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July 15, 1999

Mr. Frederick K. Grittner
Clerk of Appellate Courts
Minnesota Judicial Center
25 Constitution Avenue
Saint Paul, MN 55155-6102

Re: Minnesota Supreme Court Advisory Committee
on Rules of Civil Procedure
File No. C6-84-2134

Dear Mr. Grittner:

I am enclosing the original and twelve (12) copies of the Report of the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure.

I am also enclosing a disk containing this Report in WordPerfect 8.0 format. If you have any questions or comments, please let me know.

As always, we appreciate your assistance with this filing.

Best personal regards.

Respectfully submitted,

David F. Herr

David F. Herr
Reporter, Minnesota Supreme Court Advisory
Committee on Rules of Civil Procedure

DFH:ls
Enclosures
cc: Advisory Committee Members
34089.1

C6-84-2134

STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee on Rules of Civil Procedure

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

Final Report

July 13, 1999

Hon. Paul H. Anderson, Chair

Barbara D'Aquila, Minneapolis
Christopher Dietzen, Bloomington
Maclay R. Hyde, Minneapolis
Cynthia M. Johnson, Saint Paul
Eric D. Larson, Rochester
Douglas D. McFarland, Saint Paul
Timothy R. Murphy, Brainerd
Richard L. Pemberton, Fergus Falls
Hon. Carol Person, Duluth
Hon. Marianne D. Short, Saint Paul
Commissioner Richard S. Slowes, Saint Paul
Michael W. Unger, Minneapolis

David F. Herr, Minneapolis
Reporter

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Summary of Committee Recommendations

This Court's Advisory Committee on Rules of Civil Procedure met a number of times to review suggestions from the public, bench and bar both before and after the last major revisions to the Rules pursuant to this Committee's report dated July 22, 1996. The committee first considered issues relating to jury trials and submitted its Special Report on Jury Management Issues dated April 6, 1998. The Committee took up a wide variety of remaining issues, and specifically considered portions of the discovery recommendations it had earlier made but which were not adopted by the Court in its orders implementing the proposals contained in this Committee's July 22, 1996 report.

Advisory Committee Process

The Committee met five times during 1998 and 1999 to follow up on all of the issues pending and not reported in its Recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure since the last wholesale amendment of the Rules in 1996, effective January 1, 1997. The Committee first took up the proposals relating to changes in handling juries, and submitted its Special Report on Jury Management Issues on April 6, 1998. The Court has acted on those recommendations. *See* Order Amending the Rules of Civil Procedure, Nos. C6-84-2134 & CX-89-1863 (Minn. Sup. Ct., Aug. 27, 1998). In late 1998 and the first half of 1999, the Committee then met to discuss all remaining issues, including matters relating to discovery and disclosure that had been recommended to the Court in 1996 and not acted on. This report contains all of the Committee's recommendations for rule amendments. It also includes recommendations regarding various matters where the Committee recommends that no amendments be made.

Specific Rule Amendment Recommendations

The Committee's affirmative recommendations are two: amend Rule 11 to conform it to its federal counterpart and adopt some of the amendments to Rule 26 that were proposed to this Court in 1996, all but those relating to disclosure of expert evidence. The Committee does not believe any other changes are called for at this time.

Recommendation to Defer Major Modifications of Discovery and Disclosure Rules

The Committee believes it is appropriate to defer making wholesale changes to the discovery rules because of the significant uncertainty concerning what form the Federal Rules of Civil Procedure dealing with discovery and automatic disclosure will take in the coming years. There are pending proposals before the Federal Advisory Committee on Civil Rules or United States Supreme Court that would significantly change the rules. It is not known what form the rules may take when they come out of the Advisory Committee or when the Supreme Court acts on them. It is impossible even to speculate about whether Congress would act either to modify or overrule the recommendation from the Court. Some changes seem quite likely, however, and the changes are likely to be significant. The Committee does believe that it is reasonably likely that the federal rules will move towards greater uniformity around the country. This will result in some greater certainty as to what the rules are in Minnesota and every federal district. The Committee believes that further changes to the discovery rules in Minnesota, specifically those relating to initial disclosures and expert discovery, should await the expected crystallization of the federal rules.

