C6-84-2134

MINNESOTA SUPREME COURT

ADVISORY COMMITTEE ON CIVIL PROCEDURE

Report to Minnesota Supreme Court

September 14, 1984

RULE 3. COMMENCEMENT OF THE ACTION; SERVICE OF THE COMPLAINT.

Rule 3.01. Commencement of the Action.

A civil action is commenced against each defendant:

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

(b) at the date of acknowledgment of service if service is made by mail, or

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

Rule 3.02. Service of Complaint. [No Change]

Notes of Advisory Committee

The Rules have permitted service by any non-minor, non-party for a substantial period of time. The changes recommended to Minn. R. Civ. P. 4.02 underscore and clarify the availability of service by any individual.

The most common method for commencing an action is by service of the summons and complaint upon a defendant. A different commencement time may apply to individual defendants based upon the times upon which the summons and complaint are actually served. An alternative method for commencing an action contained in the rule provides that an action may be commenced upon delivery of the summons and complaint to a sheriff in the county where the defendant resides for service. One change to Rule 3.a is intended to clarify who is a "proper officer" for service. The Committee felt this language should be clarified to remove ambiguity or uncertainty. Commencement by delivery to the sheriff is effective only, however, if service is actually made within 60

days thereafter. The amendment to the rule is intended to make it clear that delivery to a private process server is not effective to commence an action on the date of delivery even though service is actually made within 60 days thereafter. In such a case, service will be effective, but the action will be deemed commenced as of the date service is actually made. Similarly, delivery of the summons to the Postal Service for service by mail does not commence an action. The action is commenced by mail when the defendant acknowledges service. If no acknowledgement is signed and returned, the action is not commenced until service is effected by some other authorized means.

RULE 4. PROCESS.

Rule 4.01. Summons; Form. [No Change]

Rule 4.02. By Whom Served.

~~The sheriff of the county in which the defendant is found may make service of summons and other process, and fees and mileage shall be allowed therefor.~~

Unless otherwise ordered by the court, the sheriff or [A]any other person not less than 18 years of age and not a party to the action, may make service of a summons or other process.

Rule 4.03. Personal Service. [No Change]

Rule 4.04. Service by Publications; Personal Service out of State.

The summons may be served by three weeks' published notice in any of the cases enumerated hereafter when there shall have been filed with the court the complaint and an affidavit of the plaintiff or his attorney stating the existence of one of the following cases, and that he believes the defendant is not a resident of the state, or cannot be found therein, and either that he has mailed a copy of the summons to the defendant at his place of residence or that such residence is not known to him. The service of the summons shall be deemed complete 21 days after the first publication. Personal service of such summons without the state, proved by the affidavit of the person making the same sworn to before a person authorized to administer an oath, shall have the same effect as the published notice herein provided for.

Such service shall be sufficient to confer jurisdiction:

(1) When the defendant is a resident individual domiciliary having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with the like intent;

(2) When the plaintiff has acquired a lien upon property or credits within the state by attachment or garnishment, and

(a) The defendant is a resident individual who has departed from the state, or cannot be found therein, or

(b) The defendant is a nonresident individual, or a foreign corporation, partnership or association;

When quasi in rem jurisdiction has been obtained, a party defending such action thereby submits personally to the jurisdiction of the court. An appearance solely to contest the validity of such quasi in rem jurisdiction is not such a submission.

(3) When the action is for ~~divorce~~ marriage dissolution or separate maintenance and the court shall have ordered that service be made by published notice.

(4) When the subject of the action is real or personal property within the state in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding him from any such interest or lien;

(5) When the action is to foreclose a mortgage or to enforce a lien on real estate within the state.

Rule 4.041. Additional Information to be Published. [No Change]

Rule 4.042. Service of the Complaint. [No Change]

Rule 4.043. Service by Publication; Defendant May Defend; Restitution.

If the summons be served by publication, and the defendant receives no actual notification of the action, he shall be permitted to defend upon application to the court before judgment and for sufficient cause; and, except in an action for ~~divorce~~ marriage dissolution, the defendant, in like manner, may be permitted to defend at any time within one year after judgment, on such terms as may be just. If the defense be sustained, and any part of the judgment has been enforced, such restitution shall be made as the court may direct.

Rule 4.044. Nonresident Owner of Land Appointing an Agent. [No Change]

~~**Rule 4.05. Process other than Summons and Subpoena; Service Of.**~~

~~Process other than Summons and Subpoena shall be served as directed by the Court issuing the same.~~

Rule 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 acknowledgement conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender. If acknowledgement 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 acknowledgement of receipt of summons within the time allowed by these rules.

Rule 4.06. Return.

Service of summons and other process shall be proved by the certificate of the sheriff making it, by the affidavit of any other person making it, by the written admission or acknowledgement of the party served, or if served by publication, by the affidavit of the printer or his foreman or clerk. The proof of service in all cases other than by published notice shall state the time, place, and manner of service. Failure to make proof of service shall not affect the validity of the service.

Rule 4.07. Amendments. [No Change]

Notes of Advisory Committee

Rule 4.02.

The language of the first paragraph of the existing rule 4.02 was deleted because it is no longer necessary. Under current Minnesota law, a prevailing party may recover the cost of service of process, whether by sheriff or private process server as costs and disbursements. See Minn. Stat. § 549.04 (Supp. 1983).

The changes to the second paragraph are intended to clarify the language of the rule and incorporate provisions for service of process other than summonses and subpoenas presently contained in Rule 4.05. Under the rule any person who is not a party to the action and is 18 years of age or over may serve a summons or other process. Service of subpoenas is governed by Rule 45.03, and the changes in Rule 4.02 are intended to be make the two rules consistent. The rule provides that the court may direct service of any

process by any means it deems appropriate. As a practical matter, courts will rarely have occasion to direct a specific means of service of process.

