court of Appeal	4
Five Steps to Developing Solo/Small Firm Appellate Practice <i>Katherine L. MacKinnon</i>	6
Additional Thoughts from the Presentation and Breakout Group Discussions <i>Bradley G. Clary</i>	7
Observations about Appellate Practice from My Service on the Minnesota Court of Appeals <i>Marianne D. Short</i>	8



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# Introduction

By: *Bradley G. Clary, Editor*

This issue of Appellate Practice News reports on the Section's Spring Symposium on May 31, 2002 on appellate motion practice. The issue reprints the handouts from Edward Toussaint, Jr. Chief Judge, Minnesota Court of Appeals, Cynthia L. Lehr, Chief Attorney, Anne Wyneken, Chief Deputy Attorney, Stan Keillor, Staff Attorney, all from the Minnesota Court of Appeals; Katherine L. MacKinnon, solo practitioner; and Marianne D. Short from Dorsey & Whitney LLP. The

issue also briefly summarizes certain points made by other participating panelists (Chad Oldfather from Faegre & Benson; John Baker from Greene Espel PLLP; former Justice John Simonett; and the Editor), as well as other distinguished judges and practitioners who participated in the discussions and accompanying breakout sessions. The Editor wishes to thank Michael Ford from the Quinlivan firm for contributing his notes for the preparation of this Newsletter. ■

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# Motion Practice in the Minnesota Court of Appeals

*MSBA Appellate Practice Section  
Spring Symposium May 31, 2002  
Edward Toussaint, Jr. Chief Judge, Minnesota Court of  
Appeals, Cynthia L. Lehr, Chief Attorney,  
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## I. Introduction

Motion practice includes petitions for extraordinary writs (prohibition and mandamus) and petitions for discretionary review. Some motions and most petitions are considered by the weekly Special Term panel (three judges), while other motions may be decided by the chief judge.

II. No exhaustive list of motions and deadlines in the appellate rules, but there are several “hidden” in the rules, with specific deadlines. *E.g.*, Minn. R. Civ. App. P. 110.02, subd. 1 (if appellant isn’t ordering a complete transcript, respondent may make a motion to compel in the trial court within 10 days), 129 (any request for leave to file brief as *amicus curiae* to be made within 15 days after filing of appeal), 131.02 (any request for briefing extension to be made within time specified for filing brief), 134.03, subd. 1 (any motion for additional time at oral argument to be made before hearing date), 139.03 (costs and disbursements to be taxed within 15 days after filing of decision), 139.06, subd. 1 (any motion for attorney fees must be submitted no later than deadline for taxing costs), 143.05, subd. 3 (motion to present oral argument through certified student must be filed at least 10 days before scheduled hearing).

III. Unless otherwise specified, any request for an order or other relief from the court to be made by motion under Minn. R. Civ. App. P. 127, with four copies and proof of service on opposing counsel.

## IV. Calculating time for motions

A. No deadline for making any motion specified in rule 127 (but see rules discussed above for deadlines specified elsewhere in the rules), but response time and reply time are specified.

B. Any response is due within five days after service of the motion.

C. Any reply is due within two days after service of the response.

D. Minn. R. Civ. App. P. 126.01, on calculation of time, refers you to Minn. R. Civ. P. 6.01 and 6.05 to compute time periods prescribed by the appellate rules.

1. Under rule 6.01, if the prescribed period “is less than 7 days, intermediate” weekends and holidays are excluded.

2. Under rule 6.05, if the response time is computed from date of service, and service is accomplished by mail, three days are added to the prescribed period. *See also* Minn. R. Civ. App. P. 125.03 (papers may be served personally or by mail; service by mail complete on mailing; if response period is calculated from service of paper by mail, three days added to prescribed period).

3. Because the response period on motions is less than seven, it’s five “work days” if the motion is served personally.

4. If the motion is mailed, the court formerly added three days to the response period, yielding a period of eight days (which was no longer “less than seven”), so the response period was eight “calendar days” from the date of mailing.

5. *State v. Hugger*, -N.W.2d –(Minn. Mar. 21, 2002), changed the method of calculation. Now, calculate five work days first, and then add three calendar days. If the last day is then a weekend or holiday, the deadline falls on the next business day. Now more consistent with federal timing rules, but beware of “old” cases that employ the former method of calculation.

6. Reply period is either two “work days” from personal service of the response or five “work days” from the date on which the response was mailed.

