STATE OF MINNESOTA

IN SUPREME COURT

ADM04-8001

ORDER PROMULGATING AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

Two petitions to amend the Rules of Civil Procedure were filed in 2016: by the Minnesota State Bar Association, to substantially conform certain rules to the Federal Rules of Civil Procedure and to amend Rule 23 to require that at least 50 percent of unclaimed, undistributed, funds in state class action lawsuits be donated to the Minnesota Legal Aid Foundation Fund; and by the Board on Judicial Standards, to amend Rule 63 to clarify and update the judicial-disqualification standard. We referred both petitions to the Advisory Committee on the Rules of Civil Procedure, which considered the amendments proposed in those petitions and other updates to the Rules of Civil Procedure over the course of several meetings in 2017.

The committee filed its report and recommendations on August 1, 2017. We opened a public-comment period and on December 19, 2017, held a public hearing. The court has carefully considered the petitions, the recommended amendments, and the oral and written comments regarding those recommendations. Based on that review, we have decided that the petition of the Minnesota State Bar Association should be granted in part, the petition of the Board on Judicial Standards should be granted, and the recommendations of the Advisory Committee on the Rules of Civil Procedure should be adopted in part.

Based on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The Committee's recommendation to amend the Rules of Civil Procedure to adopt timing deadlines based generally on a 7-, 14-, 21-, and 28-day system, as shown in Attachment 1 to the Committee's report, is referred to the Supreme Court Advisory Committee on the General Rules of Practice, the Supreme Court Advisory Committee on the Rules of Criminal Procedure, and the Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure. Those committees are directed to consider the recommended amendments to the Rules of Civil Procedure that are identified in Attachment 1 to the Committee's August 1 report, and determine whether similar or other changes to the time deadlines in the rules monitored by those committees should be recommended for amendment. The reports and recommendations of those committees shall be filed on or before October 1, 2018.

2. The petition of the Minnesota State Bar Association is granted in part with respect to the request to amend Rules 3–4, 23, 30, 34, 37, and 56 of the Rules of Civil Procedure.

3. The petition of the Board on Judicial Standards, to amend Rule 63 of the Rules of Civil Procedure, is granted.

4. The attached amendments to the Rules of Civil Procedure and to Rule 115.01 of the General Rules of Practice for the District Courts, are prescribed and promulgated to be effective as of July 1, 2018. The rules as amended shall apply to all cases pending on, or filed on or after, the effective date, with the exception of the amendments to Rules 26,

34, 37, and 63, which apply only to actions commenced on or after the effective date. A district court may, however, direct the parties in any case pending on the effective date of these rules to follow Rules 26, 34, and 37.

5. The Advisory Committee comments are included for convenience and do not reflect court approval of the comments.

Dated: March 13, 2018

BY THE COURT:

Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

ADM04-8001

MEMORANDUM

PER CURIAM.

Two petitions to amend the Rules of Civil Procedure were filed in 2016. First, the Minnesota State Bar Association (MSBA) filed a petition that asks the court to adopt the system used in the Federal Rules of Civil Procedure to calculate rule-imposed deadlines, to otherwise amend certain rules to conform Minnesota's rules to changes made to the Federal Rules of Civil Procedure over the last several years, and to amend Minn. R. Civ. P. 23 to require that at least 50 percent of unclaimed undistributed funds in state class action lawsuits ("*cy pres* funds") be donated to the Minnesota Legal Aid Foundation Fund. Second, the Board on Judicial Standards petitioned to amend Rule 63 to clarify and update the judicial-disqualification standard. We referred the petitions to the Advisory Committee on the Rules of Civil Procedure, which considered both petitions and other proposed rule amendments over a series of meetings in 2017.

The committee filed its report and recommendations on August 1, 2017. We opened a public-comment period and held a public hearing on December 19, 2017. Ten comments were filed, and representatives of the MSBA, Committee chair Judge Eric Hylden, and Committee reporter David Herr spoke at the public hearing. After careful consideration of the petitions, the Committee's recommendations, the written comments, and the remarks at the public hearing, we have decided to grant in part and deny in part the MSBA's

petition, grant the petition of the Board on Judicial Standards, and adopt the recommendations of the Advisory Committee with respect to most other recommended rule amendments, for the reasons explained below.

I.

The MSBA's petition asks us to amend the Rules of Civil Procedure to conform "to the time-period structure" in the Federal Rules of Civil Procedure. The Committee also recommends amendments to several rules to adopt deadlines based "on a 7-, 14-, 21-, and 28-day system," in place of the existing 5-, 10-, and 20-day deadlines. These proposed rule changes embrace similar changes made in the Federal Rules of Civil Procedure. In 2009, deadlines in the federal rules were amended to require the counting of all days—"including intermediate Saturdays, Sundays, and legal holidays" when calculating a rule-imposed deadline. *See* Fed. R. Civ. P. 6, advisory comm. note—2009 Amendments. With this change to the federal rules, all days are treated the same (except when the last day of the event falls on Saturday, Sunday, or legal holiday, in which case counting continues forward to the next day that is not a Saturday, Sunday, or legal holiday), and complicated or counterintuitive counting outcomes are eliminated. *See id.* (explaining that under the former counting rules, a 10-day period "not infrequently ended later than [a] 14-day period" that started at the same time).

The MSBA and the Advisory Committee agree that the change adopted by the federal courts to calculate rule-imposed deadlines is sound. But with respect to this particular change, the Committee recommends that input from the Advisory Committees for the General Rules of Practice, the Rules of Criminal Procedure, and the Rules of Civil

Appellate Procedure be obtained before a final decision is made on the recommended amendments to the timing provisions in the Rules of Civil Procedure.

We agree. Uniformity in procedures, between state and federal court actions, is beneficial in some instances, but must be feasible and practical in Minnesota state courts. Determining whether uniform time-calculation rules should apply in all case types, or if not in which instances a different time-calculation rule should be used, requires input from the Advisory Committees for the General Rules of Practice, the Rules of Criminal Procedure, and the Rules of Civil Appellate Procedure.

II.

The MSBA's petition asks us to amend the Rules of Civil Procedure by adopting other changes that have been made in recent years to the Federal Rules of Civil Procedure that are unrelated to the calculation of deadlines, and the Advisory Committee, agreeing with many of those changes, recommends similar amendments to the Rules of Civil Procedure. We agree that many of the amendments made over the last several years in the Federal Rules of Civil Procedure have worked well in federal practice and are likely to be useful to civil parties, practitioners, and our district courts. We therefore grant the MSBA's petition in part, and adopt the committee's recommended amendments to Rules 3–4, 14, 34, and 37 of the Rules of Civil Procedure.