Rule 4.043 and Rule 4.044.

The only change in these rules is to substitute "marriage dissolution" for "divorce" in order to conform the language of the rule to that of the statute governing such actions. See Minn. Stat. § 518.002 (1982).

Rule 4.05.

Existing Rule 4.05 is deleted in its entirety because it is now covered by Rule 4.02. The Committee also determined it is unnecessary to place an apparent burden on the Court to direct service of all process other than summonses and subpoenas. See Minn. R. Civ. P. 4.02, Notes of Advisory Committee—1984 amendment.

The Committee considered various alternatives permitting service by mail, including two amendments to the Federal Rules of Civil Procedure which were adopted in 1983. The United States Supreme Court first amended Fed. R. Civ. P. 4 to authorize service by mail. See Fed. R. Civ. P. 4(c)(2)(C)(ii). Congress then adopted a further amendment which superseded the Supreme Court's action. See P.L. #97462 [H.R. 7154] [96 Stat. 2527]. Under the present federal rule, service may be effected by mail. The Minnesota Supreme Court has also recognized the effectiveness of service by mail under the Minnesota Long-Arm Statute, Minn. Stat. § 549.21 (1980). The Minnesota Supreme Court in Stonewall Insurance Co. v. Horak, 325 N.W.2d 134 (Minn. 1982), recognized that actual receipt of the summons and complaint by mail, evidenced by a certified mail receipt signed by the individual defendant, constituted delivery under Minn. R. Civ. P. 4.03(a) and the statute. This rule does not modify the holding in Stonewall.

The change in Minn. R. Civ. P. 4.05 permitting service by mail adopts the essential provisions of Fed. R. Civ. P. 4. The rule authorizes use of the mails to deliver the summons and complaint to a defendant within or without the state, and makes service effective if the defendant acknowledges receipt of the summons and complaint. The Committee recommends that a new form (Form 22) be adopted to provide notice of the effect of the service by mail upon the defendants served. The form advises the defendant that by signing the acknowledgment of receipt the defendant admits only actual receipt of the summons and complaint and that signing does not constitute an appearance or a submission to the jurisdiction of the court and does not waive any other defenses. If an acknowledgement is not signed and returned, the plaintiff may then serve the summons and complaint by any other means authorized by the rules or by statute. There is no restriction on the means of service that may be used following unsuccessful service by mail. The Minnesota rule differs from the federal rule. See Federal Deposit Insurance Co. v. Sims, 100 F.R.D. 792 (N.D. Ala. 1984) (attempted mail service prevents service by publication under federal rule).

The rule retains the provision of its federal counterpart shifting the cost of personal service to a defendant who declines to acknowledge receipt of the summons and complaint by mail. The Committee believes this provision is an essential part of the system for service by mail, and is necessary to discourage defendants from unjustifiedly refusing to acknowledge receipt. Eden Foods, Inc. v. Eden's Own Products, Inc., 101 F.R.D. 96 (E.D. Mich. 1984).

Rule 4.06.

The change in this rule is intended to reflect that an acknowledgment of receipt, as permitted by Rule 4.05 and as contained in Form 22, constitutes adequate proof of service.

RULE 5. SERVICE AND FILES OF PLEADINGS AND OTHER PAPERS.

* * *

Rule 5.04. Filing.

~~(1) All pleadings, affidavits, bonds, and other papers in an action shall be filed with the clerk, unless otherwise provided by statute or by order of the court.~~

~~(2) All pleadings shall be so filed on or before the second day of the term at which the action is noticed for trial, otherwise the court may continue the action or strike it from the calendar.~~

~~(3) All affidavits, notices and other papers designed to be used in any cause shall be filed prior to the hearing of the cause unless otherwise directed by the court.~~

Upon the filing of any paper with the court, all papers required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter; but unless filing is ordered by the court on motion of a party or upon its own motion, depositions, interrogatories, requests to admit, and requests for production and answers and responses thereto, shall not be filed.

Notes of Advisory Committee

Rule 5.04 is revised in its entirety to create a uniform requirement for the filing of documents. Essentially, the rule requires all papers which were served upon other parties to be filed with the Court. The Committee rejected any fixed deadlines for the filing of such papers, and rather, determined simply that the papers should be filed within a reasonable period of time. The rule creates a single exception for discovery requests and responses. Filing of depositions, interrogatories, requests for admissions, and requests for production of documents, and any answers or responses to those requests, is not required

and is specifically proscribed unless ordered by the Court. The purpose of this change is to reduce the burden of processing and storing documents which are rarely required by the court. The change also protects the important privacy interests of litigants. See Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984) (en banc).

If it is necessary to bring the court's attention to materials contained in such documents a party may incorporate relevant portions of any discovery requests or responses in a brief, affidavit, or motion, or attach copies thereof, or may request an order permitting the filing of a selected document, or directing the filing of all discovery documents.

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

Rule 7.01. Pleadings. [No Change]

Rule 7.02. Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set for the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. Motions provided in these rules are motions requiring a written notice to the party and a hearing before the order can be issued unless the particular rule under which the motion is made specifically provides that the motion may be made ex parte. The parties may agree to written submission to the court for decision without oral argument unelss the court directs otherwise. The court may hear any motion by telephone conference upon the request of a party or upon the court's initiative.

(2) The rules applicable for captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions will be signed in accordance with Rule 11.

Notes of Advisory Committee

Rule 7.02(1) is amended to make it clear that the court can properly conduct motion hearings by telephone conference call. The use of telephone conference calls for hearings, in appropriate cases, is intended to facilitate prompt and inexpensive hearings on motions submitted to the courts.

This rule is also changed by the addition of a third subdivision reflecting the change in Rule 11 which requires motions to be signed after reasonable inquiry. This change reflects an identical change made in Fed. R. Civ. P. 7 by the 1983 amendment.