## V. Orders Issued by the Chief Judge

A. Orders that are unlikely to be controversial, are governed by well-established court policy, or will not be dispositive are issued by the chief judge on a daily ba-

sis; (approximately 75 each week), to avoid delay. The court may not wait for a response on motions perceived to be “routine,” so call to alert the court, if filing a response on a routine motion. (But if a timely response is received after a routine order issues, it’s reviewed to determine whether there should be an amended order.)

B. Examples include: request to file brief as *amicus curiae*, accept an informal (or improperly bound) brief, extend the time to file a transcript, to appear *pro hac vice*, for *in forma pauperis* relief (routinely remanded to trial court), or to consolidate appeals arising from the same case.

C. Motions to reschedule oral argument are routinely denied, absent an unforeseen emergency (sudden illness preventing counsel’s appearance). But the court will make reasonable accommodations in the initial scheduling of arguments if counsel have given advance notice of potential scheduling conflicts. Cases are set immediately after the first responsive brief is filed, so be sure that written notice is received by the clerk’s office before that. Minn. App. Spec. R. Pract. 1. Anticipate that the court will be scheduling cases 30-45 days “out.”

## VI. Special Term

A. Dispositive or controversial motions, as well as most petitions for discretionary review or for, extraordinary relief, are usually referred to the Special Term panel. Examples include jurisdiction questions (appealability and timeliness), motions for stays pending appeal, and motions to limit issues. On occasion, the panel will also consider expedited appeals, including bail appeals and *habeas corpus*.

B. The panel meets weekly, usually on Tuesdays. The composition of the panel changes every week, with two different judges joining the chief judge. Generally, orders are issued the same day. Counsel may call on Monday afternoon, to find out whether a matter is on the calendar, and may call on Tuesday afternoon if it’s important to know the decision right away.

### C. Discretionary review

1. May seek discretionary review of an order that is not otherwise appealable. Minn. R. Civ. App. P. 105.01. But review is rarely granted, unless (a) reversal would obviate all further proceedings in the district court and (b) the ruling involves a legal issue of broad application. *Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176, 179 (Minn. 1988); *Price v. Amdal*, 256 N.W.2d 461, 462 n.1 (Minn. 1977). “Discretionary review of discovery orders and other matters vested in the district court’s discretion strongly disfavored. See *Clark v. Monnens*,

436 N.W.2d 830 (Minn. App. 1989) (no compelling reason for discretionary review of order for IME).

2. Case currently pending before the supreme court may change the standard, judging from the questions asked at the oral argument. Watch for decision in *Gordon v. Microsoft Corp.*, No. C8-0 1- 701 (supreme court granted further review on denial of discretionary review; case argued Nov. 28, 2001 ).

3. Petition must be served and filed within 30 days after filing of order (time was not extended in same manner as time to *appeal* from order). Petition is limited to five pages, criteria are in the rules, fee is \$250, must include proof of service.

4. Response time changed in March 2001 to five days (was formerly seven), to correspond to rule 127 response time on motions. Reply is now authorized; to be served and filed within two days after service of response.

5. Very important to attach all relevant district court documents, because the court will not have access to the file.

### D. Prohibition and mandamus

1. No time limits imposed by the rules. Case law specifies that petitions should ordinarily be brought within the time to appeal from an order, but the appellate court retains discretion to consider an untimely petition, in the absence of prejudice to the other parties. *Ebenezer Soc’y v. Minnesota State Bd. of Health*, 301 Minn. 188, 193, 223 N.W.2d 385,388 (1974).

2. Filing fee is \$250, no page limits, attach all relevant documents, include proof of service and four copies. Response period is five days; no reply authorized by existing rules. The court will accept a combined petition for prohibition and mandamus, but cannot combine with other filings, e.g., notice of appeal or discretionary review.

3. Criteria contained in case law, not the rules. Not available if there’s an adequate ordinary remedy, such as a direct appeal at the close of proceedings.

### E. Emergency Applications

1. If counsel cannot get to a computer, the rules authorize a telephone application to the chief attorney. The court will also consider motions (in addition to petitions for prohibition or mandamus) on an expedited basis, if good cause is shown.

2. Court has a very strong preference for written petitions, rather than relying on telephone applications. To afford time to prepare a written petition, the court may grant some type of temporary stay and establish a schedule for the submission of a petition (or motion) and response. But counsel should always request a stay from the trial court first. The court will not act without giving the opposing party a reasonable time to respond (by phone or in writing). (Accordingly personal service, rather than mail service, is generally required).