We do not grant the MSBA's petition with respect to the proposed amendments to Rules 16.01–.02, which govern scheduling conferences. The MSBA proposes mandatory, as opposed to optional, scheduling conferences and mandatory attendance at those conferences. Mandatory requirements may, as the MSBA contends, enhance the utility of

these pretrial proceedings, but not every civil case in our state district courts requires this level of pretrial rigor. The considerable discretion exercised by the district court judge in tailoring scheduling conferences accommodates, necessarily, the variety of case management, case types, and court schedules that exist across the state. The current flexibility in Rule 16 is a better model for our state district courts.

For similar reasons, we do not grant the MSBA's petition to amend Rule 26, and we accept the Committee's recommendations regarding amendments to Rules 26.02–.04 and 26.06. The Committee did not support the MSBA's proposed amendments to Rule 26, which governs initial disclosures and discovery, in part because the current practice, which was adopted in 2013 following extensive study of civil justice reform initiatives, is reported to work well in Minnesota's district courts. The Committee's proposed amendments to Rules 26.02–.04 and 26.06 are also consistent with our existing case management processes and include an appropriate emphasis on proportionality in discovery. Thus, for Rule 26, we conclude that it is unnecessary to adopt procedures simply because they have been used in federal courts, particularly when doing so may constrain the flexibility and discretion of our district court judges without achieving an obvious benefit to the administration of justice.

Finally, although we promulgate amendments to Rule 56, which governs summary-judgment motions and practice in the district courts, we do so using our current standard, which is slightly different from that proposed by the MSBA and recommended by the Committee. Consistent with the current rule and our case law, summary judgment is appropriate only when there is no "genuine issue of material fact," as opposed to "no

genuine dispute as to any material fact." *See Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (stating that "[s]ummary judgment is appropriate *when there is no genuine issue of material fact* and a party is entitled to judgment as a matter of law." (emphasis added)); Minn. R. Civ. P. 56.03 (stating that summary judgment can be granted if "there is no genuine issue as to any material fact"); *but see* Fed. R. Civ. P. 56(a) (stating that summary judgment is granted "if the movant shows that there is no genuine dispute as to any material fact"). We have therefore promulgated amendments to Rule 56, and specifically Rules 56.01, 56.03, and 56.07 using the "genuine issue" rather than the "genuine dispute" standard.

III.

The MSBA's petition asks us to amend Rule 23 to require that "at least 50 percent of unclaimed, undistributed residual funds in class actions (i.e., *cy pres* funds) be donated to the Minnesota Legal Aid Foundation Fund."[1] Such funds would be used to support qualified legal services programs. The MSBA explains that civil legal services providers "have reaped substantial benefits" in states that have adopted court rules or enacted statutes governing the dedicated distribution of *cy pres* funds from a class-action settlement or compromise.

The Committee considered the MSBA's petition and sought input from class-action practitioners. The Committee recommends that we decline to amend Rule 23 for two

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[1] The *cy pres* doctrine, as used in a class-action context, has its roots in trust law. "In its original trust law habitat, the *cy pres* doctrine allows courts to take trust money previously designated for a defunct purpose and reallocate that money to some other purpose consonant with the purpose for which the trust was originally created." *In re Citigroup Inc. Sec. Litig.*, 199 F.3d 845, 848 (S.D.N.Y. 2016).

reasons. First, the Committee noted that there is no similar federal rule and thus, a rule of procedure governing Minnesota state court actions could be "inconsistent with numerous federal class-action decisions." Further, given the relatively few class actions in Minnesota state courts, the Committee concluded that adequate guidance on *cy pres* distributions, when the occasion arises, can be found in federal court decisions. Guidance could also be sought, the Committee noted, from analogous Minnesota law, *e.g.*, Minn. Stat. § 501B.31 (2016), which incorporates common law *cy pres* principles by allowing the "redirection" of trust funds when doing so will "as nearly as possible, accomplish the general purposes of the instrument and the intention of the grantor." *Id.*, subd. 4(c). Second, the Committee questioned whether a requirement, mandatory or permissive, for distribution of class-action *cy pres* funds to a specific category of recipients would present separation-of-powers concerns.

The MSBA, in response to the Committee's recommendation, explained that using the *cy pres* doctrine in a class action to distribute otherwise undistributed class action funds is a "pragmatic" and "justice-oriented" solution that can increase the capacity of civil legal services programs to provide access to the courts. Eight of the ten comments filed during the public comment period supported the MSBA's petition and proposed amendment to Rule 23. The MSBA's petition is also supported by the American Bar Association.

Currently, Rule 23.05 requires a district court to consider whether a proposed class-action settlement or compromise is "fair, reasonable, and adequate," Minn. R. Civ. P. 23.05(a)(3), which can "require[] an amalgam of delicate balancing, gross approximations and rough justice." *SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 231 (Minn. 1979)

(citations omitted) (explaining the "standard applied to judicial approval of settlements in class actions"). Nothing in the plain language of this rule requires or prohibits the parties from providing in a settlement or compromise agreement for a *cy pres* distribution of remaining funds, *see Buchholz Mortuaries, Inc. v. Dir. of Revenue*, 113 S.W.3d 192, 196 n.1 (Mo. 2003) (Wolff, J., concurring) (noting that the parties can agree in a settlement, "subject to court approval," that undistributed funds will be distributed "for the indirect benefit of the class"); and nothing in the rule requires or prohibits the district court, in an exercise of its discretion, from directing the distribution of *cy pres* funds to a particular recipient, including a legal services provider. *See, e.g., In re Peterson's Estate*, 277 N.W. 529, 533 (Minn. 1938) (explaining that under the "historical doctrine of judicial *cy pres*," a court can "approximate the intention of the donor when his exact intention cannot be carried out for some reason"); *Heller v. Schwan's Sales Enter., Inc.*, 548 N.W.2d 287, 289 (Minn. App. 1996) (explaining that approval of a class-action settlement is reviewed under an abuse of discretion standard), *rev. denied* (Minn. Aug. 6, 1996).

We acknowledge the basic premise that underlies the MSBA's petition: providers of civil legal aid services require funding in order to provide meaningful access to civil justice. We can also acknowledge that class-action *cy pres* distributions may be preferable as compared to other options for distributing funds that remain after class members have been compensated. *See, e.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (noting that "*cy pres* distributions have benefits over the alternative choices" for undistributed class-action funds). But, courts and commentators have observed that untethered from some nexus to the class action, the fairness of a *cy pres* distribution in a

particular class-action case may be open to question. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (acknowledging that "the *cy pres* doctrine—unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries—poses many nascent dangers to the fairness of the distribution process.").