RULE 8. GENERAL RULES OF PLEADING

Rule 8.01. Claims for Relief

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled, and if a recovery of money be demanded the amount shall be stated. Relief in the alternative or of several different types may be demanded. If a recovery of money for unliquidated damages is demanded in an amount less than $50,000, the amount shall be stated. If a recovery of money for unliquidated damages in an amount greater than $50,000 is demanded, the pleading shall state merely that recovery of reasonable damages in an amount greater than $50,000 is sought.

Rule 8.02. Defenses; Form of Denials [no change]

Rule 8.03. Affirmative Defenses [no change]

Rule 8.04. Effect of Failure to Deny [no change]

Rule 8.05. Pleading to be Concise and Direct; Consistency [no change]

Rule 8.06 Construction of Pleadings [no change]

Notes of Advisory Committee

This change is made to conform the language of the rule to the limitations of Minn. Stat. § 544.36 (1982) which was adopted in 1978.

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

Every pleading, motion and other paper of a party represented by an attorney shall be personally signed by at least one attorney of record in his individual name and shall state his address. A party who is not represented by an attorney shall personally sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief ~~there is good ground to support it~~ formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. ~~or is signed with intent to defeat the purpose of this rule, it may be stricken, as provided in Rule 12.06, as sham and false and the action may proceed as though the pleading had not been served. An attorney may be subjected to appropriate disciplinary action for a willful violation of this rule or for the insertion of scandalous or indecent matter in a pleading.~~ If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Notes of Advisory Committee

The changes in this rule follow the changes made in Fed. R. Civ. P. 11 by the 1983 amendments. First, it is now clear that the certification requirements of the rule apply to motions and other papers in addition to pleadings. This change is also found in the language of new Rule 26.07 relating to the signing of discovery requests, responses, and objections. Second, an attorney or party is required to make reasonable inquiry in order to determine the soundness of the position being advanced. Third, sanctions may be imposed for improper certification of a pleading or motion. The rule in the past permitted the offending document to be stricken under Minn. R. Civ. P. 12.06, and subjected the attorney to disciplinary action. The proposed rule permits a pleading or motion to be stricken, but affords the pleader or movant the opportunity to sign the pleading if it has not been signed. If the pleading or motion is signed in violation of the rule, the Court is authorized and encouraged to impose sanctions against the party or attorney. Rule 11 was seldom used as a basis for a discipline. The rule provides clear authority to impose sanctions for misconduct. The new rule focuses on the Court's interest in preserving the integrity of the litigation process and preventing abuse. The rule permits sanctions to be imposed against either a party or the attorney, or both, and awards damages that are essentially compensatory in nature.

Although compensatory in purpose, the imposition of costs should also deter violations of the rule. Sanctions under Rule 11 may be substantial, even though limited to compensation for unnecessary expenses incurred by opponents. See, e.g., Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1983); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984). The court may order that a penalty imposed against an attorney is actually borne by the attorney, and not shifted to the client.

RULE 16. ~~PRETRIAL PROCEDURE: FORMULATING ISSUE~~ PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT.

Rule 16.01. Pretrial Conferences; Objectives.

In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference ~~to consider~~ or conferences before trial for such purposes as

~~(1) The simplification of the issues;~~

~~(2) The necessity or desirability of amendments to the pleadings;~~

~~(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;~~

~~(4) The limitation of the number of expert witnesses;~~

~~(5) The advisability of a preliminary reference of issues to a referee;~~

~~(6) Such other matters as may aid in the disposition of the action.~~

~~The court shall~~ make an ~~order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either combine the calendar to jury actions or to non-jury actions or extend it to all actions.~~

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

Rule 16.02. Scheduling and Planning.

The court may, and upon written request of any party with notice to all parties, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(a) to join other parties and to amend the pleadings;

(b) to file and hear motions; and

(c) to complete discovery.

The scheduling order also may include

(d) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(e) any other matters appropriate in the circumstances of the case.

A schedule shall not be modified except by leave of court upon a showing of good cause.

Rule 16.03. Subjects to be Discussed at Pretrial Conferences.

The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters ~~to~~ a under Rule 53;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

Rule 16.04. Final Pretrial Conference.

Any final pretrial conference may be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference

shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

Rule 16.05. Pretrial Orders.

After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order.

The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Rule 16.06. Sanctions.

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37.02(2)(b), (c), (d). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Notes of Advisory Committee

Rule 16.

The Committee has recommended a complete revision of Rule 16. The changes adopt the important features of the 1983 amendments to Fed. R. Civ. P. 16, with certain

modifications reflecting unique features of Minnesota practice. The most important difference between State and Federal Rules is the retention of the voluntary nature of pre-trial conferences under the Minnesota Rule. The Committee considered, and rejected, the notion that the rule should require pre-trial and scheduling conferences in every case. Although the Committee believes pre-trial conferences and scheduling conferences will be of great value in many cases, it is not satisfied that their use should be compelled in every case.

Rule 16.01.

Subdivision 5 of this rule reflects one of the important purposes of pre-trial conference, providing a constructive vehicle for exploring settlement of the case.

Rule 16.02.

The Committee determined that scheduling conferences should be made optional, although it concluded they would be of value in many cases.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Rule 26.01. Discovery Methods.

Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property; for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission. ~~Unless the Court orders otherwise under subdivision 26.03 of this Rule, and except as provided in Rule 33.01, the frequency of use of these methods is not limited.~~

Rule 26.02. ~~Scope of Discovery~~ Discovery, Scope and Limits.