3. If an oral petition for prohibition or mandamus is denied, there is no filing fee, no written documentation, and no record of the petition or the court's ruling.

4. Threshold question is whether the application should be heard on an emergency basis at all. How long ago did the trial court rule? How long until the claimed injury will occur? Has counsel brought the issue to the attention of the appellate court promptly? ■



## Suggestions for Effective Motion Practice in the Minnesota Court of Appeal

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**1. File all the copies required by the rules and your proof of service with the motion papers or petition.** Requesting missing affidavits and/or copies by phone, and then processing and routing the copies when they arrive (or making copies for the judges, if they do not arrive) consumes scarce resources of the court and may delay consideration of the motion/petition.

**2. Do not attempt to combine petitions being filed under different rules.** *E.g.*, a petition for discretionary review with a petition for an extraordinary writ or a petition for discretionary review with a notice of appeal. There are different filing deadlines, fees, and requirements, and they must be filed separately. It's perfectly okay to make a motion to consolidate them after filing, if that's appropriate.

**3. Include essential supporting documents.** If you're claiming to have served notice of filing to limit the time for appeal, include a copy. If you're claiming that the judge issued the "real" final decision on another date, include a copy. In most cases, the trial court (or agency) file has not arrived at the court of appeals when a motion is being decided. In cases involving extraordinary writs or discretionary review, the file isn't coming at all. The court of appeals doesn't know anything about the case except what you tell them, so be sure to provide enough information. (But don't go overboard. There's a point of diminishing returns, and a six-inch-thick appendix containing every

document from the trial court file isn't very effective.) If you prepare an appendix, number every single page and provide an index. Don't refer to "exhibit F" and expect the judges to dig for the beginning and end of that exhibit.

**4. Don't make a request for action by the court in a letter to the clerk's office.** Rule 127 specifies that any request for an order or other relief must be made by motion, with appropriate copies and proof of service. The clerk's office receives, but will not act on, letters objecting to the timeliness or content of briefs, seeking a postponement of oral argument dates, submitting additional arguments after oral arguments, etc.

**5. Don't try to file motions and petitions by fax.** The court's rules do not authorize fax filing or service. On occasion, the staff attorneys may request a courtesy copy of a document by fax, but the original still must be filed with the clerk's office (along with the necessary copies) in person or by mail. In addition, don't demand that routine orders be faxed to you or that court staff call you personally if there's a problem with your case or an order requiring you to do something. It's okay for you to call back periodically, to check on the status of a pending matter, but we don't have the resources to provide customized notification services.

**6. If you're seeking extraordinary relief, determine whether prohibition or mandamus is applicable.** Basically, mandamus will lie if the trial court is clearly required to do something but does not control judicial discretion, while prohibition will lie if the trial court has exceeded its authority or clearly abused its discretion. *See State v. Martz*, 447 N.W.2d. 475 (Minn. App. 1989) (mandamus); *Hancock-Nelson Mercantile Co. v. Weisman*, 340 N.W.2d 866 (Minn. App. 1983) (prohibition). A threshold requirement for both writs is that there is no other adequate remedy (such as an appeal). The petition should address the required elements of the writ, and also show that the requested relief has been denied by the trial court.

**7. If you're seeking expedited or emergency relief, serve and file the papers promptly.** The court will not handle a matter on an emergency basis if the need for immediate relief has resulted from counsel's delay in bringing the matter to the attention of the trial court or this court. A request for expedited consideration should be prominently stated on the first page of the motion and in the accompanying cover letter. If making an oral petition for an emergency writ of prohibition or mandamus, fax courtesy copies of the underlying order and motion papers to the court.

**8. If you are the respondent in an appeal, don't wait until your brief is filed to challenge appellate jurisdiction.** Instead, file a motion to dismiss as soon as possible in the appeal process. Usually, such motions can be addressed by the Special Term panel before briefing has begun, thereby avoiding needless briefing if this court does not have jurisdiction.

**9. Call the clerk's office, not the staff attorneys, for routine questions.** (What are your hours? What is the zip code for the clerk's office? What color is the cover on a reply brief? What was filed?) Don't call the staff attorneys until you have read the rules and tried to find the answer. Don't expect the staff attorneys to give you "the odds" of success on your petition/motion or to tell you what to ask for. (Improper question: Should I ask for prohibition or mandamus?)

