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The Prehearing Conference—Perhaps Your Only Opportunity to Present Oral Argument to the Minnesota Supreme Court

George M. Scott

David J. Moskal

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THE PREHEARING CONFERENCE—PERHAPS YOUR ONLY OPPORTUNITY TO PRESENT ORAL ARGUMENT TO THE MINNESOTA SUPREME COURT

JUSTICE GEORGE M. SCOTT†
&
DAVID J. MOSKAL‡

In this Article Justice Scott and Mr. Moskal discuss the purpose and mechanics of Minnesota's prehearing conference procedure. Throughout the Article the authors emphasize the importance of the prehearing conference as a tool of effective appellate advocacy.

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† Associate Justice Minnesota Supreme Court. Justice Scott is a 1951 graduate of William Mitchell College of Law. Upon graduation Justice Scott and Justice Douglas Amdahl practiced law together. From 1955 to 1973 Justice Scott served as Hennepin County Attorney. In 1973 he was appointed to the Minnesota Supreme Court and was reelected to that position in 1974 and 1980. He is currently a member of the Board of Trustees of William Mitchell College of Law.

‡ Member, Minnesota Bar. Mr. Moskal received his B.A. from DePaul University in 1976 and his J.D. (magna cum laude) from William Mitchell College of Law in 1980. He is an associate in the Minneapolis law firm of Rider, Bennett, Egan & Arundel. During the 1980-1981 Minnesota Supreme Court term he served as a law clerk to Justice Scott.

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> "No legal system can long survive, in the sense of commanding public respect and confidence, which does not comport with the people's shrewd, native sense of justice. Nor should it survive. The law is not a game; it is an arbitral process. It will never be perfect because it is human. But the striving for that goal is part of the destiny of our profession."
>
> Douglas, *Pre-trial Procedure*, 26 A.B.A.J. 693, 693 (1940).

I. INTRODUCTION

In recent years the workload of the Minnesota Supreme Court has grown dramatically. The supreme court considered only 584 matters in 1971.[1] Seven years later the court considered 1,207 matters.[2] Other state supreme courts[3] and federal appellate courts[4] have experienced similar increases in their caseloads. There are several reasons why appellate courts are being inundated with appeals. In recent years the United States Supreme Court has granted indigents free representation by counsel in the review of their criminal convictions[5] and has expanded other important constitutional protections.[6] There has been a virtual ex-

1. *See* L. JENSEN & J. REHAK, MINNESOTA SUPREME COURT AUTOMATED CASEFLOW MANAGEMENT AND DOCKETING FEASIBILITY REPORT 95 app. (publication of National Center for State Courts).

2. *See* Harmon & Lang, *A Needs Analysis of an Intermediate Appellate Court*, 7 WM. MITCHELL L. REV. 51, 87 (1981).

3. *See* D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 7-8 (1974).

4. *See* Haworth, *Screening and Summary Procedures in the United States Court of Appeals*, 1973 WASH. U.L.Q. 257, in which the author comments:

> It is a tale told more than twice that more cases are being appealed to the courts of appeals than can be handled quickly and efficiently. During 1971, a total of 12,788 cases were commenced in the courts of appeals. Although 12,368 cases were terminated, the backlog increased to a total of 9,232 cases, which represents nearly a full year's work even if no new cases were filed. The dramatic nature of 12,788 filings is especially apparent when compared to the filings in the 1960's. In 1962 only 4,823 cases were filed in the courts of appeals and the backlog was 3,031 cases. In only nine years, the number of filings has increased 165.1 percent and the backlog has increased 204.2 percent. During the same nine years, the number of authorized judgeships increased only 24.4 percent, from seventy-eight to ninety-seven. The 1960's was truly a time of "exploding dockets."

Id. at 258-59 (footnotes omitted).

5. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

6. A random sample of Supreme Court decisions that have resulted in a plethora of

plosion in appeals from administrative board decisions.[7] The abrogation of numerous common-law immunities[8] and the adop-

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appeals includes the following: Terry v. Ohio, 392 U.S. 1 (1968) (stop-and-frisk doctrine); Bruton v. United States, 391 U.S. 123 (1968) (limiting use of codefendant's confessions); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment applicable to the states); Escobedo v. Illinois, 378 U.S. 478 (1964) (establishing right to counsel during interrogation before indictment); Jackson v. Denno, 378 U.S. 368 (1964) (right to prehearing on use of confessions); Aguilar v. Texas, 378 U.S. 108 (1964) (probable cause requires affirmative allegation that affiant has personal knowledge of matters supporting issuance of warrant); Brady v. Maryland, 373 U.S. 83 (1963) (prosecutor must inform defendant of favorable evidence); Draper v. Washington, 372 U.S. 487 (1963) (indigents given right to portion of transcript relevant to issue on appeal without charge).

7. *See generally* Baird, *Remedies By Judicial Review of Agency Action in Minnesota*, 4 WM. MITCHELL L. REV. 277 (1978); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817 (1976).

Several reasons may account for the increase in administrative appeals. First, courts have liberalized the standing requirements. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 683-90 (1973) (unincorporated association formed to enhance quality of environment held to have standing to challenge ICC freight rate increase); Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy, 301 Minn. 28, 31-33, 221 N.W.2d 162, 165-66 (1974) (nonprofit consumer advocate corporations given standing to challenge prohibition against advertising of prescription drug prices). Recent statutory enactments also have enlarged the concept of standing. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 702 (1976) (persons "adversely affected or aggrieved" by agency action entitled to judicial relief); MINN. STAT. § 15.0424(1) (1980) (judicial review appropriate when litigant has been "aggrieved" by final agency action).

Second, courts have indicated a willingness to review areas once thought to be outside the ambit of judicial review. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (parolees' rights); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients' due process rights); Brown v. Board of Educ., 347 U.S. 483 (1954) (school busing).

Finally, as Professor Davis points out, the doctrines of ripeness and exhaustion are frequently ignored. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 20.08, at 466 (1976).

8. As indicated in Note, *Contribution and Indemnity—An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109 (1979):

> Charitable immunity was rejected long ago by the Minnesota court. *See* Miller v. Macalester College, 262 Minn. 418, 429, 115 N.W.2d 666, 673 (1962) (college); Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 395-98, 175 N.W. 699, 700-01 (1920) (hospital). In the past 15 years the Minnesota Supreme Court has abolished sovereign immunity, *see* Nieting v. Blondell, 306 Minn. 122, 132, 235 N.W.2d 597, 603 (1975) (abrogating state immunity after August 1, 1976); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962) (abolishing governmental immunity as to school districts, municipal corporations, and other subdivisions of government), and intrafamily immunity, *see* Beaudette v. Frana, 285 Minn. 366, 371-73, 173 N.W.2d 416, 420 (1969) (abolishing interspousal immunity); Silesky v. Kelman, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968) (limiting immunity of parent from suit by unemancipated child); Balts v. Balts, 273 Minn. 419, 433, 142 N.W.2d 66, 75 (1966) (limiting immunity of unemancipated child from suit by parent).

Id. at 126 n.88. Most recently, in Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980), the court held that all exceptions to the abrogation of parental immunity contained in *Silesky* were overruled. *Id.* at 601.

tion of new tort doctrines[9] has fostered litigation. Finally, the growth of our population naturally increases appellate litigation.[10] The judicial resources available to review this expanding caseload are severely limited. Judges,[11] practitioners,[12] and academicians[13] have warned that if something is not done to alleviate this problem a crisis will occur.

Few solutions exist to eliminate the docket congestion resulting from the ever-increasing number of appeals to the Minnesota Supreme Court.[14] The traditional solution to the problem has

9. In recent years the Minnesota Supreme Court has adopted: (1) the strict products liability doctrine, *see* McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); (2) the informed consent doctrine in medical malpractice cases, *see* Cornfeldt v. Tongen, 262 N.W.2d 684 (Minn. 1977); (3) a cause of action for wrongful conception, *see* Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977), *discussed in* Comment, *Wrongful Conception*, 5 WM. MITCHELL L. REV. 464 (1979); and (4) the reasonable person standard in property owner liability cases, *see* Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972).

Minnesota's leadership in the advancement of tort law is recognized in Steenson, *The Anatomy of Products Liabilities in Minnesota: The Theories of Recovery*, 6 WM. MITCHELL L. REV. 1, 7-8 n.20 (1980).

10. *See* Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971). Judge Hufstedler comments:

> The most inexorable pressures upon the judicial system are those exerted by population. When we laid the foundations of our system in the 18th century, we were 4 million people. Absent serious demographic miscalculation or nuclear catastrophe, we will be 300 million people within the next 30 years. A people doubling itself every few decades will jolt all of its public institutions, including its courts . . . .