Unless otherwise limited by order of the Court in accordance with these Rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party, seeking discovery or to the claim or defense of any other 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. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in Rule 26.01 shall be limited by the court if it determines that: (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is either more convenient, less burdensome, or less expensive; (b) the party seeking

discovery has had ample opportunity by discovery in the action to obtain the information sought; or (c) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

(2) **Insurance Agreements** [No Change]

(3) **Trial Preparation Methods and Materials** [No Change]

(4) **Trial Preparation: Experts** [No Change]

Rule 26.03. Protective Orders [No Change]

Rule 26.04. Sequence and Timing of Discovery [No Change]

Rule 26.05. Supplementation of Responses [No Change]

Rule 26.06. Discovery Conference

At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(a) A statement of the issues as they then appear;

(b) A proposed plan and schedule of discovery;

(c) Any limitations proposed to be placed on discovery;

(d) Any other proposed orders with respect to discovery; and

(e) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matter set

forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for a party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after the service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

Rule 26.07. Signing of Discovery Requests, Responses and Objections.

In addition to the requirements of Rule 33.01(4), every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party who constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the rquest, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Notes of Advisory Committee

Most of the changes made in Rule 26 were made to adopt changes which were made in the Federal Rules of Civil Procedure in 1982 and 1983, with appropriate adaptation to Minnesota practice.

Rule 26.01.

The last sentence of the existing rule is deleted to remove any impression of approval of unlimited use of discovery. The recommended addition to Rule 26.02(1) specifically permits the court to limit either frequency or extent of use of any discovery procedure, and the language of existing Rule 26.01 is inconsistent with the new language.

The change does not specifically limit the use of discovery, but makes it clear that the court is empowered — and encouraged — to limit discovery when appropriate

Rule 26.02.

The recommended change to Rule 26.02 mirrors a change to Federal Rule 26(d). That change is intended to provide the court specific authority to manage discovery in order to prevent abusive discovery practices. This approach was considered, both by the federal committee and this Committee, to be superior to arbitrary limitations on the scope of discovery. The Committee determined that limitations on the amount or extent of discovery will be useful in certain cases, and should not be imposed in other cases. The courts are given specific guidelines relating to the exercise of their discretion. Courts are encouraged to require the parties to use discovery devices well-suited to their legitimate needs and consistent with Rule 1. The use of mandatory language is intended. The committee intends that the rule be a useful tool to curtail discovery abuse, and cannot foresee a circumstance in which a court should decline to limit discovery if it makes the determination that subdivisions (a), (b), or (c) would exist. The rule grants additional authority for entry of an order preventing duplicative discovery. The rule permits the entry of an order prospectively limiting the amount and type of discovery which may be used. Such a prospective order may be entered even before discovery is sought. The Committee anticipates that Rule 26.02(1), as amended, will be of value in controlling "runaway" discovery in smaller cases. The Committee believes that the over-discovery in small cases is a significant problem, and encourages the use of this rule by attorneys and judges to provide reasonable limitations on discovery. Other jurisdictions have considered specific, pre-determined limits on the availability of discovery in "small" cases. See generally R. Haydock & D. Herr, Discovery Practice § 12.6.1, at 521-22 (1982).

The Committee has recommended rules which will give the trial courts power to control discovery abuse. It is important for trial judges to be aggressive in curtailing unnecessary discovery. See Renfrew, Discovery Sanctions: A Judicial Perspective, 2 Rev. Litigation 71 (1981); Schwarzer, Managing Litigation: The Trial Judge's Role, 61 Judicature 400 (1978).

Rule 26.06.

Rule 26.06 adopts in Minnesota the discovery conference as a tool to manage discovery. This procedure was established in the Federal Rules of Civil Procedure by the 1983 amendment. See Fed. R. Civ. P. 26(f). The discovery conference is optional. The court may, however, require the parties to attend one upon its own motion. Additionally, any party may request a discovery conference under this rule, and, if one is properly requested, the court is required to hold a conference. The Committee anticipates that discovery conferences will be the exception, rather than the rule, in Minnesota practice. A discovery conference may also be held as part of a pretrial conference under Minn. Rule 16.01, or a scheduling conference held under Minn. Rule 16.02. In cases involving complex issues, multiple parties, or other factors which make the litigation complex or complicated, discovery conferences should be used in order to ease the burdens of litigation upon the parties, their attorneys, and the judicial system.

Rule 26.07.

Rule 26.07 is entirely new. The rule adopts the 1982 amendment to the Federal Rules, particularly Rule 26(g), verbatim. Discovery requests and responses are subject to the certification requirements of Rule 11. All discovery requests and responses must be signed by an attorney if a party is represented by an attorney. This requirement is in

addition to Rule 33.01(4)'s requirement that interrogatory answers be signed under oath by the party. The purpose of the rule is to discourage parties from engaging in unjustifiable discovery conduct, including making frivolous or unnecessary discovery requests, making deceptive or non-responsive answers to discovery requests, and interposing ill-founded and groundless objections to discovery.

The Committee believes the discovery practices of most Minnesota attorneys presently comply with the spirit and purpose of the rule. The Committee considers the change appropriate, however, to discourage those attorneys who abuse discovery, thereby increasing the cost of litigation and imposing an unnecessary burden on the court system.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.

* * *

Rule 30.06. ~~Certification and Filing by Officer; Copies;~~ Notice of ~~Filing~~ Certification; Copies.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court or agreed to by the parties, ~~he~~ the officer shall ~~then place~~ securely sealed the deposition in an envelope endorsed with the title of the action and marked "Deposition of (herein insert the name of witness)," and shall promptly ~~file it with the clerk of the court in which the action is pending, or send it by registered or certified mail to the clerk thereof for filing.~~ send it to the party taking the deposition, who shall be identified on the record.

Documents and things produced by inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (a) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (b) offers the originals to be marked for identification after giving each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the ~~court~~ person taking the deposition, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its ~~filing~~ receipt from the officer to all other parties.

Notes of Advisory Committee

The change to Rule 30.06 is made in conjunction with the recommended changes to Rule 5. Because Rule 5 does not require deposition transcripts routinely to be filed, Rule 30 should be amended to remove the requirement that the court reporter file the transcripts.