The considerations relevant to judicial approval of a class-action settlement or compromise can vary considerably from case to case, based on the nature of the particular class action and the terms of any settlement or compromise agreement, including terms that address a possible *cy pres* distribution. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (explaining that a "class-action settlement that calls for a *cy pres* remedy" should not be approved as "fair, adequate, and reasonable" unless that remedy "account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes and the interests of the silent class members" (alteration in original) (citation omitted)). Given these considerations and the district court's broad discretion in this area of law, we conclude that mandating the distribution of a specific minimum percentage of *cy pres* funds to a single recipient may unnecessarily constrain the district court's evaluation of what is fair, adequate, and reasonable in a given case. On the other hand, the district court's evaluation of those considerations, when it comes to *cy pres* funds, may be better informed if it has input from potential *cy pres* recipients, including civil legal services providers.

Thus, we believe the appropriate balance between class-action principles and the *cy pres* remedy is to require notice to legal services providers when the district court is considering the possible distribution of *cy pres* funds. *See also Sister Elizabeth Kenny Found., Inc. v. Nat'l Found.*, 126 N.W.2d 640, 646 (Minn. 1964) (addressing, in the context

of a trust distribution, when a possible beneficiary of *cy pres* funds should be permitted to intervene). As promulgated here, the rule will require the district court to provide notice to qualified legal services programs, *see* Minn. Stat. § 480.24, subd. 3 (2016) (defining such programs), about a *cy pres* distribution from a class-action settlement or compromise. The district court can also decide to provide notice to other potential *cy pres* recipients, if appropriate based on the factors relevant to the individual case. Those who receive notice can then decide whether or not to request distribution of some or all of the *cy pres* funds, and the district court can decide, based on the nexus between the nature, purpose, and objectives of the class action and the interests of the class, and the interests of the potential *cy pres* recipients, how to distribute the *cy pres* funds. With these features, we believe the appropriate balance is struck among multiple interests, including the discretion of the district court, the objectives of a particular class action, the terms of a settlement or compromise, and our commitment to adequate funding for civil legal services providers.

IV.

Fourth, the Board on Judicial Standards proposed amendments to Rule 63 to update the judicial-disqualification standard for consistency with the standard in other rules and in appellate decisions.

Currently, Rule 63 requires a trial judge to recuse if the judge "might be excluded for bias from acting therein as a juror." Minn. R. Civ. P. 63.02. The Code of Judicial Conduct provides a different disqualification standard, one that does not necessarily depend on potential juror bias. *See* Minn. Code of Jud. Conduct 2.11(A) (stating that a judge is disqualified from presiding over "any proceeding in which the judge's impartiality

might reasonably be questioned"). We have said that judicial disqualification is based on a bias, or an appearance of bias, standard. *See Troxel v. State*, 875 N.W.2d 302, 314 (Minn. 2016) (stating that "impartiality," as used in Rule 2.11(A) of the Code "means the absence of bias or prejudice in favor of or against, particular parties or classes of parties, as well as maintenance of an open mind in considering the issues" (citation omitted)); *Powell v. Anderson*, 660 N.W.2d 107, 114–15 (Minn. 2003) (stating the disqualification standard for an appellate judge). The standard applied in our cases is consistent with the Code of Judicial Conduct, and is reflected in the Rules of Criminal Procedure. *See* Minn. R. Crim. P. 26.03, subd. 14(3) (prohibiting a judge from presiding "if disqualified under the Code of Judicial Conduct"). Consistency in the rules regarding the standard for judicial disqualification is preferred, and the Advisory Committee agrees that the rules should be updated.

We note that with these amendments to Rule 63.03, we do not adopt the 14-day deadline that may, in the future, be adopted in other rules. Rule 63.03 requires a party to serve notice to remove a judge "within ten days after the party receives notice" of which judge will preside at the proceeding (or not later than "the commencement of the trial or hearing.") Minn. R. Civ. P. 63.03. We recognize that a 10-day deadline is inconsistent with the committee's recommendation to use 7, 14, 21, or 28 days for rule-imposed deadlines. But in this instance, resolution of judicial-assignment decisions sooner rather than later will be beneficial to the parties and promote efficient case management.

V.

Last, the Committee recommends amendments to Rules 10, 12, 31, and 67 to clarify procedures for parties, address recent legislative changes, and make minor corrections. None of the comments addressed these recommended amendments, and all of the recommended amendments will improve procedures in civil cases. We therefore adopt these amendments.

We appreciate the work of the Minnesota State Bar Association, whose efforts brought before us the proposed federal conformity amendments and the *cy pres* discussion; and, the attention of the Board on Judicial Standards to consistency among the rules and the Code of Judicial Conduct. We also acknowledge the thorough and thoughtful work of the Committee in addressing these petitions, and the helpful comments offered during the public comment period.

AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

[Note: In the following amendments, deletions are indicated by a line drawn through the words and additions are indicated by a line drawn under the words.]

3.01. Commencement of the Action

A civil action is commenced against each defendant:

(a) when the summons is served upon that defendant~~,~~; or

(b) at the date of ~~acknowledgement of service if service is made by mail or other means consented to by the defendant either in writing or electronically~~ signing of a waiver of service pursuant to Rule 4.05; or

(c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

Filing requirements are set forth in Rule 5.04, which requires filing with the court within one year after commencement for non-family cases.

Advisory Committee Comment—2018 Amendments

Rule 3.01 is amended to implement the amendment to Rule 4.05, which replaces the somewhat unreliable procedure involving the "Acknowledgement of Service" form with a more straightforward procedure relying on a "Waiver of Service" form. Rule 3.01 defines the date of commencement of an action using the wavier of process procedure.

~~4.05. Service by Mail~~

~~In any action service may be made by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender. If acknowledgment of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service shall be ineffectual.~~

~~Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt of summons within the time allowed by these rules.~~

4.05. Waiving Service of Summons

(a) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4.03 has a duty to avoid unnecessary expenses of serving the summons. A plaintiff may request that the defendant waive service of a summons. The notice and request must:

(1) be in writing and be addressed:

(A) to the individual defendant; or

(B) for a defendant subject to service under Rule 4.03(b)-(e) to the agent authorized to receive service;

(2) be accompanied by a copy of the complaint, two copies of Form 22B or a substantially similar form, and a prepaid means for returning a signed copy of the form;

(3) inform a defendant, using Form 22B or a substantially similar form, of the consequences of waiving and not waiving service;

(4) state the date when the request is sent;

(5) give a defendant 30 days after the request was sent—or 60 days if sent to a defendant outside the United States—to return the waiver; and

(6) be sent by first-class mail or other reliable means.