Id. at 902 (footnote omitted).

11. *See* Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974); Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29 (1968).

12. *See* Burdick, *Federal Courts of Appeals: Radical Surgery or Conservative Care*, 60 KY. L.J. 807 (1972).

13. *See* Haworth, *supra* note 4; Wright, *The Federal Courts—a Century After Appomattox*, 52 A.B.A.J. 742 (1966); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949 (1964).

14. The average case processing time in the Minnesota Supreme Court was 14.25 months in 1976. *See* L. JENSEN & J. REHAK, *supra* note 1, at 20. The following chart illustrates the processing time for 1977 filings:

Appeals Granted a Hearing and Disposed of by Opinion

	Average Time in Months		
	Civil	Criminal	Both
En Banc—signed and per curiam opinions	15.5 (1 pending) (35)	22.1 (10)	16.99 (45)
—signed opinions	13.9 (32)	19.3 (8)	15.0 (40)

been to appoint more supreme court justices.[15] At best, this solution is merely a stop-gap measure. Moreover, a nine-judge court is probably the size limit of an effective judicial body.[16]

Another suggested solution is the creation of an intermediate court of appeals. That solution is keenly debated in a recent symposium in the *William Mitchell Law Review*[17] and will not be further examined here—except to say that Minnesota certainly needs such a court as soon as possible.

One possible solution to combat the vast increase in the supreme court's caseload is the use of an appellate prehearing conference (PHC). The remainder of this Article will examine this unique mechanism. First, the historical context in which the PHC evolved will be described, to provide a perspective for understand-

Division	—signed and per curiam opinions	15.1 (158)	17.5 (2 pending) (41)	15.6 (199)
	—signed opinions	15.1 (147)	17.6 (35)	15.6 (182)
Nonoral	—signed and per curiam opinions	13.3 (34)	14.8 (67)	14.3 (101)
	—signed opinions	15.8 (12)	17.5 (23)	16.9 (35)
Total		14.9 (227)	16.3 (118)	15.4 (345)

(Numbers in parentheses indicate total number of cases in that category)

Harmon & Lang, *supra* note 2, at 91 app., table 6. By comparison, the American Bar Association standard for timely disposition of appellate cases by a three-judge panel is approximately 30 to 60 days. Additional time may be expected in particularly complex cases. *See* ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.52 (Approved Draft 1977).

15. Professor Wright has suggested such a solution to clear up the docket congestion in the United States Court of Appeals for the Fifth Circuit. *See* Wright, *supra* note 13, at 968-69.

In 1973 the Minnesota Legislature enacted legislation providing for two additional justices on the existing seven-person Minnesota Supreme Court. *See* Act of May 24, 1973, ch. 726, § 1, 1973 Minn. Laws 2133, 2134 (codified at MINN. STAT. § 480.01 (1980)).

16. The administrative difficulties resulting from such a "solution" may well result in problems of a greater magnitude. *See* Warren, *Administrative Problems of the Federal Judiciary*, 23 BUS. LAW. 7, 8 (1967). Justice Frankfurter, in a concurring opinion, noted that beyond a certain number of judges a court's efficiency is subject to the law of diminishing returns. *See* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring).

17. *See Symposium on an Intermediate Appellate Court in Minnesota*, 7 WM. MITCHELL L. REV. 41 (1981).

ing its present usage.[18] Second, the mechanics and goals of the PHC from 1976 to 1979 will be briefly reviewed.[19] Third, the mechanics and goals of the present PHC will be discussed.[20] Finally, appellate strategy during the PHC will be commented upon.[21]

II. HISTORY OF THE PHC

It is difficult to trace the genesis of the PHC. No doubt its historical roots grew out of late 17th and early 18th century pretrial practice in Europe. Professor Sarpy indicates that the French judicial system initiated pretrial conciliation efforts in 1790.[22] Other scholars, however, trace the first formal judicial conciliation efforts to England in 1831.[23] Under this procedure, a third-party claimant bringing an action for money or property was required to appear and articulate the nature of his claim so the court could frame the issues to be resolved.[24]

The first extensive use of a pretrial mechanism began in Scotland in 1868. Under a procedure known as the "Adjustment of Issues,"[25] the litigants were required to inform the court to what extent they agreed upon the issues to be resolved.[26]

Germany, following the lead of the other industrial countries on the European continent, established a "preparatory proceeding" in the German Code of 1877.[27] This legislation also required liti-

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18. *See* notes 22-38 *infra* and accompanying text.

19. *See* notes 39-52 *infra* and accompanying text.

20. *See* notes 53-74 *infra* and accompanying text.

21. *See* notes 75-94 *infra* and accompanying text.

22. *See* Sarpy, *Pre-Trial in Louisiana*, 6 LOY. L. REV. 105, 107 (1952). One commentator states:

> As with the discovery of America, every European nation lays claim to having the first judicial pretrial conciliation effort. Although legal historians have traced the first formal judicial conciliation efforts to the French, I am certain that the Irish judicial system implemented pretrial practice—don't ask me how I know, suffice it to say that we Irish are always looking for ways to make work shorter.

Scott, *An Update On The Pre-Hearing Conference*, in APPELLATE PRACTICE INSTITUTE IV-4 (1981) (Advanced Legal Education, Hamline University School of Law).

23. *See* Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 219 (1937).

24. *See id.*

25. *See* Sunderland, *The Function of Pre-Trial Procedure*, 6 U. PITT. L. REV. 1, 2-3 (1939).

26. *See id.*

27. *See* A. ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 618 (1927).

gants to counsel with the appropriate judicial officer to limit and crystalize the issues in dispute.

Pretrial practice did not take root in America, however, until 1929 when the Third Judicial Circuit of Michigan (Detroit) initiated a formal "conciliation docket."[28] The main goal of the Michigan pretrial practice was to bring about settlements, thereby reducing court congestion.[29] Because of the success of Michigan's pretrial practice, courts in Massachusetts, Ohio, and New Jersey adopted it, with equally favorable results.[30]

In 1938 the American Bar Association took cognizance of the movement to initiate pretrial procedures and urged all metropolitan courts to provide for such a procedure.[31] Because of the American Bar Association's encouragement, a pretrial procedure was included in Rule 16 of the newly promulgated Federal Rules of Civil Procedure in 1938.[32] Perhaps the most well-liked of the federal rules,[33] numerous state courts have adopted similar procedures.[34]

The excellent results achieved through the use of pretrial proce-

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28. *See* Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 133 (1971).

29. *See id.*

30. *See* H. NIMS, PRE-TRIAL 3 (1950). *See also* Kincaid, *Pre-Trial Conference Procedure in California*, 4 U.C.L.A. L. REV. 377, 378 (1957); Note, *Federal Pre-Trial Practice: A Study of Modification and Sanctions*, 51 GEO. L.J. 309, 314-15 (1963).

31. *See* A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 518-35 app. (1949).

32. Rule 16 provides:

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by a rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

FED. R. CIV. P. 16.

33. *See* Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 163 (1956).

34. By 1955, 40 states had adopted similar rules. *See* Section on Judicial Administra-

dures prompted the Second Circuit Court of Appeals, in November 1973, to initiate an analogous procedure at the appellate level.[35] The objectives of the Second Circuit's preargument con-

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tion of the ABA, *Report of the Pre-trial Committee*, 17 F.R.D. 474, 474-75 (1955). Minnesota's version, MINN. R. CIV. P. 16, provides:

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:
> (1) The simplification of the issues;
> (2) The necessity or desirability of amendments to the pleadings;
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
> (4) The limitation of the number of expert witnesses;
> (5) The advisability of a preliminary reference of issues to a referee;
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

Id.

35. *See* Kaufman, *supra* note 11, at 1094. Chief Judge Kaufman indicates that the Second Circuit implemented a preargument conference because that court "witnessed a 109.5% increase in filings since 1965. Filings have swelled nationally from 6,766 in 1965 to 16,936 in 1973, a rise of 142.9%." *Id.* at n.1.

"One forecast now estimates that in 1981, . . . approximately 38,875 cases will be docketed annually in the [federal] courts of appeals." Haworth, *supra* note 4, at 259-60 (footnotes omitted).

The Second Circuit's authority for implementing its preargument conference may be found in Rule 33 of the Federal Rules of Civil Appellate Procedure:

> The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

FED. R. APP. P. 33.

