

No. C4-84-2133

**STATE OF MINNESOTA
IN SUPREME COURT**

In re:

**Supreme Court Advisory Committee
on Rules of Civil Appellate Procedure**

**Recommendations of Minnesota Supreme Court
Advisory Committee on
Rules of Civil Appellate Procedure**

**Supplemental Report
August 31, 2009**

**Hon. Jill Flaskamp Halbrooks, Chair
Hon. G. Barry Anderson, Liaison Justice**

**Richard S. Slowes, Supreme Court Commissioner
Frederick K. Grittner, Clerk of the Appellate Courts
*Ex Officio***

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Hon. Louise Dovre Bjorkman, Saint Paul
Diane B. Bratvold, Minneapolis
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Charles F. Webber, Minneapolis**

**David F. Herr, Minneapolis
Reporter**

Advisory Committee on Rules of Civil Appellate Procedure

This report contains a revised recommendation to address the concerns of two comments received during the public comment period for these proposed rules. Both comments, filed by separate divisions of the Minnesota County Attorneys Association, raise valid concerns about the burden that maintaining confidentiality would impose on juvenile protection cases (see July 21, 2009, letter of Julie K. Harris) and civil commitment cases and habeas corpus cases arising from civil commitment orders (see July 17, 2009, letter of John L. Kirwin).

The committee does not believe it appropriate that these cases be categorically exempted from the proposed rule on handling confidential information on appeal. Instead, the committee has reviewed its proposed Rule 112 and recommends that a revised version be adopted. The primary change in this rule is to remove any requirement that separate “public” and “private” versions of briefs be filed (though that may still be appropriate in some cases), and instead to rely on the requirement of Rule 112.03 that expressly imposes a duty to maintain the confidentiality of sealed information, but does not mandate a single, specific means of discharging that duty. The committee believes this rule is more flexible and should serve the interests of all parties.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON THE
RULES OF CIVIL APPELLATE
PROCEDURE

Revised

Recommendation 4: The Court Should Adopt a New Rule 112 to Provide Guidance on Handling Confidential and Sealed Information in Appellate Proceedings.

Specific Recommendation

Rule 112 should be ~~amended~~ adopted as follows:

[Reporter's Note: Because this rule is entirely new, underscoring is omitted for clarity; REVISIONS FROM THE APRIL 7, 2009, REPORT ARE SHOWN WITH UNDERLINING AND INTERLINING.]

1 **RULE 112. CONFIDENTIAL INFORMATION; SEALING**
2 **OF PORTIONS OF RECORD**

3 **Rule 112.01 Status of Confidential Record Material on Appeal.**

4 **Subdivision 1. Materials ~~Filed Under Seal in the Trial Court~~ Not**
5 **Available to the Public.** Materials that are filed in the trial court under seal or in
6 another manner that makes the materials unavailable to the public ~~in the trial court~~
7 pursuant to statute, court rule, or trial court order, as well as any documents
8 containing restricted identifiers as defined in Rule 11 of the General Rules of
9 Practice, will remain under seal or not available to the public on appeal unless
10 either the trial court or appellate court orders otherwise.

11 **Subd. 2. Sealing of Materials on Appeal.** In extraordinary situations
12 where material in the record is confidential or trade-secret information that was
13 not protected by a confidentiality order in the trial court, a party may move to have
14 it filed under seal on appeal. The motion must demonstrate the need for sealing
15 the information and must set forth the efforts made to maintain the confidentiality
16 of the information before the motion was brought.

17 **Advisory Committee Comment—2009 Adoption**

18 Rule 112 is a new rule intended to codify existing practices relating
19 to handling confidential information on appeal. The rule applies to
20 information that is filed under seal pursuant to a court order for sealing,
21 as well as to other information that is not available to the public by
22 operation of law.

23 The general policy of the Minnesota courts is that court records are
24 accessible to any member of the public. See Rule 2 of Minnesota Rules
25 of Public Access to Records of the Judicial Branch, *reprinted in*
26 *MINNESOTA RULES OF COURT: STATE 1083* (West 2009 ed.). This
27 general policy is carried forward by Rule 4 governing accessibility of
28 case records. Rule 4, subdivision 3, specifies that restricting access to
29 case records is governed by court rules. Many statutes limit access to
30 particular case types. *See* Minnesota Rules of Public Access to Records
31 of the Judicial Branch Rule 4, Advisory Committee Comment—2005,
32 *reprinted in* *MINNESOTA RULES OF COURT: STATE 1085-86* (West 2009
33 ed.)(collecting citations to statutes). In addition, Minn. Gen. R. Prac. 11
34 requires filing of personal identifying information in a separate
35 document filed under seal.