(b) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(1) the expenses later incurred in making service; and

(2) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(c) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a signed waiver need not serve an answer to the complaint until 60 days after the request was sent to that defendant—or until 90 days after it was sent to that defendant outside the United States.

(d) Results of Filing of a Waiver. When a plaintiff files a waiver of service, proof of service is not required and these rules apply as if a summons and complaint had been served on the date of signing of the waiver.

(e) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

Advisory Committee Comment—2018 Amendments

Rule 4.05 is completely revamped to replace the somewhat unreliable procedure relying on the "Acknowledgement of Service" form with a more straightforward

procedure, used in federal court since 1993, relying on a "Waiver of Service" form. New Rule 4.05 is modeled closely on its federal counterpart.

The former procedure created the illusion that valid service could be accomplished by U.S. Mail, but it was a procedure that gave control over the process completely to the defendant and little incentive to a plaintiff to make use of it. This rule does not authorize service by mere mailing—it is necessary for the defendant to waive formal service and return the waiver-of-service form. Service is accomplished and proven by the waiver, not the mailing. Additionally, the new procedure is not limited to delivery by mail or any other means expressly authorized by these rules—it allows valid service to be accomplished by any means that is agreed to the defendant being served—mail, private courier, email, or even social media would all be acceptable if the defendant agreed to waive service under this rule. The only requirement is that the defendant sign and return a waiver-of-service form.

RULE 10. FORM OF PLEADINGS

10.01. Caption; Names of Parties

Every pleading shall have a caption setting forth the name of the court and the county in which the action is brought, the title of the action, the court file number if one has been assigned, and a designation as in Rule 7, and, in the upper ~~right hand~~ right-hand corner, the appropriate case type indicator as set forth in the subject matter index included in the appendix as Form 23. If a case is assigned to a particular judge for all subsequent proceedings, the name of that judge shall be included in the caption and adjacent to the file number. In the complaint, the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the first party on each side with an appropriate indication of other parties. A party may be identified by initials or pseudonym only where authorized by law or court order.

Advisory Committee Comment—2018 Amendments

Rule 10.01 is amended to add the final sentence to clarify that, although actions must normally be brought in the name of the real party in interest (see Rule 17.01), in certain limited circumstances the court may allow a party to proceed anonymously. In actions brought pursuant to Minn. Stat. § 604.31 for the nonconsensual dissemination of private sexual images (so-called "revenge porn"), the party is entitled to an order allowing anonymity (such as by using the pseudonym "John Doe" or "Jane Doe" or a party's real or substituted initials), but a court order is still required. In other exceptional circumstances, a party must obtain leave of court to proceed either under a pseudonym or by initials, and that relief is governed by the court's discretion.

RULE 12. DEFENSES AND OBJECTIONS; WHEN AND HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON PLEADINGS

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Advisory Committee Comment—2018 Amendments

Rule 12.01 establishes the time to respond to a complaint. In 2017 the Minnesota Legislature adopted a statute that extends the time to respond to certain actions relating to architectural barriers to public access to buildings. See Minn. Laws 2017, ch. 80, §§ 7 & 3, to be codified as Minn. Stat. § 363A.331, subds. 2 & 2a. The statute applies to actions brought on or after May 24, 2017.

RULE 14. THIRD-PARTY PRACTICE

~~**14.01. When Defendant May Bring in Third Party**~~

~~Within 90 days after service of the summons upon a defendant, and thereafter either by written consent of all parties to the action or by leave of court granted on motion upon notice to all parties to the action, a defendant as a third-party plaintiff may serve a summons and complaint, together with a copy of plaintiff's complaint upon a person, whether or not the person is a party to the action, who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff and after such service shall forthwith serve notice thereof upon all other parties to the action. Copies of third-party pleadings shall be furnished by the pleader to any other party to the action within five days after request therefor. The person so served, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed in accordance with this rule against any person who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.~~

~~14.02. When Plaintiff May Bring in Third Party~~

~~When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which, pursuant to Rule 14.01, would entitle defendant to do so.~~

~~14.03. Orders for Protection of Parties and Prevention of Delay~~

~~The court may make such orders to prevent a party from being embarrassed or put to undue expense, or to prevent delay of the trial or other proceeding by the assertion of a third-party claim, and may dismiss the third-party claim, order separate trials, or make other orders to prevent delay or prejudice. Unless otherwise specified in the order, a dismissal pursuant to this rule is without prejudice.~~

14.01. When a Defending Party May Bring in a Third Party

(a) Timing of the Summons and Complaint. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain consent of all parties to the action or the court's leave granted on notice to all parties to the action if it files the third-party complaint more than 90 days after service of the summons upon that defending party.

(b) Service of Complaint with Third-Party Complaint. The third-party plaintiff must serve a copy of the plaintiff's complaint with the third-party summons and complaint.

(c) Service on Other Parties. A copy of the third-party summons and complaint must be promptly served on all other parties to the action.

14.02. Third-Party Defendant's Claims and Defenses

The person served with the summons and third-party complaint—the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13.01 and may assert any counterclaim against the third-party plaintiff under Rule 13.02 or any crossclaim against another third-party defendant under Rule 13.07;

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

14.03. Plaintiff's Claims Against a Third-Party Defendant

The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13.01, and may assert any counterclaim under Rule 13.02 or any crossclaim under Rule 13.07. With leave of the court, the third-party defendant may assert counterclaims permitted under Rule 13.05 or Rule 13.06.

14.04. Motion to Strike, Sever, or Try Separately

Any party may move to strike the third-party claim, to sever it, or to try it separately.

14.05. Third-Party Defendant's Claim Against a Nonparty

A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

14.06. When a Plaintiff May Bring in a Third Party

When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

14.07. Defending Against a Demand for Judgment for the Plaintiff

The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

14.08. Protective Orders for Parties and Prevention of Delay

The court may make such orders to prevent a party from being embarrassed or put to undue expense, or to prevent delay of the trial or other proceeding by the assertion of a third-party claim, and may dismiss the third-party claim, order separate trials, or make other orders to prevent delay or prejudice. Unless otherwise specified in the order, a dismissal pursuant to this rule is without prejudice.