The other federal circuit courts, instead of implementing a preargument conference, have relied upon the method of limiting oral argument to lessen their increasing docket congestion. As Chief Judge Kaufman notes:

> All circuits but the Second engage in substantial screening for the purpose of reducing the time allowed for oral argument or eliminating it altogether. Several alternatives are utilized. The First, Third, Fifth, Sixth, Seventh, Eighth, Tenth and D.C. Circuits allow, according to the necessities of the case, full argument not to exceed 30 minutes, limited argument of less than 30 minutes, or no oral argument at all. The Fourth and Ninth Circuits either permit a full 30 minute argument or deny any time for argument. The Second Circuit, by contrast, grants a minimum 15 minute argument in all cases and often a full 30 minutes or longer. . . .
>
> The decision to permit oral argument in circuits other than the Second is based on information contained in the briefs and the record. Several circuits

ference are to simplify issues and to encourage parties in civil cases to reach voluntary settlements.[36] Preliminary reports indicate that both of these goals are being met.[37] Because of the Second Circuit's success, nine other courts, including the Minnesota Supreme Court, have implemented various types of appellate PHC's.[38] The fundamental goals and mechanics of the Minnesota PHC are discussed below.

III. THE PHC IN MINNESOTA

On September 10, 1976, the Minnesota Supreme Court initiated

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make a preliminary classification on the basis of the appellant's brief (First, Fourth and Sixth), or a "docketing statement" containing a description of the issues and authorities, together with a copy of the district court opinion (Tenth). . . . The First Circuit exercises some early review by requiring a "statement of errors" relied upon by the appellant.

Kaufman, *supra* note 11, at 1094 n.4 (citations omitted).

The Eighth Circuit's screening process is described by Judge Bright as follows:

> All of the circuits—with the exception of the Second Circuit which uses "affirmances from the bench" to cut short its workload—now employ so-called "screening procedures" in which a panel of judges, and sometimes law clerks acting under judicial supervision, gives a preliminary examination to the issues raised in each docketed case in order to determine three things: (a) whether there is any merit to the case at all, (b) if so, how difficult a case it is, and (c) whether oral argument would be of any value to its disposition. Based upon this evaluation, the meritless case receives short shrift, and is subject to "summary disposition," usually by a brief order or short per curiam opinion. The case possessing merit is rated for full argument (30 minutes per side), limited argument (15 to 20 minutes per side), or for nonargument. A nonargument case may be a difficult one but is usually the sort of case where argument probably won't assist the court. For example, it may be one where the court must examine the whole record to determine if substantial evidence supports the trial court's decision.

Bright, *The Changing Nature of the Federal Appeals Process in the 1970's*, 65 F.R.D. 496, 500 (1974) (footnotes omitted).

36. *See* Kaufman, *supra* note 11, at 1094.

37. *See id.* The following statistics are instructive:

Second Circuit Results
(As of December 31, 1976)

Period	Conferences Scheduled	Settled or Dismissed	Rate
July 1, 1974 - June 30, 1975	415	299	72.0%
July 1, 1975 - June 30, 1976	677	365	53.9%
July 1, 1976 - December 31, 1976	339	188	55.5%
Overall	1431	852	59.5%

Memorandum from William F. Wall to Joseph A. Trotter, Jr. 2 (Feb. 18, 1977) (on file at William Mitchell Law Review office). *But cf.* Goldman, *The Appellate Settlement Conference: An Effective Procedural Reform?*, STATE COURT J. 3, 43-44 (Winter 1978) (concluding that the preargument conference probably has not reduced the Second Circuit's workload).

38. The following table mentions the 10 appellate jurisdictions using various forms of prehearing settlement conferences:

the use of the PHC in civil actions.[39] In January 1979 the court adopted new PHC rules.[40] Because of the recent amendments to

JURISDICTION AND SETTLEMENT RATE

Appellate Jurisdiction	Procedure Initiated	Settlement Rate
United States, 2d Circuit	April 1974	59.5%
California, 3d District	November 1974	49%
New York, 2d Department	December 1974	49.5%
New York, 1st Department	April 1975	30%
Washington, Division II	May 1976	42.6%
Louisiana, 4th Circuit	July 1976	14.4%
Colorado	January 1976	N/A
Minnesota, Oklahoma, Wisconsin	Late 1976	N/A

Memorandum from William F. Wall, *supra* note 37, at 1 .

39. *See* Note, *The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation*, 63 MINN. L. REV. 1221, 1224 (1979). Then Rule 133.02 of the Minnesota Rules of Civil Appellate Procedure provided the authority for implementing the new prehearing conference. *See id.* at 1224 n.18. That rule provided:

> The Supreme Court may direct the attorneys for the parties to appear before the Supreme Court or a judge or a designated officer thereof for a prehearing conference to consider settlement, simplification of the issues, and such other matters as may aid in the disposition of the proceedings by the Supreme Court. The Supreme Court or judge thereof shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel. Such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Minn. R. Civ. App. P. 133.02, 4 MINN. STAT. app. 6, at 6733 (1976) (repealed 1979).

40. The amended PHC rule reads as follows:

> **Prehearing Conference Procedures**
>
> By order of the Supreme Court of the State of Minnesota dated January 10, 1979, the following procedures and Prehearing Conference Statement are specified:
>
> IT IS ORDERED that, pursuant to Appellate Rule 133.02, the following Prehearing Conference Procedures in all non-criminal matters are hereby established to remain in effect until further order of the Court:
>
> **A. Prehearing Conference Statement.** Simultaneously with the service of the notice of appeal pursuant to Appellate Rule 103.01(1), or with the filing of the writ pursuant to Appellate Rule 115.03(3), the appellant or relator shall serve on all other parties separately represented, and transmit (with proof of service) to the clerk of Supreme Court a completed Prehearing Conference Statement in the form prescribed by the Court. The statement will not be treated as confidential.
>
> Within ten days after service of appellant's statement, the respondent shall serve on all other parties separately represented, and within three days thereafter file with the clerk of Supreme Court (with proof of service) a Prehearing Conference Statement supplementing that of appellant in the particulars respondent deems to be of assistance to the Court.
>
> **B. Notice of Prehearing Conference—Duties of Parties.** Following receipt of appellant's statement, the Court shall schedule a Prehearing Conference pursuant to Appellate Rule 133.02 unless it notifies the parties to the contrary. The attorneys for the parties shall be notified of the time and place of the conference, which will be held promptly, before the record is transcribed and briefs prepared. Attendance at the conference by the attorneys shall be obligatory. They shall have full authority to reach settlements, limit issues, and deal with

the PHC rules, Justice James C. Otis notes:

> It is only a slight exaggeration to say that any resemblance

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such other matters as may aid in the disposition of the appeal. Upon receipt of the notice of Prehearing Conference, the attorneys shall make arrangements for their clients or their clients' insurers or indemnitors to be available at the time of the conference by telephone communication to approve matters requiring client approval. The clients may in some instances be required to accompany their attorneys to the hearing.

C. Transcript. The appellant will not order a transcript until authorized by the Court to do so. Upon receipt of such authorization, the appellant shall, pursuant to Rule 110.02, notify the court reporter.

D. Prehearing Conference. The Prehearing Conference shall be conducted by a justice of the Court. Settlement discussions, if any, shall be confidential, otherwise the documents presented and discussions conducted will not be treated as confidential.

E. Prehearing Conference Order. The Prehearing Conference justice shall issue an order reciting the action taken at the Prehearing Conference and his recommendation, if any, pursuant to Rule 133. The justice may also recommend any other procedures appropriate to Rule 133.02 and the assignment of the appeal to En Banc, division, or non-oral consideration.

F. Sanctions. Failure of a party or his attorney to obey the foregoing provisions of this Order shall result in such sanctions as the Court may deem appropriate.

G. Exceptions. The provisions of this Order are not applicable to extraordinary writs pursuant to Appellate Rule 120.

H. Form of Prehearing Conference Statement:

STATE OF MINNESOTA
IN SUPREME COURT

INFORMATION FURNISHED HEREIN WILL NOT BE TREATED AS CONFIDENTIAL	CIVIL APPEAL PREHEARING CONFERENCE STATEMENT OF APPELLANTS or RESPONDENTS (Strike one)	Please Complete and File Original with: John McCarthy, Clerk of Supreme Court, 230 State Capitol St. Paul, MN 55155

1. Title of Case: (Describe parties as appellant or respondent)
2. Names and Addresses and Telephone of Attorneys
   For Appellants or Relators:
   For Respondents:
   For Other Parties:
3. A. Court or Agency from which appeal is taken:
   B. Name of Judge or Hearing Officer who presided:
   C. State whether appeal is from an order or judgment and the date of the order or judgment.
4. Type of Litigation (e.g., automobile negligence, products liability, malpractice, real estate, zoning, taxation, UCC, domestic matters, insurance, etc.):
5. Brief Description of Claims, Defenses, Issues Litigated, and Result Below (Do not detail evidence):
6. Nature of Judgment or Order as to Which Review is Sought (Appellant: Attach copy of judgment or order, verdict, copy of any memorandum, findings of facts, or conclusions of law of the court or agency below, pleadings, trial briefs, and any documents which may be the subject of the litigation such as deeds, wills, contracts, or insurance policies). DO NOT PREPARE OR SUBMIT AN APPELLATE BRIEF OR TRIAL TRANSCRIPT FOR THE PREHEARING CONFERENCE:
7. Issues Proposed to be Raised on Appeal:

between the appellate prehearing conferences (PHC) conducted by the Minnesota Supreme Court in the fall of 1976, and those conducted today, is purely coincidental. The PHC rules adopted on January 10, 1979, reflect a drastic change, if not a reversal, in the court's approach and in the purpose of those hearings.[41]

To better understand the use of and need for the PHC in Minnesota, the 1976 approach must be contrasted with the 1979 system of conducting the PHC.