36 The majority of orders restricting access to court records in civil
37 cases are entered pursuant to Minn. R. Civ. P. 26.03(e)(limiting persons
38 present during discovery, (f)(allowing court to order sealing of
39 depositions), and (h)(allowing court to order parties to file other
40 documents under seal). *See generally* *Minneapolis Star & Tribune v.*
41 *Schumacher*, 392 N.W.2d 197 (Minn. 1986). Criminal case protective
42 orders are governed by MINN. R. CRIM. P. 25. *See generally*
43 *Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550 (Minn.
44 1983); *Nw. Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn.
45 1977).

46 The most common situation relating to sealed materials on appeal
47 relates to the continued protection of materials filed under seal in the
48 trial court. Subdivision 1 of Rule 112 restates the general rule that
49 documents that are sealed in the trial court will remain sealed on
50 appeal.

51 **Rule 112.02. Handling of Sealed Confidential Portions of the Appellate**
52 **Record.**

53 Any sealed materials that are filed under seal or in another manner that
54 makes the materials unavailable to the public that need to be included in an
55 addendum or appendix on appeal shall be prepared in a separately bound
56 Confidential Addendum or Confidential Appendix and filed in a sealed envelope
57 designated as “Filed under Seal pursuant to Order of the _____ Court
58 dated _____” or in substantially similar form that describes the basis for the
59 assertion of confidentiality . ~~To the extent information filed under seal must be~~
60 ~~discussed in motions or briefs on appeal, the parties must file separate “public”~~

61 ~~and sealed versions of the motion or brief, with confidential information redacted~~
62 ~~in the public version and stated as necessary in the sealed version. Each~~
63 ~~separately represented party must be served with both the “public” and sealed~~
64 ~~versions of any documents filed with the court.~~

65 **Advisory Committee Comment—2009 Adoption**

66 Rule 112.02 creates the required process for handling sealed records
67 on appeal. The rule is intended to permit the ready handling of
68 confidential documents by the court and to ensure that sealed
69 information remains inaccessible to the public. Despite the additional
70 expense that may be incurred, the duty to maintain confidentiality may
71 require a more cumbersome process to permit the parties to advance
72 their appellate arguments without compromising confidentiality rights
73 that are recognized under law. Because the parties to an action have an
74 interest in ensuring that any “public” version of a document has
75 appropriately been redacted, service of both the public and sealed
76 version must be made on all parties.
77

78 **Rule 112.03. Duty to Maintain Confidentiality.**

79 Every party to an appeal must take reasonable steps to prevent the
80 disclosure of confidential information, both in oral argument and written
81 submissions filed with the court, except in the manner prescribed in Rule 112.02.

82 **Advisory Committee Comment—2009 Adoption**

83 Rule 112.03 imposes an affirmative duty on all parties to maintain
84 the confidentiality of information that is protected by statute, rule, or
85 court order. ~~This rule requires filing information separately and under~~
86 ~~seal and may also require care at oral argument not to disclose~~
87 ~~confidential information.~~

88 If the inability to discuss confidential information in motion papers
89 or briefs would cause substantial hardship or prevent the fair
90 presentation of a party’s argument, a party may seek leave to file
91 separate “public” and sealed versions of the motion or brief, with
92 confidential information redacted in the public version and stated as
93 necessary in the sealed version. Each separately represented party
94 would have to be served with both the “public” and sealed versions of
95 any documents filed with the court and served on all parties. Other
96 means to minimize the disclosure of confidential information include
97 referring to parties by their initials or description rather than by name,
98 or by describing this information in terms of its specific location in the
99 confidential part of the record without disclosing the information itself.

100 **Rule 112.04. Oral Argument.**

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Appellate arguments are public hearings.

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Advisory Committee Comment—2009 Adoption

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Even in cases where portions of the record are confidential and filed under seal, the oral argument hearing will be in open court, open to the public, and possibly televised. The rule does not forbid closing a hearing to the public. Neither the Minnesota Supreme Court nor the Minnesota Court of Appeals has closed a hearing in the past.

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