Advisory Committee Comment—2018 Amendments

Rule 14 is substantially reorganized and reformatted to include paragraphing and headings. The amended rule is modeled on Fed. R. Civ. P. 14 after its restyling amendment in 2007. The committee believes that the current Rule 14.01, set forth in a single (and long) paragraph, is not particularly readable. These changes are intended to make the rule easier to use and understand, but are not intended to change the substantive interpretation of the rule. Because the rule closely follows its federal counterpart, federal court decisions on third-party practice will have greater value in interpreting the state rule.

Rule 14.08 is new in number, but identical to the former Rule 14.03, except for the change of title. "Orders for Protection" is replaced with the more familiar "Protective Orders" for limitations on discovery. This change is made to avoid confusion with restraining orders to prevent personal abuse or harassment.

RULE 23. CLASS ACTIONS

* * *

23.05. Settlement, Voluntary Dismissal, or Compromise

(a) **Court Approval.**

(1) A settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class is effective only if approved by the court.

(2) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. The court shall also direct notice regarding the distribution of residual funds, if any, that remain after payment of all approved class member claims, expenses, litigation costs, attorney's fees, and other court-approved disbursements. This notice shall be provided to qualified legal services programs within the meaning of Minnesota Statutes § 480.24, subdivision 3, and any other potential recipient of residual funds identified by the parties or the court.

(3) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. In approving the distribution or other disposition of residual funds, the district court shall consider all relevant factors, including the recommendations of the parties, the nexus between the nature, purpose, and objectives of the class action and the interests of the class members, and the interests of potential recipients of the residual funds.

(b) **Disclosure Required.** The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23.05(a) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(c) **Additional Opt-Out Period.** In an action previously certified as a class action under Rule 23.02(c), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(d) **Objection to Settlement.**

(1) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23.05(a)(1).

(2) An objection made under Rule 23.05(d)(1) may be withdrawn only with the court's approval.

RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY

* * *

26.02. Discovery Methods, Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the methods and scope of discovery are as follows:

* * *

~~**(b) Scope and Limits.** Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Subject to these limitations, parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Upon a showing of good cause and proportionality, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.~~

(b) Scope and Limits. Unless otherwise limited by court order, the scope of discovery is as follows. Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

* * *

(3) Limits Required When Cumulative; Duplicative; More Convenient Alternative; and Ample Prior Opportunity. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the burden of proposed discovery is outside the scope permitted by Rule 26.02(b).

The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

Advisory Committee Comment—2018 Amendments

Rule 26.02 is amended to adopt the changes made to Fed. R. Civ. P. 26(b) in 2015. The amendments are intended to improve the operation of the rule and to avoid some of the problems that were encountered under the former rule.

26.03. Protective Orders

(a) In General. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(a 1) that the discovery not be had;

(b 2) that the discovery may be had only on specified terms and conditions, including a designation of the time or location or the allocation of expenses, for the disclosure or discovery;

(c 3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(~~d~~ 4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(~~e~~ 5) that discovery be conducted with no one present except persons designated by the court;

(~~f~~ 6) that a deposition, after being sealed, be opened only by order of the court;

(~~g~~ 7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(~~h~~ 8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(b) Ordering Discovery. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(c) Awarding Expenses. Rule 37.01(d) applies to the award of expenses incurred in connection with the motion.

Advisory Committee Comment—2018 Amendments

Rule 26.03 is amended to adopt a change made to Fed. R. Civ. P. 26(c) in 2015. The amendment explicitly provides that cost-shifting is one option available to the court in implementing protective relief, where appropriate. The rule is not intended to make cost-shifting a routine part of discovery motions, but recognizes that there are some situations where it is appropriate. The rule is also subdivided and numbered to make it easier to use and cite; the headings are not intended to affect the interpretation of the rule.

26.04. Timing and Sequence of Discovery

(a) Timing. Notwithstanding the provisions of Rules 26.02, 30.01, 31.01(a), 33.01(a), ~~34.02,~~ 36.01, and 45.01, parties may not seek discovery from any source before the parties have conferred and prepared a discovery plan as required by Rule 26.06(c) except in a proceeding exempt from initial disclosure under Rule 26.01(a)(2), or when allowed by stipulation or court order.

(b) Early Rule 34 Requests.

(1) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(A) to that party by any other party, and

(B) by that party to any plaintiff or to any other party that has been served.

(2) When Considered Served. The request is considered to have been served when the parties have conferred and prepared a discovery plan as required by Rule 26.06(c).

(~~b~~c) Sequence. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(ed) Expedited Litigation Track. Expedited timing and modified content of certain disclosure and discovery obligations may be required by order of the supreme court adopting special rules for the pilot expedited civil litigation track.

Advisory Committee Comment—2018 Amendments

Rule 26.04 is amended to adopt a change made to Fed. R. Civ. P. 26(d) in 2015, which allows the service of Rule 34 requests before other discovery is permitted. The rule permits a party responding to the request additional time to prepare an appropriate response, but does not compel earlier response or production. The service of an earlier request may also provide earlier notice to a party of the need to preserve evidence for use in the case, and thus eliminate some disputes over spoliation of evidence. The effect of the rule is to authorize earlier service of Rule 34 requests but the rule does not allow a serving party to accelerate the response deadline by doing so.

26.06. Discovery Conference and Discovery Plan

* * *

(c) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26.01, including a statement of when initial disclosures were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(3) any issues about disclosure ~~or~~, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(4) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these

claims after production—whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that the court should issue under Rule 26.03 or under Rule 16.02 and .03.

* * *

Advisory Committee Comment—2018 Amendments

Rule 26.06(c) is amended to provide expressly for inclusion of preservation of evidence as a subject to be addressed in the discovery plan in every case. This requirement recognizes both the importance of document-preservation issues and the benefits of addressing the issue early in the case.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

* * *

30.05. Review by Witness; Changes; Signing

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Rule 30.06(~~1~~a) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

RULE 31. DEPOSITIONS OF WITNESSES UPON WRITTEN QUESTIONS

31.01 Serving Questions; Notice

(a) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (~~2~~b). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(b) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26.02(~~a~~b), if the person to be

examined is confined in prison or if, without the written stipulation of the parties, the person to be examined has already been deposed in the case.

* * *

Advisory Committee Comment—2018 Amendments

Rule 31.01(a) is amended to correct the cross-reference to paragraph 2(b) of the rule. Rule 31.01(b) is similarly amended only to correct the cross-reference to the correct paragraph of Rule 26.02. These amendments are not intended to change the operation or interpretation of either rule.