A. Minnesota PHC—1976 to 1979 (The Old Procedure)

The September 1976 Minnesota Supreme Court Order establishing the PHC required an appellant when serving a notice of appeal (or filing a writ of certiorari) to serve simultaneously a PHC statement on all litigants and the PHC officer.[42] Within ten

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8. Reasons why the appeal or other proceedings should or should not be decided pursuant to Rule 133.01:
One purpose of this Prehearing Conference is to encourage the parties to reach a voluntary settlement before incurring the expense of securing a transcript and preparing and printing briefs, or if that is not possible, to define the issues.

Signed _____ Date _____

TO BE EXECUTED BY THE ATTORNEY FOR APPELLANT OR RESPONDENT WHO IS HANDLING THE APPEAL

Order by the Minnesota Supreme Court Establishing Prehearing Conference Procedures in Non-Criminal Matters (Jan. 10, 1979), *appended to* MINN. R. CIV. APP. P. 133.02 [hereinafter cited as Order of Jan. 10, 1979].

41. Otis, *Supreme Court Prehearing Conferences—A Progress Report Under the New Rules*, MINN. TRIAL LAW., Aug.-Sept. 1980, at 6.

42. In 1976, the following procedures were set out:

A. Prehearing Conference Statement. With the service of the notice of appeal pursuant to Appellate Rule 103.01(1), or the filing of the writ pursuant to Appellate Rule 115.03(3), the appellant or relator shall serve on all other parties separately represented and transmit (with proof of service) to the prehearing judge a completed prehearing conference statement in the form attached hereto.

Within ten days after service of appellant's statement, the respondent shall serve on all other parties separately represented, and bring (with proof of service) to the Prehearing Conference, a Prehearing Conference Statement supplementing that of appellant in the particulars respondent deems to be of assistance to the Court.

B. Notice of Prehearing Conference—Duties of Parties. Following receipt of appellant's statement, the court shall schedule a Prehearing Conference pursuant to Appellate Rule 133.02 unless it notifies the parties to the contrary. The attorneys for the parties shall be notified of the time and place of the conference, which will be held promptly, before the record is transcribed and briefs prepared. Attendance at the conference by the attorneys shall be obligatory. They shall have full authority to reach settlements, limit issues and deal with such other matters as may aid in the disposition of the appeal. Upon receipt of the notice of Prehearing Conference, the attorneys shall make arrangements for their

days after service of the appellant's PHC statement, the responding parties were required to file return PHC statements.[43] In their PHC statements litigants were required to identify the case, the type of litigation, the outcome in the trial court, and the issues presented on appeal.[44] Trial briefs, orders and other relevant doc-

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clients or their clients' insurers or indemnitors to be available at the time of the conference by telephone communication to approve matters requiring client approval. In divorce, custody, alimony, and support cases, the clients may in some instances be required to accompany their attorneys to the hearing.

C. Transcript. In all cases subject to Rule 133.02, the 60-day period permitted the reporter for furnishing a transcript pursuant to Rule 110.02(2) shall not commence to run until entry of the Prehearing Conference Order or receipt of notice from the Court that a conference will not be held. The appellant shall notify the reporter of such order or notice.

D. Prehearing Conference. The Prehearing Conference shall be conducted by a justice of the Court or a hearing officer designated by the Court. The justice who conducts the conference shall not participate in any subsequent decisional process. No court personnel, attorney, party or any other person taking part in the conference shall make public or communicate to, or discuss with, anyone engaged in the decisional process any matters considered or divulged at the conference which do not subsequently appear in the Prehearing Conference Order.

E. Prehearing Conference Order. An order shall be entered following the conference and shall reflect only the procedures or disposition to which the parties have agreed as follows:

(1) Dismissal of the appeal
(2) Limitation of the issues
(3) Continuation of the appeal unaffected by Rule 133.02
(4) Adoption of any procedures appropriate to the purpose of Rule 133.02.

F. Sanctions. Failure of a party or his attorney to obey the foregoing provisions of this Order shall result in such sanctions as the Court may deem appropriate.

G. Exceptions. The provisions of this Order are not applicable to extraordinary writ proceedings pursuant to Appellate Rule 120.

Order by the Minnesota Supreme Court Implementing Prehearing Conference Procedures in Civil Appeals, 303 Minn. ix (Sept. 10, 1976) [hereinafter cited as Order of Sept. 10, 1976].

43. *Id.*

44. The 1976 Order required litigants to use the following PHC form:

	STATE OF MINNESOTA IN	
S. Ct. File No.	SUPREME COURT	Please complete and Return to "Prehearing
	CIVIL APPEAL	Judge," 230 Capitol
_____	PREHEARING	St. Paul, 55155
	CONFERENCE	no later than

1. Title of Case:

2. Names and Addresses and Telephone of Attorneys:

For Appellant or Relator:

For Respondent:

For Other Parties:

3. Court or Agency as to which Review is sought:

Name of Judge or Hearing Officer:

4. Type of Litigation (e.g., automobile negligence, products liability, malpractice, real estate, zoning, taxation, UCC, domestic matters, insurance, etc.):

uments were to be attached to the PHC statements.[45]

Attendance at the PHC by the parties' attorneys was mandatory in all civil actions.[46] The attorneys were required to have the necessary authority to settle the matter in dispute.[47] Either a representative of the commissioner's office or a justice (usually Justice Otis) presided at the PHC.[48] Regardless of the person conducting the PHC, all matters discussed during that conference were to be kept confidential.[49] Consequently, any justice conducting a conference was precluded from participating in any subsequent supreme court consideration of that matter.[50]

The primary goal of the PHC from 1976 to 1979 was the settlement of lawsuits.[51] Resolving procedural problems and limiting

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5. Brief description of claims, defenses, issues litigated, and result below (do not detail evidence):

6. Nature of judgment or order as to which review is sought (appellant: attach copy of judgment or order as well as a copy of any memorandum, finding of facts, or conclusions of law of the court or agency below.) Order of 1976, *supra* note 18.

7. Issues proposed to be raised on appeal (attach any trial briefs which are relevant to these issues and which were submitted to the court or agency below. DO NOT PREPARE OR SUBMIT AN APPELLATE BRIEF OR TRIAL TRANSCRIPT FOR THE PREHEARING CONFERENCE):

8. This prehearing conference is designed to encourage the parties to reach a voluntary settlement before incurring the expense of securing a transcript and preparing and printing briefs, or if that is not possible, to limit the issues. Please set forth succinctly any additional information which will assist the court and the parties in reaching an agreement to accomplish these ends. Information concerning settlement negotiations will be kept strictly confidential.

_____ _____
Signed Date

TO BE EXECUTED BY THE ATTORNEY FOR APPELLANT OR RESPONDENT WHO IS HANDLING THE APPEAL.

Id. at xi-xii.

45. *Id.* at xii.

46. *Id.* at ix.

47. *Id.* at ix-x. Notwithstanding the clear rule requiring counsel to have settlement authority, most attorneys came to the PHC without settlement authority. When this occurred, the presiding official sometimes ordered a second conference. *See* Address by Justice James Otis of the Minnesota Supreme Court, The Appellate Practice Institute 14-15 (Nov. 4, 1977) [hereinafter cited as Otis Address] (transcript on file at William Mitchell Law Review office).

48. *See* Order of Sept. 10, 1976, *supra* note 42, at x.

49. *Id.*

50. *Id.*

51. Justice Otis notes:

> [T]he original and announced purpose of prehearing conferences was to bring the parties together, (and in extreme cases to knock heads if necessary), in an effort to settle appeals where it seemed clear to the PHC judge that the litigants

issues on appeal were only secondary goals.[52] Although the procedural aspect of the PHC has remained essentially the same, as indicated below, the primary purpose of the PHC after 1979 has changed dramatically.