The Committee also considered the question of whether the court reporter or the attorneys for the parties are more suitable custodians of the deposition transcripts. The Committee determined that it is more efficient and convenient for the attorney or party taking the deposition to have custody of the original transcripts. The rule continues to require that the court reporter seal the deposition in an envelope with the title of the action on the outside. This requirement will become especially important as attorneys retain custody of the original transcripts. In order to avoid any uncertainty about the retention of the original transcript, the rule requires that the person to whom the deposition is sent should be identified on the record.

Because the rule is changed to delete the requirement for filing, the requirement of Rule 30.06(3) is changed to make it unnecessary for notice of filing to be given. Notice of receipt of the transcripts by the party taking the deposition is required, although that notice may be waived by stipulation.

RULE 31. DEPOSITIONS OF WITNESSES UPON WRITTEN QUESTIONS.

* * *

Rule 31.02. Officers to Take Responses and Prepare Record.

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rules 30.03, 30.05, and 30.06, to take the testimony of the witness in response to the questions and to prepare, certify, and ~~file or mail the deposition, attaching thereto a copy of the notice and the questions received by him.~~ return them to the party taking the deposition. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

Rule 31.03. Notice of Filing.

When the deposition is ~~filed~~ received from the officer, the party taking it shall promptly give notice thereof to all other parties.

Notes of Advisory Committee

Rule 31.02.

The changes in Rule 31.02 are designed to implement for depositions of witnesses upon written questions the same changes made in the procedure for handling depositions on oral examination. See proposed changes to Minn. R. Civ. P. 30.06.

RULE 38. JURY TRIAL OF RIGHT

Rule 38.01. Right Preserved

In actions for the recovery of money only, or of specific real or personal property, ~~or for a divorce on the ground of adultery,~~ the issues of fact shall be tried by a jury, unless a jury trial be waived or a reference be ordered.

Rule 38.02. Waiver [no change]

Rule 38.03. Placing Action on Calendar [no change]

Notes of Advisory Committee

This change is made to conform the language of the rule to the statute governing marriage dissolution actions and establishing the grounds for marriage dissolution. See Minn. Stat. § 518.002 et seq. (1982).

RULE 43. EVIDENCE.

Rule 43.01. Form and Admissibility

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of this state, or under the Minnesota rRules of eEvidence. ~~heretofore applied in the trials of actions in the courts of this state.~~ In any case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

Rule 43.02. Examination of Hostile Witnesses and Adverse Parties.

A party may interrogate an unwilling or hostile witness by leading questions. A party may call an adverse party or ~~his managing agent or employee or an officer, director, managing agent or employee of the state or any political subdivision thereof or of a public or private corporation or of a partnership or association or body politic which is an adverse party,~~ a witness identified with an adverse party, and interrogate him by leading questions and contradict and impeach him on material matters in all respects as if he had been called by the adverse party. Where the witness is an adverse party he may be examined by his counsel upon the subject matter of his examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted and impeached by any other party adversely affected by his testimony. Where the witness is ~~an officer, director, managing agent, or employee of~~ a witness identified with ~~the~~ an

adverse party he may be cross-examined, contradicted and impeached by any party to the action

Rule 43.03. Record of Excluded Evidence [no change]

Rule 43.04. Affirmation in Lieu of Oath [no change]

Rule 43.05. Evidence and Motions [no change]

Rule 43.06. Res Ipsa Loquitur [no change]

Rule 43.07. Interpreters [no change]

Notes of Advisory Committee

Rule 43.01.

This rule is changed to conform the Rules of Civil Procedure to practice under the Minnesota Rules of Evidence, adopted in 1977 and which govern proceedings in the courts of the State. See Minn. R. Evid. 101 & 1101(a).

Rule 43.02.

This amendment is made to conform the language of the Rules of Civil Procedure to the language of the Minnesota Rules of Evidence. See Minn. R. Evid. 611(c). Cross-examination is now permitted of any person "identified with an adverse party." This change has expanded the scope of cross-examination under the rules. See Minn. R. Evid.

611(c), Advisory Committee Comment; 11 P. Thompson, Minnesota Practice, Evidence § 611.03, at 262-63 (1979).

RULE 45. SUBPOENA

Rule 45.01. For Attendance of Witnesses; Form; Issuance.

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence or tangible things, signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service.

(2) Subpoenas shall be issued only in connection with a duly noted deposition as set forth in Rule 45.04 or in connection with a hearing or trial as set forth in Rule 45.05. Violation of this provision constitutes an abuse of process, and shall subject the attorney or party to appropriate sanctions or damages.

(3) Every subpoena shall contain a notice to the person to whom it is directed advising that person of his right to reimbursement for certain expenses under Rule 45.06, and his right to have the amount of those expenses determined prior to compliance with the subpoena.

Rule 45.02. For Production of Documentary Evidence. [No Change]

Rule 45.03. Service. [No Change]

Rule 45.04. Subpoena for Taking Depositions; Place of Examination. [No Change]

Rule 45.05. Subpoena for a Hearing or Trial.

Rule 45.06. Expenses of Non-Parties.

Subject to the provision of Rules 26.02 and 26.03, a witness who is not a party to the action or an employee of a party [except a person appointed pursuant to Rule 30.02(6)] and who is required to give testimony or produce documents relating to a profession, business or trade, or relating to knowledge, information or facts obtained as a result of his activities in such profession, business or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.

The party serving the subpoena shall make arrangements for such reasonable compensation prior to the time of the taking of such testimony. If such reasonable arrangements are not made the person subpoenaed may proceed under Rule 45.02 or 45.04(2). The party serving the subpoena may, if objection has been made, move upon notice to the deponent and all parties for an order directing the amount of such compensation at any time before the taking of the deposition. Any amounts paid shall be subject to the provisions of Rule 54.04.

Rule ~~45.06~~.07. Contempt.