**10. If it is not in the rules and the clerk's office can not help you, call the staff attorneys.** We would rather answer the questions "up front" than clean up a mess afterwards!

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#### **Appellate Practice Section Website**

Section members may want to visit the Section's website, which is accessible through [practicelaw.org](http://practicelaw.org), the MSBA's latest online tool. After you enter the website through [www.practicelaw.org](http://www.practicelaw.org), click on the appellate practice file and obtain a variety of helpful insights regarding appellate practice and procedure.

You should also be aware that the Minnesota Civil Appellate Rules are now available in full text online through the Minnesota Court website. This is accessible at [www.courts.state.mn.us](http://www.courts.state.mn.us). Once you enter the website, click on the "court rules" file. ■

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not have to download or install anything; any member with Internet access has instant access to all of *practicelaw.org*. The material in *practicelaw.org* is organized into "FILES," each covering a specific practice area. Currently there are four files: **family law, employment law, appellate practice, and marketing**. A fifth file contains miscellaneous material that is of value but not comprehensive enough to justify its own file (for example, the **Uniform Conveyancing Blanks**.) Each file is organized into "tabs," which cover a specific topic in that practice area. Visit the site at [www.practicelaw.org](http://www.practicelaw.org) and register today!

# Five Steps to Developing Solo/Small Firm Appellate Practice

By: Katherine L MacKinnon, Esq.

Key Steps	Applicable Song Line
<p><b>1. Produce a quality product – excel at appellate work.</b></p> <ul style="list-style-type: none"> <li>• Write well</li> <li>• Know the rules of appellate procedure</li> <li>• Know how to work with a record</li> </ul> <p><b>2. Develop brief production capability – maintain legal research means and brief production capacity.</b></p> <ul style="list-style-type: none"> <li>• Purchase, lease computer legal research ability</li> <li>• Maintain access to law library</li> <li>• Keep current on legal research skills</li> <li>• Acquire word-processing software with table of authorities function</li> <li>• Develop network of appellate support service providers, <i>i.e.</i> printers, surety bond provider</li> </ul> <p><b>3. Network with other lawyers in similar practices and be accessible – be available and approachable for advice.</b></p> <ul style="list-style-type: none"> <li>• Network with lawyers through volunteering, bar activities, mentoring programs</li> <li>• Do seminars</li> <li>• Consult for free</li> <li>• Be ready to help on off days and/or short notice</li> </ul> <p><b>4. Be financially flexible.</b></p> <ul style="list-style-type: none"> <li>• Develop creative fee arrangements such as flat fees or blended contingent fees</li> <li>• Offer to ghost write brief</li> </ul> <p><b>5. Enjoy what you do, but be ready to be fearless.</b></p> <ul style="list-style-type: none"> <li>• Show that you enjoy this work</li> <li>• Be ready to take the provocative or difficult case more established appellate lawyers would not take.</li> <li>• Be confident of your skills</li> </ul>	<p><i>He's a Pinball Wizard...</i> The Rock Opera, <u>Tommy</u></p> <p><i>Marian, Madam Librarian...</i> <u>The Music Man</u></p>   <p><i>Consider Yourself, One of Us...</i> <u>Oliver!</u></p>   <p><i>Money Makes the World Go Around...</i> <u>Cabaret</u></p>   <p><i>I Have Confidence in Me...</i> <u>The Sound of Music</u></p>



# Additional Thoughts from the Presentation and Breakout Group Discussions

By: Bradley G. Clary, Editor (with assistance also from Michael Ford's notes and from Cynthia Lehr)

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1. *What should counsel do if the court asks a question at oral argument where the material is **not** in the record?* Try to answer the question, but counsel can add: "That's not really in the record, and that's a good reason to remand." Do **not** say (if possible): "I am sorry judge; I was not trial counsel."

2. *Is oral argument really important?* Yes. Judges may have formed preliminary views based on the briefs, but they try to stay open-minded. Help the court to zero in on where the key point of disagreement is.

3. *What about "Brandeis briefs"?* It can be helpful to cite the court to material taken from the **public domain** and **reasonably incontrovertible**, even if the material is not in the trial court record. The court of appeals is essentially error-correcting. The Supreme Court is policy making. "Brandeis brief" kinds of facts are helpful on policy issues. Policy data is also helpful in petitions for review.

4. *What should counsel do with the new language in Rule 128.05 regarding supplemental authority cites? How far can counsel go?* Cite the case, and add a one or two sentence explanation of how the case is relevant. This is helpful when a really new authority surfaces on a point that matters.