B. Minnesota PHC—1979 to Present (The New Procedure)

The original method of conducting the PHC in Minnesota had several drawbacks. First and foremost, the justice presiding at the PHC was disqualified from participating in any resolution of the case.[53] This resulted in an eight-judge court, with several decisions preliminarily falling into the "no man's land" of a four-to-four vote.[54] Second, some members of the bar expressed concern that the PHC was being used to coerce settlements.[55] Third, some critics of the PHC maintained that instead of decreasing appellate congestion, such conferences actually increased the supreme court's workload.[56] Fourth, at least one critic expressed doubts

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would be better served by compromising their differences before experiencing the expense, delay, and agony of a full-blown appeal.

Otis, *supra* note 41, at 6-7. Other commentators note that the encouragement of settlements is a primary goal of appellate pretrial practice. *See* Kaufman, *supra* note 11, at 1102-03; Mack, *Settlement Procedures in the United States Court of Appeals: A Proposal*, 1 JUST. SYS. J. 17, 26 (1975); *cf.* Otis, *Prehearing Conferences—a Help or a Hindrance to Appellate Litigation*, HENNEPIN LAW., Sept.-Oct. 1977, at 20 ("on occasion we . . . use some pretty unsubtle language to describe the merits of the case, such as 'If you insist on pursuing this appeal, counsel, I hope at the same time you keep up the payments on your malpractice policy.' ") [hereinafter cited as Otis, *Help or a Hindrance*].

Federal pretrial practice under Rule 16 also has as one of its primary purposes the settlement of lawsuits. *See* Wright, *The Pretrial Conference*, 28 F.R.D. 141 (1961). Judge Wright comments:

> I tell them, "this case is worth $20,000 for the settlement," . . . and I tell them further to go tell their client that I said so.
>
> . . . .
>
> And the funny thing is, the lawyers in our district want . . . to be able to go back to their clients and have some of the load taken off their shoulders. They say, "This is what I think, but the judge says this."

Id. at 145.

52. *See* Otis, *supra* note 41, at 7.

53. *Id.* at 6.

54. *Id.*

55. *See* Otis, *Help or a Hindrance, supra* note 51, at 19; W. Adams, Some Observations on the Minnesota Prehearing Conference 13 (May 4, 1977) (unpublished report) (on file at William Mitchell Law Review office); *cf.* Jenswold, *Pretrial Conferences*, 38 WIS. B. BULL., Oct. 1965, at 35, 41 (pretrial judge "characterized as black robed haggler" (quoting William H. Morrison)).

56. *See* Otis, *Help or a Hindrance, supra* note 51, at 19; Note, *supra* note 39, at 1232 ("both total case processing time and the number of cases that each justice must decide may actually increase as a result of the conference"); Adams, *supra* note 55, at 9.

whether the PHC did anything except discourage settlements.[57] Fifth, an appellate court's use of the PHC may damage its integrity.[58] Finally, questions have been raised regarding the cost of attending the PHC for litigants who reside in outstate areas. Any benefits from the PHC may be outweighed by the concern that outstate litigants may not appeal cases because of the burden of traveling to St. Paul for the PHC.[59]

In an effort to correct these deficiencies, the supreme court on January 10, 1979, adopted new PHC rules.[60] Under the new rules, information contained in documents used in conjunction with the PHC, including the PHC form, as well as discussions at the conference, are no longer confidential.[61] Consequently, a justice is no longer disqualified from participating in the consideration of cases that he presided over as PHC justice.[62] Under the new rules only a justice may preside over the PHC.[63] Other than these changes, the procedure and form of the PHC remain essentially the same.

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57. *See* Adams, *supra* note 55, at 7-8. *But see* Note, *supra* note 39, in which the commentator states:

> There is no question that the Minnesota Supreme Court's prehearing conference experiment has been a success. The fact that, during the experimental year, the overall rate of settlement was 12.7% higher than during the preceding year lends some support to the hypothesis that prehearing conferences reduce appellate court workloads. It is also significant that the average time required to process a case during the experimental year [1976-1977] was 382 days, down substantially from the 405 days required in the previous year.
>
> The findings of this study cast serious doubt upon the criticisms that prehearing conferences force litigants into unfavorable settlements, impose unfair expenses on certain parties, and cause a loss of respect for the appellate process.

Id. at 1256-57.

58. *See* Jenswold, *supra* note 55, at 41; Otis, *Help or a Hindrance*, *supra* note 51, at 19.

59. *See* Note, *supra* note 39, at 1233. *But cf.* Otis, *Help or a Hindrance, supra* note 51, at 19 (suggesting that outstate litigants not be compelled to attend mandatory PHC). Telephonic prehearing conferences, discussed in note 69 *infra*, should obviate any travel burdens outstate litigants may have.

60. *See* note 40 *supra*.

61. Order of Jan. 10, 1979, *supra* note 40, at ¶ A. Additionally, "[s]ettlement discussions, if any, shall be confidential, otherwise the documents presented and discussions conducted will not be treated as confidential." *Id.* ¶ D.

62. Justice Otis notes:

> Under the new rules all of the judges except the chief share equally in the assignment of prehearing conferences, between 90 and 100 civil appeals for each judge per year. None of the files, documents, or discussions at the conference is confidential. Consequently the PHC judge is not disqualified from participating fully in the consideration and decision of the appeals with which that judge has dealt at a PHC, with two qualifications. To minimize the tendency toward one judge decisions, the PHC judge is not assigned the case and does not sit as a member of any three-judge nonoral panel in a case where that judge has presided at the prehearing conference.

Otis, *supra* note 41, at 6.

63. *See* Order of Jan. 10, 1979, *supra* note 40, at ¶ D.

More important than the procedural and mechanical changes in the PHC was the supreme court's decision to modify the purpose of the PHC. As previously mentioned, the primary reason for establishing the PHC was to encourage settlements.[64] Under the new system, the goal of effectuating settlements is of only secondary importance.[65] The primary purpose of the PHC is to assist the court in making a preliminary report regarding the merits of the appeal, and to help determine how the case should be set for appellate review.

The shift in goals of the PHC takes on added significance when one considers that beginning in August 1980, only 150 to 160 of the 1,300 annual civil appeals in Minnesota will be granted oral argument.[66] The remaining cases will either be granted nonoral en banc treatment or will be reviewed nonorally by a three-judge panel. Any decision made by the three-judge panel must be approved by a majority of the court. Because the PHC justice determines the form of appellate review that a case will receive, that judge may be the only justice to hear "oral argument."[67] Consequently, lawyers should prepare for the PHC as if it is their only opportunity to present oral argument to the supreme court. Coming unprepared to the PHC, or sending a young associate with no familiarity with the case to the PHC, is a cardinal sin. As Justice Otis notes, "[l]awyers at the PHC should be as fully prepared to present their arguments as if they were making a formal presentation in open court."[68] The wisdom of Justice Otis' comments is

64. See note 51 *supra* and accompanying text.

65. Minnesota Supreme Court Commissioner Cynthia M. Johnson states: "While it was originally contemplated that the prehearing conference would aid in the settlement of marginal cases, that primary function has now been changed to one of facilitating review by the court and where possible, expediting the procedure." Johnson, *Supreme Court Procedure*, MINN. TRIAL LAW., Aug.-Sept. 1980, at 8.

66. Commissioner Johnson notes:

> In 1980 the court will consider and decide . . . approximately 1,300 direct appeals and special matters coming before it . . . .
>
> . . . .
>
> Effective September 1, 1980, the court will hear and decide all cases scheduled for oral argument, sitting en banc only. In practical effect, approximately only 150 to 160 cases will be heard orally.

Id.

67. Justice Otis notes: "It is the PHC judge who decides what kind of consideration a particular case will receive. More important, as noted above, in about 80 percent of the appeals the PHC judge will, in effect, be the only judge to hear 'oral argument.'" Otis, *supra* note 41, at 7.

68. *Id.*

readily seen when one considers what transpires before, during, and after the PHC.

Before the PHC the presiding justice reviews the PHC statements, trial briefs, the trial court's findings and order, the jury verdict, and any other relevant memoranda and documents.[69] If the PHC statement is poorly drafted, or if the trial briefs, jury verdict, trial court orders, etc. are not attached, the initial impression will not be favorable. Thus, lawyers should draft their PHC statements with meticulous attention.