RULE 34. PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

34.01. Scope

(a) In General. Any party may serve on any other party a request within the scope of Rule 26.02:

(1) to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect and copy, test, or sample:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images~~, phono-records~~, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary~~,~~—by the respondent through detection devices into reasonably usable form, or

(B) to inspect and copy, test, or sample any designated tangible things that constitute or contain matters within the scope of Rule 26.02 and that are in the possession, custody or control of the party upon whom the request is served, or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02.

Advisory Committee Comment—2018 Amendments

Rule 34.01 is amended to incorporate the scope of discovery set forth in Rule 26.02. This change is made to make that limitation on the scope of any Rule 34 discovery obligation clear to litigants, and is not intended to expand or narrow the scope of discovery.

34.02. Procedure

(a) Timing. The request may, without leave of court, be served upon any party with or after service of the summons and complaint.

(b) Contents of the Request. The request:

(1) ~~shall~~ must set forth with reasonable particularity ~~the items~~ each item or category of items to be inspected ~~either by individual item or by category,~~ ~~and~~;

(2) ~~describe each item and category with reasonable particularity. The request~~ ~~shall~~ must specify a reasonable time, place, and manner ~~of making~~ for the inspection and performing the related acts~~.~~; and

(3) ~~The request~~ may specify the form or forms in which electronically stored information is to be produced.

(c) Responses and Objections.

(1) **Time to Respond.** The party upon whom the request is served ~~shall~~ must serve a written response within 30 days after ~~the service of the request,~~ the party is served (or deemed served pursuant to Rule 26.04(b)). ~~except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant.~~ The court may allow a shorter or longer time.

(2) **Responding to Each Item.** The response shall state, with respect to each item or category, either that inspection and related activities will be permitted as requested, or ~~unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection~~ state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(3) **Objections.** An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, that part shall be specified and inspection permitted of the remaining parts.

(4) **Responding to a Request for Production of Electronically Stored Information.** The response may state an ~~If~~ objection ~~is made~~ to ~~the~~ a requested form ~~or forms~~ for producing electronically stored information. If no form was specified in the request, the responding party must state the form or forms it intends to use.

~~(5) The party submitting the request may move for an order pursuant to Rule 37 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.~~

(5) **Producing the Documents or Electronically Stored Information.** Unless ~~the parties otherwise agree, or the court~~ otherwise ~~orders~~ stipulated or ordered by the court, these procedures apply to producing documents and electronically stored information:

(A~~a~~) A party ~~who produces documents for inspection shall~~ must produce ~~them as~~ documents as they are kept in the usual course of business at the time of the request and may ~~or, at the option of the producing party, shall~~ organize them to correspond ~~with~~ to the categories in the request;

(B~~b~~) If a request does not specify the form ~~or forms~~ for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a ~~form or forms that are~~ reasonably usable form; and

(C~~c~~) A party need not produce the same electronically stored information in more than one form.

Advisory Committee Comment—2018 Amendments

Rule 34.02 is amended to adopt the changes made to Federal Rule 34 in 2015. The most significant change is the provision in Rule 34.02(c)(3) that requires a party asserting an objection to a request for production to disclose whether any document is being withheld from production based on those objections. This rule change has curtailed one aspect of game-playing from federal practice and has worked well in federal court. It is adopted in state court practice to accomplish the same purpose. The rule does not require a detailed log of all documents withheld, but the objecting party must make it clear that documents are being withheld based on the objections asserted. This disclosure can then support dialogue over the nature of withheld information and a motion to resolve the appropriateness of the objections asserted.

The rule is also reformatted to make it clearer and easier to use by adding subdivisions and headings. These formatting changes are not intended to affect the interpretation of the rule.

34.03. Persons Not Parties

(a) Subpoenas. As provided in Rule 45, a nonparty may be compelled to produce documents and electronically stored information and to permit an inspection.

(b) Independent Actions. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Advisory Committee Comment—2018 Amendments

Rule 34.03(a) is a new section that makes clear that Rule 34 requests may be enforced against nonparties through use of subpoenas issued pursuant to Rule 45.

RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY: SANCTIONS

37.01. Motion for Order Compelling Disclosure or Discovery

(a) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the county where the discovery is being, or is to be, taken.

(b) Specific Motions.

(1) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26.01, any other party may move to compel disclosure and for appropriate sanctions.

(2) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(A) a deponent fails to answer a question propounded or submitted under Rules 30 or 31;

(B) a corporation or other entity fails to make a designation under Rule 30.02(f) or 31.01(c);

(C) a party fails to answer an interrogatory submitted under Rule 33; or

(D) ~~if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested~~ a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) Evasive or Incomplete Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(d) Expenses and Sanctions.

(1) If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26.03 and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Advisory Committee Comment—2018 Amendments

Rule 37 is amended to adopt changes made to Federal Rule 37 in 2015. Rule 37.01(b)(2)(D) is amended to provide express authority for a motion for an order compelling discovery when a party fails to respond to a request either by the production of requested information or by the agreement to permit inspection. This amendment provides the means for enforcing the obligations under amended Rule 34.02.

* * *

~~**37.05. Electronically Stored Information**~~

~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

37.05. Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(a) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(b) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(1) presume that the lost information was unfavorable to the party;

(2) instruct the jury that it may or must presume the information was unfavorable to the party; or

(3) dismiss the action or enter a default judgment.

Advisory Committee Comment—2018 Amendments

Rule 37.05 is amended to redefine the sanctions available for the failure to preserve electronically stored information ("ESI"). The amendment follows closely the amendment made to Fed. R. Civ. P. 37(e) in 2015 and is intended to create a clearer standard for imposition of sanctions for the failure to preserve electronically stored information. First, the rule looks to ameliorating any prejudice by allowing discovery to restore or replace the missing information. This might be accomplished by locating alternate copies of the information, or reconstructing backed up copies. In the absence of prejudice, the rule does not authorize the imposition of sanctions for loss of information. The rule does not limit other sanctions based on conduct other than failure to preserve ESI. If prejudice does occur, the amended rule requires that a remedial sanction be implemented—one that is designed and limited to curing the prejudice. Most often, this would be an order precluding evidence or limiting claims or defenses affected by the missing ESI. If the missing ESI was intentionally destroyed or otherwise made unavailable, the rule allows the more drastic sanctions of imposition of a presumption or either allowing or requiring a jury either to draw an adverse inference that the information was unfavorable to the party or, in egregious situations, dismiss the action or grant a default judgment.