Failure to obey a subpoena without adequate excuse is a contempt of court.

Notes of Advisory Committee

Rule 45.01(2).

This change makes clear the limits of proper use of subpoenas by attorneys. The Committee is aware of instances in which an attorney obtains a subpoena and then uses it for ex parte discovery or investigation. Such use of the subpoena has never been proper under the rules, and is an abuse which is prevalent enough to require specific attention.

The rule makes it clear that use of a subpoena to compel the attendance of a non-party is appropriate only in conjunction with a properly noticed deposition or hearing. If the deposition is not properly scheduled, with proper notice to all parties to the action, the attorney has abused the subpoena power.

The recommended rule does not create any new remedies, but subjects the attorney to damages for abuse of process as well as sanctions under the rules. For example, involuntary dismissal under Minn. R. Civ. P. 41.02(1) might in some cases be appropriate for this violation.

Rule 45.01(3) and Rule 45.06.

These changes are intended to clarify and enlarge the rights of non-parties to litigation. The Committee has attempted to balance the legitimate interests of litigants in obtaining information and testimony from non-parties against the general principle that non-parties should not be required to bear the burdens of litigation in which they have no personal interest. The rights of such non-parties have been considered by the federal courts in determining whether to enforce subpoenas under Fed. R. Civ. P. 45. See, e.g., Florida v. Kerr-McGee Corp. (In re Coordinated Pretrial Proceedings in Petroleum Prods. Anti-trust Litigation), 669 F.2d 620 (10th Cir. 1982); United States v. Columbia Broadcasting System, 666 F.2d 364 (9th Cir.), cert. denied, 457 U.S. 1118 (1982).

The new Rule 45.06 would mandate reimbursement to non-parties who are required to spend inordinate amounts of time or incur other unusual expenses in preparing for and complying with a subpoena. The rule does not necessarily require the reimbursement of nominal expenses. The rule is intended to prevent a party from obtaining expert testimony or opinions through use of the subpoena power without special compensation. The Committee concluded that non-parties should not be drawn into litigation

involuntarily and without compensation merely because they may have some expertise useful to one or more of the parties. See, e.g., Buchanan v. American Motors Corp., 697 F.2d 151 (6th Cir. 1983); Andrews v. Ely Lilly & Co., 36 Fed. R. Serv. 2d 397 (N.D. Ill. 1983). At a minimum, such non-parties are entitled to reasonable compensation for their efforts. This recommended rule is not intended to limit the court's authority under Rule 26.03 to enter any appropriate protective order, including a protective order that the discovery requested not be had.

The Committee recommends a procedure requiring the resolution of the question of compensation prior to compliance with the subpoena. In one decision, the court ordered the party issuing the subpoena to pay the substantial expenses after compliance had taken place. See, e.g., United States v. Columbia Broadcasting System, 666 F.2d 364 (9th Cir.), cert. denied, 457 U.S. 1118 (1982) ($2.3 million reimbursed to subpoenaed parties). The Committee determined the parties should resolve the compensation issue prior to compliance with the subpoena, and to require resolution of the question before the parties proceed. This is intended to remove any uncertainty involved in compliance.

Payments made to compensate non-parties as part of the subpoena process should be considered taxable costs under Rule 54.04.

RULE 51. INSTRUCTIONS TO JURY; OBJECTIONS.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform the counsel of its proposed action upon the requests prior to their arguments to the jury, and such action shall be made a part of the record. The court shall instruct the jury ~~after the arguments are completed.~~ before or after closing arguments of counsel except, at the discretion of the court, preliminary instructions need not be repeated. The instructions may be in writing and, in the discretion of the court, one complete copy may be taken to the jury room when the jury retires to deliberate. No party may assign as error unintentional misstatements and verbal errors, or omissions in the charge, unless he objects thereto before the jury retires to consider its verdict, stating ~~distinctly~~ specifically the matter to which he objects and the ground of his objections. An error in the instructions with respect to fundamental law or controlling principle may be assigned in a motion for a new trial though it was not otherwise called to the attention of the court.

Notes of Advisory Committee

The recommended changes in Rule 51 follow the changes made to Fed. R. Civ. P. 51 as part of the 1982 amendments. The changes to the rule essentially accomplish two things: they permit jury instructions to be given either before or after the arguments of counsel, and they provide specific authority to permit instructions to be given in writing and one copy to be taken to the jury room for deliberation. The Committee also substituted "specifically" for "distinctly" in the penultimate sentence of the rule in order to clarify its meaning.

The traditional practice in Minnesota is to charge the jury following the arguments of counsel. The Committee anticipates that this practice will continue notwithstanding the change in the rule. The Committee determined, however, that it was appropriate to provide trial judges the latitude to give instructions before argument in certain complex cases or cases involving complicated instructions on the law. One advantage of permitting arguments to follow the instructions is that the attorneys can refer in argument to the court's actual instructions, rather than to the "hypothetical" instructions that they anticipate the court will give.

The change to permit written instructions is intended largely to conform the rules to the occasional practice of Minnesota trial judges. The rule does not require written instructions, and the Committee anticipates that written instructions will remain the exception rather than the rule. The rule permits written instructions to be given either for consultation during the delivery of instructions by the trial judge, or for retention by the jury and later consultation in the jury room. Many trial judges have used written instructions for years, and have found them to be useful to juries in certain cases. If the court permits written instructions to go to the jury room, all instructions shall be included in writing.

The changes to the rule permitting instructions to be given either before or after the argument and permitting written instructions have been adopted for Minnesota criminal practice. See Minn. R. Crim. P. 26.03, subd. 18(4). The language of the rule changes is drawn in part from the criminal rules.

RULE 52. FINDINGS BY THE COURT.

Rule 52.01. Effect.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Finding of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court or in an accompanying memorandum. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.