During the PHC the presiding justice usually asks the litigants to summarize what transpired in the lower court and to describe the issues that will be raised on appeal. Therefore, the PHC is an important opportunity for counsel to convince the PHC justice that his client's position should prevail on appeal.[70]

After the PHC the effectiveness of each counsel's advocacy is often reflected in the PHC justice's post-PHC memorandum. That memorandum, addressed to the other justices and commissioner's office, discusses the facts, issues, and usually, the merits of the appeal. Additionally, the PHC justice usually indicates in the PHC memorandum his reasons for setting the case for oral or non-oral consideration. Although the justice presiding over the PHC is never assigned to write an opinion for that case, his recommendations are usually given great weight by the other members of the

69. After the PHC statements are reviewed the PHC justice determines whether a telephonic prehearing conference is appropriate. Although no formal order regarding such conferences has been issued, the supreme court currently is experimenting with such a system. Telephonic conferences will be available only in those cases in which all the attorneys have offices outside the seven-county metropolitan area.

If the PHC justice determines that a case is appropriate for a telephonic PHC, that justice will notify the attorneys involved that they need not be physically present on the date and time set for the PHC. Such counsel must, however, be available at their listed telephone numbers on the date and time originally scheduled for the PHC.

It is also contemplated presently that the offer of a telephonic PHC must be accepted by all of the attorneys involved. If there is not total agreement regarding a telephonic PHC, the physical presence of all lawyers in the PHC justice's chambers will be required.

70. Justice Otis notes:

> There is usually vigorous give-and take [*sic*] between court and counsel to surface the issues and to analyze their golden opportunity for counsel to win or lose at least one important vote when the time comes for the rest of the court to decide the outcome. It is an opportunity, sad to relate, too often missed.

Otis, *supra* note 41, at 7.

If counsel has not convinced the PHC justice that there is some merit to the appeal and the PHC "justice feels this is a matter that . . . [will definitely be affirmed], he will tell you frankly that he is recommending to the entire court that this case be summarily affirmed." Scott, Appellate Procedure In Minnesota 2 (Mar. 7, 1980) (unpublished report) (on file at William Mitchell Law Review office).

court.[71]

The PHC justice also makes the preliminary determination about the procedural posture the case will assume on appeal. In approximately eighty percent of the cases, the PHC justice will allow the parties to dispense with formal, printed briefs and will instead order that the parties prepare informal letter briefs to supplement their trial briefs.[72] The PHC justice also has the authority

71. Again, Justice Otis' comments are instructive:

> The critical importance of the prehearing conference is underscored by the fact that most of the PHC judges, in many if not most of the cases, write post PHC memorandums addressed to the other judges, commissioners, and law clerks, discusses the contentions pro and con, and usually takes a position on how the appeal should be decided. Except for the judge to whom the case is assigned (who is never the PHC judge) the PHC judge will normally have given the appeal considerably [more] time and attention than any of his colleagues. Accordingly there is a predictable tendency to give great weight to the views of the PHC judge both on the part of the judge to whom the case is assigned and the other members of the court.

Otis, *supra* note 41, at 7.

> The process that occurs after the PHC has also been summarized, as follows: [A]t the conclusion of the prehearing conference the justice will issue an order that will be mailed to the parties, and he will also write a memorandum to the Commissioner's Office explaining his impressions of the appeal. The Commissioner's Office will then take the matter, after whatever is to be submitted is received, and analyze it factually and legally in a memorandum that will then go to the entire court. The matter is then assigned to a justice other than the prehearing justice, who will outline at a non-oral conference of three justices his judgment of the proper disposition of the matter. He may very well disagree with the prehearing justice. Then, of course, the other justices will give their impression, either agreeing or disagreeing with him, in order of seniority. The case is then reduced to opinion or order and circulated among the nine justices for their agreement or disagreement and contemplation. Therefore, . . . the entire court considers these matters quite thoroughly.

Scott, *supra* note 70, at 5.

72. The justice also, by his order, will indicate what type of briefs should be submitted and the timetable that he wishes the attorneys to follow. This is discussed thoroughly and is usually agreeable to the parties, at the conference. Our new system is to spread out the prehearing conferences to all nine justices, who will handle seven of these, usually in one day, once a month. This procedure was initiated in January of this year, 1980. Statistics are therefore not available at this point, but again I would venture a guess that 80 percent of these appeals will be handled on informal, letter-type briefs. By this, we mean you can supplement whatever record is agreed upon at the conference by your explanation of either the facts or the law, hopefully not repeating that which is already in the file. Many files at that point will have the trial briefs and other helpful information. As I have stated, none of this should be duplicated. The suggestion would be that in your informal letter-type brief you merely refer to that which you have presented to the trial court, and state why that court was in error. I might pause here for a second and tell you that in many cases we do not ask for any briefs. The informal, letter-type brief is a matter for your decision. If you feel that the issue is so clear that the court can easily understand the question you raise and you wish to submit the matter on your prehearing conference statement, including other matters that were before the trial court, you need not submit any brief at all. This is left up to you as to how short, how long, or whether the brief is omitted completely.

to remand the case to the trial court for further factfinding or to rule on pending motions. The PHC justice sets the time for ordering transcripts and preparing briefs. In most instances the parties will receive the PHC justice's order within one week after the conference.[73]

No doubt, "[p]rehearing conferences are here to stay. They have proved a useful, if not an indispensable tool in expediting civil appeals to the Supreme Court of Minnesota."[74] Consequently, counsel should strive to be as effective an advocate during the PHC process as possible. Some suggestions regarding effective PHC appellate advocacy are offered below.

IV. EFFECTIVE APPELLATE ADVOCACY AND THE PHC

A. The Decision to Appeal

Any discussion of effective appellate advocacy must begin with an examination of the decision to appeal. Although there are several excellent textbooks on appellate practice,[75] none devotes more than passing interest to the preliminary decision of whether to appeal an adverse verdict. The difference between a good and an excellent appellate advocate is that the latter appraises with microscopic care not only his chances of prevailing on appeal, but also the long-term effect of a supreme court decision on the issues in dispute.

Because of the doctrine of stare decisis, a Minnesota Supreme Court opinion adverse to a client's interest may affect scores of that client's related files. Consequently, an effective appellate advocate, prior to filing his PHC statement, must carefully ponder the effects of an opinion adverse to his client's interest.

Scott, *supra* note 70, at 3.

73. If after receiving the PHC order, a litigant believes that another form of review is appropriate, he may petition the court for a writ of mandamus or prohibition pursuant to MINN. R. CIV. APP. P. 120, 121. *See* Johnson, *supra* note 65, at 8 ("A party dissatisfied with the hearing designation may file a motion for a different type of consideration. The motion is presented at special term together with a statement reflecting the prehearing conference justice's reasons for the original designation and a final decision is made."). If your motion is denied then apply the Truman doctrine. A discussion of the Truman doctrine is contained in Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1, 36 & n.158 (1977).

74. Otis, *supra* note 41, at 24.

75. A few of the better works on appellate writing include the following: E. RE, BRIEF WRITING AND ORAL ARGUMENT (4th ed. 1974); F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS (1967); Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285 (1953).

The decision to appeal must also be made in light of the statistical chances of success. Approximately eighty percent of all decisions appealed to the Minnesota Supreme Court are affirmed.[76] Only a small percentage of the approximately 1,300 civil actions filed each year are reversed. Because the appellant's chance of success is limited, it is recommended that the appellant's attorney wait at least one week after an adverse lower court order before filing an appeal and a PHC statement. This will ensure that the appeal is not taken until all emotions have sufficiently cooled to permit a reasoned decision on whether an appeal is proper.[77]

B. The PHC Statement Should Be Brief, Truthful, Eloquent, and Comply Fully with Minn. R. Civ. App. P. 133.02

Once one decides to appeal, the necessary appeal papers *and* the PHC statement must be prepared. When preparing the PHC statement, the advice of Justice Robert H. Jackson is instructive. He suggests that an effective appellate advocate

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76. Chief Justice Sheran has indicated:

> Given the 80-percent rate of affirmance in civil appeals, it is obvious that the time and money of most appellate litigants are being wasted, and their expectations frustrated. The civil appeal prehearing conferences are designed to, in the aggregate, reduce the waste of time, the waste of money, and the frustration and uncertainty of delay that inevitably accompany civil appeal.

Otis Address, *supra* note 47, at 14 (quoting Chief Justice Sheran of the Minnesota Supreme Court).

Justice Scott has voiced a similar view:

> A strange phenomenon has come about in the American judicial system, whereby everyone thinks that in order to have a case decided in his favor after an adverse ruling in the trial court there must be an appeal. Eighty percent of the cases, again, are affirmed. So, therefore, the time, the energy, the emotion, and the money involved in 80 percent of all appeals is actually wasted. We have pondered this problem, and have wondered why we are cutting down so many trees to publish all these opinions in the law books when about 20 percent, at the most, have any precedential value at all. We therefore, at the prehearing conference, attempt to analyze the issues and the entire case by an informal discussion and make our best judgment as to whether this is one of the cases that should not have been appealed.