By its terms, this rule applies only to failure to produce ESI where there is a duty to preserve it. There is no reason, however, that the courts should not, in the exercise of their discretion, follow this rule where there is the failure to preserve other evidence, such as physical evidence or documents in non-electronic form.

RULE 56. SUMMARY JUDGMENT

~~**56.01. For Claimant**~~

~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the service of the summons, or after service of a motion for summary judgment by the adverse party,~~

~~move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.~~

56.01. Motion for Summary Judgment or Partial Summary Judgment

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record or in a written decision the reasons for granting or denying the motion.

~~**56.02. For Defending Party**~~

~~A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

56.02. Time to File a Motion

Service and filing of the motion must comply with the requirements of Rule 115.03 of the General Rules of Practice for the District Courts, provided that in no event shall the motion be served less than 14 days before the time fixed for the hearing. Unless the court orders otherwise, a party may not file a motion for summary judgment more than 30 days after the close of all discovery.

~~**56.03. Motion and Proceedings Thereon**~~

~~Service and filing of the motion shall comply with the requirements of Rule 115.03 of the General Rules of Practice for the District Courts, provided that in no event shall the motion be served less than ten days before the time fixed for the hearing. Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~

56.03. Procedures

(a) Supporting Factual Positions. A party asserting that there is no genuine issue as to any material fact must support the assertion by:

(1) citing to particular parts of materials in the record, including

depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(2) showing that the materials cited do not establish the absence or presence of a genuine issue for trial, or that an adverse party cannot produce admissible evidence to support the fact.

(b) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(d) Affidavits. An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.

~~**56.04. Case not Fully Adjudicated on Motion**~~

~~If, on motion pursuant to this rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.~~

56.04. When Facts Are Unavailable to the Nonmovant

If a nonmovant shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(a) defer considering the motion or deny it;

(b) allow time to obtain affidavits or to take discovery; or

(c) issue any other appropriate order.

~~**56.05. Form of Affidavits; Further Testimony; Defense Required**~~

~~Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of~~

~~all documents or parts thereof referred to in an affidavit shall be attached thereto or served therewith. A "sworn copy" includes documents that are authenticated by a signature under penalty of perjury, pursuant to Minn. Stat. § 358.116. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.~~

56.05. Failing to Properly Support or Address a Fact

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56.03, the court may:

(a) give an opportunity to properly support or address the fact;

(b) consider the fact undisputed for purposes of the motion;

(c) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(d) issue any other appropriate order.

~~**56.06. When Affidavits are Unavailable**~~

~~Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.~~

56.06. Judgment Independent of the Motion

After giving notice and a reasonable time to respond, the court may:

(a) grant summary judgment for a nonmovant;

(b) grant the motion on grounds not raised by a party; or

(c) consider summary judgment on its own initiative after identifying for the parties the material facts that may not be genuinely in dispute.

~~**56.07. Affidavits Made in Bad Faith**~~

~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party submitting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits~~

~~causes the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.~~

56.07. Failing to Grant All the Requested Relief

If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely at issue and treating the fact as established in the case.

56.08. Affidavit Submitted in Bad Faith

If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Advisory Committee Comment—2018 Amendments

Rule 56 is extensively revamped to improve its operation. These amendments closely follow the amendments to Rule 56 of the Federal Rules of Civil Procedure in 2010. They are not intended to change substantially practice under the rule, and very carefully preserve the familiar test of "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law" in Rule 56.01.

Rule 56.03(c) makes it clear that the court is not required to consider any matters beyond those filed in conjunction with the motion for summary judgment—filed by either the movant or any other parties. Rule 115.03(d) of the Minnesota General Rules of Practice sets forth specific requirements for what must be filed for summary judgment motions and responses. Rule 56.03 also retains, however, the traditional rule allowing the court to base either the grant or denial of summary judgment on any factual material contained in the record—this means the entire court file record, including all pleadings, other filings, and transcripts of arguments or hearings.

Rule 56.03(d) refers to "affidavits" as that term is defined for all proceedings by Rule 15 of the Minnesota General Rules of Practice. That rule encompasses both statements signed, sworn to, and notarized and statements signed under penalty of perjury in accordance with the rule.

Rule 56.06 carries forward the existing procedure allowing entry of judgment in favor of the movant or nonmovant, granting the motion on grounds other than those argued, or considering summary judgment on its own initiative. See, e.g., Del Hayes & Sons, Inc. v Mitchell, 304 Minn. 275, 230 N.W.2d 588 (1975) (sua sponte grant of summary judgment allowed). Where the court acts on its own initiative, the rule specifies that the parties are entitled to notice of its view about fact issues that may not be in dispute. That notice should precede any order for summary judgment by the 14-day minimum notice period specified in Rule 56.02.

RULE 63. DISABILITY OR DISQUALIFICATION OF JUDGE; NOTICE TO REMOVE; ASSIGNMENT OF A JUDGE

* * *

63.02 Interest or Bias

No judge shall sit in any case if ~~that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror~~ disqualified under the Code of Judicial Conduct. If there is no other judge of the district who is qualified, or if there is only one judge of the district, such judge shall forthwith notify the Chief Justice of the Minnesota Supreme Court of that judge's disqualification.

63.03 Notice to Remove

Any party or attorney may make and serve on the opposing party and file with the administrator a notice to remove. The notice shall be served and filed within ten days after the party receives notice of which judge or judicial officer is to preside at the trial or hearing, but not later than the commencement of the trial or hearing.

No such notice may be filed by a party or party's attorney against a judge or judicial officer who has presided at a motion or any other proceeding of which the party had notice, or who is assigned by the Chief Justice of the Minnesota Supreme Court. A judge or judicial officer who has presided at a motion or other proceeding or who is assigned by the Chief Justice of the Minnesota Supreme Court may not be removed except upon an affirmative showing ~~of prejudice on the part of~~ that the judge or judicial officer is disqualified under the Code of Judicial Conduct.

After a party has once disqualified a presiding judge or judicial officer as a matter of right, that party may disqualify the substitute judge or judicial officer, but only by making an affirmative showing ~~of prejudice. A showing that the judge or judicial officer might be excluded for bias from acting as a juror in the matter constitutes an affirmative showing of prejudice~~ that the judge or judicial officer is disqualified under the Code of Judicial Conduct.

Upon the filing of a notice to remove or if a litigant makes an affirmative showing ~~of prejudice against~~ that a substitute judge or judicial officer is disqualified under the Code of Judicial Conduct, the chief judge of the judicial district shall assign any other judge of any court within the district, or a judicial officer in the case of a substitute judicial officer, to hear the cause.