Rule 52.02. Amendment. [No Change]

Notes of Advisory Committee

The changes to Rule 52.01 are intended to permit trial courts to make findings of fact and conclusions of law orally or in a written memorandum. This change follows the change to Federal Rule 52(a) made by the 1983 amendments, and is intended to provide trial courts with greater latitude in the means of delivering decisions. The prior rule did

not prohibit oral findings, and the amendment specifically allows them. The change is not intended to relax in any way the requirement that some specific statement be made of the facts found and the legal conclusions drawn from those facts. The purpose of requiring findings is to permit meaningful review upon appeal and it is therefore necessary that trial courts find facts and state conclusions clearly and specifically. For this reason, the oral findings and conclusions must be stated on the record, in the presence of the parties, in order that they are adequately preserved.

The Committee also determined that the rule should be changed to permit a written opinion or memorandum of decision to stand as findings of fact and conclusions of law in certain cases. The changes are intended to permit the trial court to issue a decision in a form suited to the case. The written opinion or memorandum must include a separate statement of the facts, and explain the legal conclusions drawn therefrom. It is not necessary that the findings of fact be identified in separately numbered paragraphs or that the conclusions of law be similarly stated.

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

Rule 63.01. Disability of Judge. [No Change]

Rule 63.02. Interest or Bias. [No Change]

Rule 63.03. ~~Affidavit of Prejudice~~ Notice to Remove.

Any party or his attorney may make and serve on the opposing party and file with the clerk an notice to remove. ~~affidavit stating that, on account of prejudice or bias on the part of the judge who is to preside at the trial or at the hearing of any motion, he has good reason to believe and does believe that he cannot have a fair trial or hearing before such judge.~~ The ~~affidavit~~ notice shall be served and filed ~~not less than 10 days prior to the first day of a general term, or 5~~ 3 ~~days prior to a special term or a day fixed by notice of motion, at which the trial or hearing is to be had, or, in any district having two or more judges,~~ within ten days after the party receives notice of which judge is to preside at the trial or hearing, but not later than the commencement of the trial or hearing. ~~Upon the filing of such affidavit, with proof of service, the clerk shall forthwith assign the cause to another judge of the same district, and if there be not other judge of the district who is qualified, or if there be only one judge of the district, he shall forthwith notify the chief justice of the supreme court.~~

No such notice may be filed by a party or his attorney against a judge who has presided at a motion or any other proceeding of which the party had notice. A judge who has presided at a motion or other proceeding may not be removed except upon an affirmative showing of prejudice on the part of the judge.

After a litigant has once disqualified a presiding judge as a matter of right, he may disqualify the substitute judge, but only by making an affirmative showing of prejudice. A showing that the judge might be excluded for bias from acting as a juror in the matter constitutes an affirmative showing of prejudice.

Upon the filing of a notice to remove or if a litigant makes an affirmative showing of prejudice against a substitute judge, the chief judge of the judicial district shall assign any other judge of any court within the district to hear the cause.

Rule 63.04. Assignment of Judge. [No Change]

Notes of Advisory Committee

Rule 63.03 has been substantially rewritten in order to adapt the rule to statutory changes made by the Minnesota Legislature. The rule revisions are intended to follow in large part the notice of removal procedure established by Minn. Stat. § 542.16 (1982). The Committee has attempted to make it clear that a party must file a notice to remove with respect to any individual judge the first time that judge presides in an action. The rule is intended to prevent counsel from using the notice to remove procedures to remove an assigned judge after that judge has presided at one or more pretrial hearings.

The Committee also considered various time limits in which a notice of removal should be filed, and determined that a party should be allowed ten days in which to file a notice to remove if the identity of the presiding judge is known that far in advance. The Committee determined this time period was appropriate in part because it recognized that the decision to remove an individual judge is frequently made by the party rather than the attorney, and a ten-day period was deemed appropriate to permit consultation with the client and to permit a decision to be made. The Committee also determined that

a decision to remove a judge should be made before any proceedings before that judge take place, and the period in which the judge may be removed therefore ends absolutely at the time the trial or hearing commences. This final limitation applies regardless of the length of time during which the parties have known the identity of the judge to preside at the hearing or trial.

RULE 68. OFFER OF JUDGMENT OR SETTLEMENT; ~~TENDER OF MONEY IN LIEU OF JUDGMENT.~~

~~Rule 68.01. Offer of Judgment.~~

At any time ~~more than one~~ prior to ten days before the trial begins, a any party ~~defending against a claim~~ may serve upon ~~the~~ an adverse party an offer to allow judgment to be ~~taken against him for the money or property, or~~ entered to the effect specified in ~~his~~ the offer or to pay or accept a specified sum of money, with costs and disbursements then accrued~~.~~, either as to the claim of the offering party against the adverse party or as to the claim of the adverse party against the offering party. Acceptance of the offer shall be made by service of written notice of acceptance within ten days after service of the offer. If the offer is not accepted within the ten day period, it is deemed withdrawn. During the ten-day period the offer is irrevocable. If ~~before trial the adverse party serves written notice that~~ the offer is accepted, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and thereupon the clerk shall enter judgment. An offer not accepted ~~shall be deemed withdrawn and evidence thereof~~ is not admissible, except in a proceeding to determine costs and disbursements. If the judgment finally ~~obtained by the offeree~~ entered is not more favorable to the offeree than the offer, the offeree must pay the offeror's costs and disbursements~~, incurred after the making of the offer.~~ The fact that an offer is made but not accepted does not preclude a subsequent offer.