Scott, *supra* note 70, at 2; *cf.* Steinberg, *The Criminal Appeal*, in COUNSEL ON APPEAL 8 (A. Charpentier ed. 1968) (80% of all criminal appeals affirmed even if token briefs submitted by government).

77. The following comments also are instructive:

> As a conclusion, I would suggest that you do not appeal until your emotion has been reduced to reason. Give yourself a few days to even decide whether or not you are going to appeal. Take into consideration the record, the facts that you have going for you, and whether or not the law is on your side. We do respect stare decisis and very seldom reverse a case that has just been decided in the last several years. You must also decide the cost to your client if the issues cannot be decided without a full transcript.

Scott, *supra* note 70, at 6.

> will master the short Saxon word that pierces the mind like a spear and the simple figure that lights the understanding. He will never drive the judge to his dictionary. He will rejoice in the strength of the mother tongue as found in the King James version of the Bible, and in the power of the terse and flashing phrase of a Kipling or a Churchill.[78]

The PHC statement should not exceed four or five pages. Brevity alone, however, does not ensure that the PHC statement will be effective. The PHC statement must be truthful and eloquent. The description of the claims, defenses, issues, and result in the lower court; the issues proposed to be raised on appeal should be prepared with meticulous attention. It goes without saying that one should never distort or misrepresent any facts in the PHC form.[79]

Because a complete understanding of the case is necessary to prepare a persuasive PHC statement, the attorney who tried the case or the attorney who will handle the appeal should not delegate this task.[80] Remember, the PHC statement provides the basis for the PHC justice's initial impression concerning the merits of the appeal.[81]

Complete compliance with Rule 133.02 of the Minnesota Rules of Civil Appellate Procedure also is necessary. Three common deviations from that rule deserve brief mention. First, all of the documents—jury verdict, trial court orders, etc.—required by paragraph six must be attached to the PHC statement.[82] Because the PHC justice has before him only the documents that accompany the PHC statement, failure to comply with this rule prevents a comprehensive consideration of the appeal at the PHC stage.

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78. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 863-64 (1951). Another writer notes: "The word that appears to have come from a Thesaurus should probably have been left there." Nordby, *The Craft Of The Criminal Appeal*, 4 WM. MITCHELL L. REV. 1, 40 (1978).

79. *See* Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 183-84 (1946) (emphasizing that a persuasive factual presentation is the most important aspect of appellate writing).

In preparing the PHC form the litigants should be identified by name and not merely as appellant or respondent. *See* M. PITTONI, BRIEF WRITING AND ARGUMENTATION 30-31 (3d ed. 1967); *cf.* FED. R. APP. P. 28(d) (discouraging use of "appellant" and "appellee" to describe litigants).

80. *See* Otis, *supra* note 41, at 7 ("to send a subaltern who knows little or nothing about the facts and law, can be fatal to the cause of the laywer who is responsible for the appeal").

81. *See* notes 69-71 *supra* and accompanying text.

82. *See* Order of Jan. 10, 1979, *supra* note 40, at ¶ H(6).

Second, on many occasions PHC statements have been erroneously filed with the district court or the clerk of the Minnesota Supreme Court. The correct procedure is to file the PHC statement and affidavits of service with the supreme court's secretary in charge of PHC calendars.

Finally, the PHC secretary has had to make frequent telephone calls to respondents, inquiring when their PHC statements will be filed. Apparently there is a mistaken belief among members of the bar that only appellants must prepare and serve PHC statements. All parties to an appeal must prepare and serve such forms.[83]

C. Treat the PHC as a Substitute for Oral Argument

As previously mentioned the PHC justice may be the only member of the court to hear oral argument regarding the merits of an appeal.[84] Because the PHC justice usually takes a position on the merits of an appeal in his PHC memorandum to the other justices and the commissioner's office, the effective appellate advocate will treat the PHC as a substitute for oral argument.[85]

It is not beneath an attorney to spend time preparing for the PHC. Indeed, Caruso, at the apex of his career, rehearsed his roles. Although there is no need to gesture before a mirror, it is helpful to have another attorney ask you the types of questions you anticipate that the PHC justice will ask.[86] If you are unable to articulate why there is reversible error in the friendly confines of your law office, it will be difficult to do so during the PHC.

In summary, during the PHC counsel should strive to convince the PHC justice of the merits of his client's position. The vigorous give-and-take between court and counsel during the PHC presents

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83. *Id.* at ¶ A.

84. *See* notes 67-68 *supra* and accompanying text.

85. *See id.*

86. John McCarthy, Clerk of the Minnesota Supreme Court, states:

> Before you initiate an appeal to the Supreme Court, you should frankly appraise your prospects for success. The statistics offer cold comfort. One appeal in ten results in a reversal. One appeal in six yields some relief, ranging from a slight modification to a complete reversal. You should always ask yourself, "Is this a case where the result so offends the appellate court that it will look for ways to reverse?" *At this juncture, it is also helpful to have an attorney friend with whom you can candidly discuss the tentative appeal. He or she may supply the objectivity you lack.*

McCarthy, *Perfecting The Appeal In The Minnesota Supreme Court*, in APPELLATE PRACTICE INSTITUTE II-2 (1981) (emphasis added) (Advanced Legal Education, Hamline University School of Law); *cf.* Nordby, *supra* note 78, at 52 ("it is best to prepare the oral argument from a devil's advocate's point of view, searching out one's own weaknesses and anticipating the most probing questions in order to prepare the most effective answers").

an excellent opportunity to create a lasting and, hopefully, favorable impression upon the court.[87] At a minimum the PHC should be viewed as the last opportunity to present a spoken word on behalf of a client.

D. Selecting and Stating the Issues

The PHC justice will invariably ask counsel to relate what they consider the dispositive issues on appeal. When considering a response to such an inquiry, the effective appellate advocate will be wise to once again consider the advice of Justice Robert H. Jackson. He recommends:

> One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.[88]

Thus, whenever possible, counsel should select with a detached mind the issues he will relate to the PHC justice. Not only must minor points of dispute be rejected, issues should be consolidated whenever possible. PHC statements containing more than five is-

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87. The effectiveness of oral presentation at the PHC should never be underestimated. Judge Bright's comments on oral argument before the entire court are equally apt to oral presentations made at the PHC: "Oral argument serves two purposes: it gives the lawyers a chance to present their theory of the case in a nutshell, and it allows the judges to ask questions to clear up any doubts that the court might have about the case or the lawyer's approach to it." Bright, *supra* note 35, at 506.

Justice Marshall concurs in the importance of oral presentations to appellate courts:

> All the lawyers I know, especially those who have written on advocacy, stress the importance of oral argument. Most judges do, too. I suspect that those who don't have become so inured to the poor arguments that are often made that they do not appreciate the value of oral argument in general. During a few arguments in the Second Circuit, I've recalled with approval the remark in *King Henry VI*, Part II, "The first thing we do, let's kill all the lawyers."

Marshall, *The Federal Appeal*, in COUNSEL ON APPEAL 141, 144 (A. Charpentier ed. 1968).

88. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, in ADVOCACY AND THE KING'S ENGLISH 193 (G. Rossman ed. 1960).

sues are suspect as passing the point of diminishing returns.[89] There is simply no way to present adequately more than five issues in a one-hour PHC or any ensuing brief.

The advice of the great advocate John W. Davis also should be heeded:

> Yet those judges who sit in solemn array before you, whatever their merit, know nothing whatever of the controversy that brings you to them, and are not stimulated to interest in it by any feeling of friendship or dislike to anyone concerned. They are not moved as perhaps an advocate may be by any hope of reward or fear of punishment. They are simply being called upon for action in this appointed sphere. They are anxiously waiting to be supplied with what Mr. Justice Holmes called the "implements of decision." These by your presence you profess yourself ready to furnish. If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and in what order would you want the story told? How would you want the skein unraveled? What would make easier your approach to the true solution? These are questions the advocate must unsparingly put to himself. This is what I mean by changing places with the court.[90]

Mr. Davis' advice, simply put, is that an appellate advocate change places with the PHC justice. Frame the issues so that you would be persuaded by the merits of the appeal if you were the PHC justice.