Advisory Committee Comment—2018 Amendments

Rule 63 is amended to apply the disqualification standard of the Minnesota Code of Judicial Conduct to disqualification under the civil rules. The standard in the existing rule—whether the judicial officer would be excused from service as a juror and tying that determination to an affirmative showing of prejudice—does not accurately state the correct standard. Rule 26.03, subd. 14(3) of the Minnesota Rules of Criminal Procedure uses the Code of Judicial Conduct standard, and the Minnesota Supreme Court has applied the Code of Judicial Conduct for deciding questions of disqualification of judges on the Minnesota Court of Appeals. See Powell v. Anderson, 660 N.W.2d 107, 114–15 (Minn. 2003). The juror-based standard dates back to Minnesota's Territorial days. See Minn. Rev. Stat. 1851, ch. 69, art. 2, § 5. The standard has not been modified in the civil rules

since, including upon the adoption of the Code of Judicial Conduct by the Minnesota Supreme Court in 1974.

This amended rule adopts a standard for disqualification or recusal of a judge that is clearer and readily accessible to judges and litigants. Although close questions of disqualification may properly be resolved in favor of disqualification, the Code of Judicial Conduct also recognizes that a judicial officer has an affirmative duty to hear matters properly assigned where disqualification is not required by the Code. See Rule 2.7 of the Code of Judicial Conduct.

RULE 67. DEPOSIT IN COURT

* * *

67.04. Money Paid into Court

Where money is paid into the court pending the result of any legal proceedings, the judge may order it deposited in a ~~designated state or national bank~~ account maintained by the court administrator. ~~or savings bank. In the absence of such order, the court administrator is the official custodian of all moneys, and the judge, on application of any person paying such money into court, may require the court administrator to give an additional bond, conditioned as the bond authorized in Minnesota Statutes, section 485.01, in such amount as the judge shall order.~~

Advisory Committee Comment—2018 Amendments

Rule 67.04 is amended to reflect the abrogation of the statutory bond requirement for court administrators found in the prior version of the rule. See 2006 Minn. Laws, ch. 260, art 5, § 40. Because of that legislative change, the rule is amended to allow deposit in court by order of the court. The court can determine the appropriate terms for that deposit. As a practical matter, an order is necessary to authorize the administrator to accept the funds and to provide for release of the funds upon further order.

APPENDIX OF FORMS

~~FORM 22 NOTICE AND ACKNOWLEDGMENT OF SERVICE BY MAIL~~

~~NOTICE~~

~~TO: (insert the name and address of the person to be served.)~~

~~The enclosed summons and complaint are served pursuant to Rule 4.05 of the Minnesota Rules of Civil Procedure.~~

~~You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.~~

~~Signing this Acknowledgment of Receipt is only an admission that you have received the summons and complaint, and does not waive any other defenses.~~

~~You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.~~

~~If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.~~

~~If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.~~

~~I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint was mailed on (insert date).~~

_____

~~Signature~~

_____

~~Date of Signature~~

~~ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT~~

~~I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).~~

_____

~~Signature~~

_____

~~Relationship to Entity/Authority to Receive Service of Process~~

_____

~~Date of Signature~~

Forms 22A and 22B

(Note: Forms 22A and 22B are new, but underscoring to indicate additions in these forms is omitted to improve readability)

FORM 22A. NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS

TO: (insert the name and address of the person to be served.)

Why Are You Getting this?

A copy of a Summons and Complaint is attached to this notice. This is not formal service of the summons on you, but rather is my request that you sign and return the enclosed waiver of service in order to avoid the cost of serving you. The cost of service will be avoided if I receive a signed copy of the waiver within __ days after the date designated below as the date on which this Notice and Request is sent.

I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records. If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is signed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is outside the United States).

What Happens Next?

If you do not return the signed waiver form within the time indicated, I will arrange to have the summons and complaint served on you (or the party on whose behalf you are addressed) and will then, to the extent authorized by court rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. Your duty to waive the service of the summons is explained on the reverse side (or at the foot) of this waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this ___ day of _____, 20___.

_____

Signature

FORM 22B. WAIVER OF SERVICE OF SUMMONS

TO: _____ (name of plaintiff's attorney or unrepresented plaintiff)

I received your request that I waive service of a summons in the lawsuit of ____(caption of action)____, in the District Court for the ____ District of Minnesota, _____ County. I have also received a copy of the complaint in the lawsuit, two copies of this document, and a means for returning the signed waiver to you without cost to me. I agree to save the cost of service of the summons and complaint in this lawsuit.

I understand that I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons. I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after ___ (date request was sent) ____, or within 90 days after that date if the request was sent outside the United States.

_____

Date

_____

Signature

_____

Printed/typed name:

[Note: To be printed on reverse side of the waiver form or set forth at the foot of the form]:

DUTY TO AVOID UNNECESSARY COSTS OF SERVICE OF SUMMONS

Rule 4 of the Minnesota Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver. It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property.

A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought. A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

MINNESOTA GENERAL RULES OF PRACTICE

PART C. MOTIONS

* * *

Rule 115.01. Scope and Application

This rule shall govern all civil motions, except those in family court matters governed by Minn. Gen. R. Prac. 301 through 379 and in commitment proceedings subject to the Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act.

(a) Definitions. Motions are either dispositive or nondispositive, and are defined as follows:

(1) Dispositive motions are motions which seek to dispose of all or part of the claims or parties, except motions for default judgment. They include motions to dismiss a party or claim, motions for summary judgment and motions under Minn. R. Civ. P. 12.02(a)-(f).

(2) Nondispositive motions are all other motions, including but not limited to discovery, third party practice, temporary relief, intervention or amendment of pleadings.

(b) Time. The time limits in this rule are to provide the court adequate opportunity to prepare for and promptly rule on matters, and the court may modify the time limits, provided, however, that in no event shall the time limited be less than the time established by Minn. R. Civ. P. ~~56.03~~ 56.02. Whenever this rule requires documents to be filed with the court administrator within a prescribed period of time before a specific event, and the documents are not required to be filed electronically, filing may be accomplished by mail, subject to the following: (1) 3 days shall be added to the prescribed period; and (2) filing shall not be considered timely unless the documents are deposited in the mail within the prescribed period. If service of documents on parties or counsel by mail is permitted, it is subject to the provisions of Minn. R. Civ. P. 5.02 and 6.05.

* * *