~~Rule 68.02. Tender of Money in Lieu of Judgment~~

~~If the action be for the recovery of money, instead of the offer of judgment provided for in Rule 68.01, the defendant may tender to the plaintiff the full amount to which he is entitled, together with costs and disbursements then accrued. If such tender~~

~~be not accepted; the plaintiff shall have no costs and disbursements unless he recover more than the sum tendered; and the defendant's costs and disbursements shall be deducted from the recovery, or, if they exceed the recovery, he shall have judgment for the excess. The fact of such tender having been made shall not be pleaded or given in evidence.~~

Notes of Advisory Committee

The changes to Rule 68 are intended to accomplish two things. First, the former offer of judgment procedure will be available to both plaintiffs and defendants in order to encourage settlement by all parties. Second, an offer of settlement is irrevocable during a ten-day period, but has no continued vitality if not accepted within that ten-day period. This change is made to answer the question raised by the Minnesota Supreme Court in Everson v. Kapperman, 343 N.W.2d 19 (Minn. 1984). The Minnesota practice will now conform to practice under Federal Rule 68, although the language of the rules is not identical.

The principal effect of making an offer of settlement under Rule 68 is to shift the burden of paying costs properly taxable under Minn. R. Civ. P. 54.04. Nothing in the rule limits the use of any other devices to encourage the settlement of actions or to reach agreement upon settlement. Thus, although Rule 68 does not apply to any offers of settlement made within ten days before trial, neither does it prohibit such offers. An offer made within ten days before trial does not shift the responsibility for taxable costs.

Minn. Stat. § 549.09, subd. 1 (1982), as amended by Minn. Laws 1983, ch. 399 (effective July 1, 1984), provides for recovery of prejudgment interest. Rule 68 does not affect the operation of that statute.

FORM 22

NOTICE AND ACKNOWLEDGEMENT 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

Dated: September 14, 1984.

Unanimously approved.

MINNESOTA SUPREME COURT
COMMITTEE ON CIVIL PROCEDURE

James L. Hetland, Jr., Chair

Honorable Robert E. Bowen
G. Alan Cunningham
J. Peter Dosland
Nancy C. Dreher
Conrad M. Fredin
Honorable Otis H. Godfrey
Maclay R. Hyde
Leonard J. Keyes
Douglas D. McFarland
Honorable Ann D. Montgomery
Richard R. Quinlivan
Honorable Susanne C. Sedgwick
Charles R. Zierke

David F. Herr
Reporter

MINORITY PROPOSED AMENDMENT TO RULE 26.01.

Rule 26.01. Discovery Methods.

Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property; for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission. ~~Unless the Court orders otherwise under subdivision 26.03 of this Rule, and except as provided in Rule 33.01, the frequency of use of these methods is not limited.~~ No party may take more than two depositions either by oral examination under Rule 30 or by written questions under Rule 31 unless agreed to by all parties or ordered by the court.

Comments of Minority Members

A primary concern of both the Bench and the Bar is the increasing cost of civil litigation, both in terms of time and in pre-trial dollar costs. The primary cause of this increasing expense is pre-trial discovery costs. The trial Bar and trial Bench now commonly refer to this fact as "discovery abuse." No member of the Committee disagrees that discovery abuse must be ended and that unlimited use of discovery must be curtailed. The Committee is divided only on the means to be adopted by the Court.

A majority of the members believes that amendments to the discovery rules similar to those adopted by the Federal Courts providing case management and discovery management by the Court are sufficient for the present time and should be given a trial

period before other remedies are considered. The majority also believes that the problem of discovery abuse is complex enough to require a more comprehensive solution than the minority proposal to limit depositions.

The minority members believe that the Federal Rule amendments address only a small part of the problem (complex case management) and ignore the real vice — cost of litigation in small and moderate dollar value and non-complex issue cases. The minority agrees with the desirability of case management and discovery management by the Court in the larger and more complex cases. In the state trial courts complex cases are not in the majority. It is not reasonable to burden the trial judge with the formalities and time costs of discovery management in non-complex cases. It is also not reasonable to ignore the non-complex cases when addressing discovery abuse. With this in mind, the minority sought an additional and different way to control discovery abuse.

In 1968, the Minnesota Supreme Court adopted a unique approach to control discovery abuse in the unlimited use by a party of Rule 33 Interrogatories, setting a maximum limit on the number of interrogatories a party could submit to another party without prior court approval. If the maximum were not reasonable for some reason, a party could seek Court permission for the use of additional questions. It is important to note that the burden of seeking assistance from the Court is transferred to the inquiring party and removed from the answering party. For years this Rule has worked so well that no attempt has been made to amend it. This rule has now been adopted by the federal courts in Minnesota, Local Rule 3B (D. Minn.), and in other jurisdictions, see R. Haydock & D. Herr, Discovery Practice § 4.4.2 & nn. 10-12, at 288 (1982). The minority believes the same principle can be applied to the use of depositions. With a maximum limit on the number of depositions a party can take without prior approval of the parties or the Court, the parties would tend to be more discriminating in their use of depositions and would

tend to use this discovery technique in a manner consistent with real trial needs rather than unfettered fishing expeditions. In the complex cases where additional depositions are needed and appropriate, the probability is that the case is also appropriate for case and discovery management under the amendments recommended by the Committee. Recognizing the desirability of management of litigation by experienced counsel without Court intervention except where the parties cannot agree, the minority proposal would also permit the parties to agree to additional discovery depositions without the need of a Court order.

The minority members believe that a maximum limit is needed to control the current abuse of discovery depositions through overuse in non-complex cases. Two of the undersigned join in this report only if the Rule permitted five, rather than two, depositions without Court order. One member suggested that two depositions be allowed in simple, two-party actions, and that five be permitted in multiple-plaintiff or multiple-defendant actions. Whether that maximum should be two or five in number is not as critical as the need to set a maximum and remove the current incentives toward overuse. Experience has demonstrated that untrammeled rights to use discovery depositions do not produce the result mandated in Rule 1 of a "just, speedy and inexpensive determination of every action."

Honorable Robert E. Bowen
Conrad M. Fredin
Leonard J. Keyes
Honorable Ann D. Montgomery
Honorable Susanne C. Sedgwick
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