E. Know the Standard of Judicial Review

In addition to inquiring about the issues, the PHC justice often asks counsel what standard of judicial review is applicable. Surprisingly, many lawyers respond to this question with, "I do not know," or "Why is that important?" The standard of review is the PHC justice's "measuring stick." When a trial court determines a question of law, the supreme court must inquire if the trial court was "right."[91] Because the scope of review is so broad, these cases have a better chance of being placed on the oral en banc calendar. Conversely, when reviewing a trial court's finding of fact the

89. *See* Bright, *supra* note 35, at 504 ("raising a plethora of meritless claims of error reduces by comparison the strength of other, more meritorious claims").

90. Davis, *The Argument of an Appeal*, in ADVOCACY AND THE KING'S ENGLISH 216 (G. Rossman ed. 1960).

91. *See, e.g.*, Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 354 (Minn. 1978); Naffke v. Naffke, 240 Minn. 468, 470-71, 62 N.W.2d 63, 65 (1953).

"clearly erroneous" standard of review is applicable.[92] Such cases have a much higher chance of being set for nonoral consideration and are more likely to be disposed of by summary affirmance. Accordingly, if lawyers believe that oral argument will enhance their chances of prevailing they should attempt to convince the PHC justice that issues of law are in dispute.

F. At All Times Be Courteous and Dignified

It should go without question that all participants must show respect and deference to one another during the PHC. Some lawyers, however, perhaps due to the informality of the PHC, do not display courtesy to one another. Professor Wiener's "attitude of respectful intellectual equality"[93] is just as appropriate during the PHC as during oral argument before the entire court.[94]

Although a case may call for forceful hard-hitting statements, most judges feel uncomfortable when "advocates" recklessly accuse their adversaries of improper conduct. There is no need for heated rhetoric to convince the court of the merits of a client's position; arguments based on logic and public policy are always more persuasive.

G. Ethical Considerations

Any discussion of Minnesota PHC practice is incomplete without considering the PHC in relation to the ethics of appellate practice. Commentary on this subject is necessary because court

92. MINN. R. CIV. P. 52 states that "[f]indings of fact shall not be set aside unless clearly erroneous." The Minnesota Supreme Court has interpreted the rule as follows: "We will reverse a trial court's findings only if, on a review of the entire record, we are left with a firm and definite conviction that a mistake has been made." Roy Matson Truck Lines, Inc. v. Michelin Tire Corp., 277 N.W.2d 361, 361-62 (Minn. 1979); *see* Vernon J. Rockler & Co. v. Glickman, Isenberg, Lurie & Co., 273 N.W.2d 647, 650 (Minn. 1978); *In re* Trust Known as Great Northern Iron Ore Properties, 308 Minn. 221, 225, 243 N.W.2d 302, 305 (1976), *noted in* 5 WM. MITCHELL L. REV. 541 (1979); *In re* Estate of Balafas, 293 Minn. 94, 96, 198 N.W.2d 260, 261 (1972).

93. F. WIENER, *supra* note 75, at 280. Judge Bibb's comments also are instructive: " 'It's all right to cuss the court, just so long as he doesn't hear it.' . . . The proper decorum of the court cannot be maintained unless the lawyer is courteous, not only to the court but to witnesses and opposing attorneys as well." Bibb, *What a Judge Expects of a Lawyer: A Symposium*, 30 TENN. L. REV. 333, 341 (1963) (quoting Judge Carlock).

94. Of course, the deference shown to all participants should not be overdone. As Justice Jackson comments: "Be respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices. We think well enough of ourselves already." Jackson, *supra* note 78, at 802.

opinions rarely discuss the ethical norms of appellate practice.[95] The *Minnesota Code of Professional Responsibility* also fails to offer sufficient guidance for appellate advocates because its disciplinary rules and ethical considerations generally are geared to trial practice.[96]

Perhaps the dearth of commentary concerning appellate ethics indicates that ethics at the appellate level is not a problem. Another possible reason for the paucity of material on this subject is that few clients are aware that their lawyers have deviated from acceptable appellate ethical practices. Regardless of the reasons for the lack of commentary on this subject, several ethical concerns deserve mention.

First, although a lawyer has a duty to "represent his client zealously"[97] it is totally improper for a lawyer to take an appeal that is clearly frivolous.[98] If the contentions made on appeal have no merit, the PHC justice will not hesitate to inform appellant's counsel that his chances of prevailing are nonexistent.[99] Such frank advice is necessary because the Minnesota Supreme Court will not permit appellants to use the PHC as a vehicle to delay payment of a judgment or to obtain nuisance settlements. As Justice Otis notes, "we aren't about to encourage—let alone coerce—concessions from a respondent, be he plaintiff or defendant, if the appeal is patently devoid of merit."[100]

Second, counsel has a duty to appeal only those matters that may properly come before the court. Consequently, before an appeal is taken the question of whether the appeal is proper should be carefully considered. Special attention must be given to recently amended Rule 104.01 of the Minnesota Rules of Civil Appellate Procedure, concerning appeals "from a partial judgment

95. One of the few cases to comment upon a lawyer's breach of appellate ethical rules is Matherne v. United States, 391 F.2d 449, 450 (5th Cir. 1968) (noting the frequency of violation of ethical norms at the appellate level).

96. The fundamental ethical principles to guide all lawyers practicing within the state may be found in the *Minnesota Code of Professional Responsibility*.

97. MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1.

98. *See* Lee v. State, 204 So. 2d 245, 248-49 (Fla. Dist. Ct. App. 1967). The Minnesota Supreme Court has not hesitated to dismiss a frivolous appeal. *See* Lowe v. Patterson, 265 Minn. 42, 45-46, 120 N.W.2d 313, 316 (1963).

Several courts have disciplined attorneys for pursuing meritless appeals. *See In re* Bithoney, 486 F.2d 319, 325 (1st Cir. 1973); Tovar v. State, 39 Ariz. 528, 530, 8 P.2d 247, 248 (1932) (per curiam).

99. *See* Otis, *Help or a Hindrance, supra* note 51, at 20.

100. *Id.* at 18.

disposing of less than all multiple claims."[101] A premature appeal will result in the PHC justice's ordering that the case be remanded to the trial court for a final disposition of "all of the remaining multiple claims."[102] In view of the supreme court's mounting caseload,[103] it is difficult to justify the time that the PHC justice spends conducting legal research and reviewing the PHC statements and accompanying documents, when a cursory review of the Minnesota Rules of Civil Appellate Procedure would indicate that the appeal is premature or otherwise improper.

Third, an attorney must file all necessary trial court briefs, orders, etc., required by the PHC rules.[104] When a lawyer fails to include the necessary documents with his PHC statement, it is impossible for the PHC justice to consider the appeal adequately.[105]

Finally, an attorney's presentation during the PHC should be consistent with the facts and arguments presented during trial. Because the trial transcript is not to be prepared before the PHC,[106] lawyers have a duty to present only those facts they know will be supported by the record.[107]

V. CONCLUSION

Because of the mushrooming caseload of the Minnesota Supreme Court, members of the court perceived the need to alter the court's procedural rules to provide litigants with their day in court, at a reasonable cost, without totally exhausting judicial resources. Although not a panacea for the problem of docket congestion, the PHC is the vehicle the supreme court has chosen to make the determination of litigation more expeditious without making it more expensive.

This Article has attempted to explain the rudiments of the

101. MINN. R. CIV. APP. P. 104.01, *reprinted in* Finance and Commerce, Dec. 12, 1980, at 12, col. 2.

102. *See id.*

103. *See* notes 1-2 *supra* and accompanying text.

104. *See* note 82 *supra* and accompanying text.

105. Appellate courts have not hesitated to dismiss a case when appellants fail to include the necessary trial court documents and exhibits. *See* Heritage Shelter Care Home, Inc. v. Miller, 31 Ill. App. 3d 700, 703-04, 334 N.E.2d 355, 358 (1975). In Matherne v. United States, 391 F.2d 449 (5th Cir. 1968) (per curiam), the Fifth Circuit Court of Appeals issued an official reprimand to an attorney who was derelict in submitting the trial court records necessary to review the controversy. *See id.*

106. *See* Order of Jan. 10, 1979, *supra* note 40, at ¶ C.

107. Failure to comply with this requirement obviously violates DR 7-102 of the *Minnesota Code of Professional Responsibility*.

PHC. Additionally, it has sought to go beyond the formal rules of PHC practice and touch upon craftsmanship at the first stage of appellate practice.

Members of the Minnesota bar have supported the court's decision to use the PHC. Because the Minnesota Supreme Court is constantly reevaluating and modifying its internal procedures, it is hoped that this Article will engender additional discussion among members of the bar on how to improve PHC practice. No doubt, the PHC rules are not perfect. It is the bar's duty to point out objectively to the court where improvement is needed.