5. *Should counsel use visual aids at oral argument?* Generally, no. It can be difficult to ensure that all members of the court can effectively see the presentation. However, sometimes visual images can be helpful in cases, for example, that involve property issues. If counsel insists on visual aids, arrangements should be made in advance with the court's clerk and opposing counsel. Copies should be made available for the court's panel members, their law clerks, and opposing counsel. Lawyers using a visual aid should also explain that the visual aid does not rely on anything outside the record on appeal.

6. *There is technically no such thing as a motion or petition to reconsider in the court of appeals, **but** there are times when counsel can suggest the court fix a simple "clerical" error in its opinion, such as "Smith" instead of "Jones," a misattribution of a quote, or a double-counting*

of a number. If there is a simple error, just call the clerk's office. It is not appropriate to argue that the court made the wrong decision, or to second-guess the court's choice of language.

7. *Can counsel move to change an unpublished opinion to "published"?* Yes, counsel "can" make a motion for any relief. But no such motion is authorized by the appellate rules or caselaw, and the few such motions that have been made to the court of appeals over the years have been uniformly **denied**.

8. *The court of appeals receives a lot of petitions for discretionary review of class certification decisions.* The court of appeals uniformly historically has **denied** those petitions for discretionary review. [Ed. Note: The Supreme Court recently clarified the standard for discretionary review of those in *Gordon v. Microsoft Corp.*, 645 N.W. 2d 393, 401-02 (Minn. 2002). The Court announced three "primary" factors:

- "(1) When a questionable denial of class certification is the 'death knell' of plaintiffs' case because their individual claims are too small to pursue individually;
- (2) When a questionable grant of class certification places inordinate pressure on the defendant to settle; and
- (3) Whether the appeal will permit resolution of an important legal issue that is also important to the particular litigation."

The Court went on to say that, "[A]ppellate review of class certification orders should be an exception rather than the norm and the ultimate discretion whether to exercise discretionary review should lie with the court of appeals." 645 N.W. 2d at 403.]

9. *If counsel has a request for relief of some kind, **file a motion**.* Do not just send a letter.

10. *Is a motion to strike effective?* It makes sense to ask the question: "Is the relevant material important or genuinely prejudicial?" If so, move to strike. If the other side is misstating a bunch of cases, then counsel need not neces-

sarily go through every one of them. Go through the two or three key ones in detail. Then point out there are similar discrepancies in the treatment of the other cases.

11. *Oral argument on special term motions is not usual.* The court **never** allows oral argument on a “special term motion.” On a rare occasion involving a petition for emergency relief, there might be a conference call presentation by counsel to the court.

12. *Counsel are failing to make post trial motions* in civil bench trials and therefore are losing an opportunity to preserve a better scope and standard of review.

*The public needs to understand that appellate cases are decided by a process, and not just on whim.* All of us can help the public understand that. ■



# Observations about Appellate Practice from My Service on the Minnesota Court of Appeals

By: Marianne D. Short, Dorsey & Whitney LLP

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## Observations

Three observations about appellate practice from my service on the Minnesota Court of Appeals

- I. A successful appellate strategy begins in the trial court.
- II. The standard of review defines the intensity of examination of the issue on review.
- III. Appellate counsel must find a winning argument that will resonate with the court and avoid the temptation to join issues that may detract from its force and simplicity.

### I. Issue Preservation

- A. Educate early
- B. Object immediately
- C. Illustrate position
- D. Appeal internally

### II. Standard of Review

- A. Factual issue — clearly erroneous
- B. Evidentiary issue – abuse of discretion
- C. Legal issue – de novo
- D. Any wiggle room (be creative)?

## III. A Forceful, Winning Argument

### A. Written Brief:

- Use the opening and concluding paragraphs of your written submissions to preview and reemphasize your strongest points.
- Humanize your client and explain the reasons that account for the key events.
- Refine your argument until you achieve clarity at all levels.
- Clearly state the bottom line.

### B. Oral Argument:

- Listen and respond to questions, which embody your listeners’ concerns.
- Explain why point is favorable and how adoption will produce desirable results.
- Focus on the important, relevant issues.

## Conclusion

Appellate Advocacy requires familiarity with numerous technical rules regarding the proper manner of perfecting and raising issues before an appellate court. After tediously jumping through all the hoops, don’t lose sight of the need to persuade the court of the merits of your case. ■