Recommendations Not Requiring Rule Amendment

Rule 6.01 on Counting Days. The Committee considered a recommendation that Rule 6.01 be amended to change the method for counting time when counting "backwards" from a due date and the deadline falls on a weekend or holiday. Under the current rule, the action required to be taken would be required on the last business day before the calculated due date, and the MSBA recommended that the rule be changed to permit the action (whether

service or filing) to take place on the first business day after the calculated due date. The Committee believes that changing the formula in Rule 6.01 to calculate the computation of time would create potential pitfalls because Rule 6.01 is used in other contexts besides simply trial court proceedings. *See, e.g.,* MINN. R. CIV. APP. P. 126.01 (appellate rules adopt Rule 6.01 counting mechanisms). Other than in the timing of motion practice governed by Rule 115 of the Minnesota General Rules of Practice, the committee is unaware of problems with the present rule. The committee does not believe a change in Rule 6.01 should be made to attempt to remedy this one possible problem. The Court may wish to refer this question to its Advisory Committee on General Rules of Practice to consider whether or not the perceived problems with these rules should be addressed by adjustment of the time periods, particularly the short time periods for reply briefs, under the general rules. We recommend if any change is made, however, it should be made in the motion briefing rules, and not in MINN. R. CIV. P. 6.01.

Rule 47 and Use of Interpreters. The Committee also considered an issue raised by the Minnesota Supreme Court Interpreter Advisory Committee dealing with court interpreters. That Committee notes that MINN. STAT. § 546.44, subd. 3 (1996) provides that "the fees and expenses of an interpreter should be determined by the presiding official and paid by the court" while MINN. R. CIV. P. 43.07, although otherwise largely consistent with the statute, contains a provision that is largely consistent, but potentially inconsistent with the statute, allowing the court to require one or more of the parties to bear the cost and tax the expense ultimately as a cost in the action. Minnesota Supreme Court Interpreter Advisory Committee, BEST PRACTICES MANUAL REGARDING INTERPRETERS IN THE MINNESOTA STATE COURT SYSTEM, at 19 [draft, April 6, 1999]. The Committee believes that the rule of civil procedure creates an appropriate procedure, and that the apparent conflict presents a policy question more than a question of procedure. It does not believe amendment of the rule of procedure is appropriate in any event.

Subjects The Committee Will Follow

In addition to the discovery and disclosure issues in the federal courts, the Committee will follow a number of issues that may warrant attention in the future despite the conclusion that rule amendments are not justified at this time.

Deposition Reporting. The Committee heard from interested groups of court reporters about increased use of various contractual relationships between court reporters and parties or their insurers and concerns about the effects this may be having on the litigation process. The Committee monitored legislation advanced by these reporters and examined the rules to see if amendments to the rules were warranted at this time. The Committee recommends that no rule amendments be made for two reasons. First, the Legislature has now enacted a fairly comprehensive bill regulating court reporters. *See* MINN. LAWS 1999, ch. 215, *to be codified as* MINN. STAT. § 486.10. The existence of this legislation to some degree limits the practical ability of rulemaking to address these issues and may to some degree address the perceived problems. Second, the existing rules now control the reporting of depositions, particularly MINN. R. CIV. P. 28.03 (establishing criteria for disqualification of deposition reporter for interest); 30.02 (requiring deposition copies to be available to all parties on same terms). These rules provide authority to deal with the potential problems outlined to the Committee. Although the Committee has not learned of any practices that have resulted in actual bias in reporting or clear appearance of prejudice, these are important issues and the Committee intends to continue to follow them to see if there are indeed problems requiring rule amendments.

Rule 54 and Taxation of Costs. The Committee considered a recommendation that Rule 54 be amended to create a specific deadline for taxing costs following judgment. Although the absence of a deadline may occasionally create confusion over the timeliness of a bill of costs, the Committee heard of only isolated difficulty with this absence of a deadline, and considered a number of potential drawbacks to setting a specific deadline. The federal rules do not contain a specific deadline for taxing costs. The Committee does not believe the proposed rule amendment is necessary or appropriate at this time, and so makes no recommendation for a rule change at this time.

Offers of Judgment. The committee is aware of issues surrounding the use of offers of judgment under Rule 68, and believes it may be appropriate to consider amendment of this rule. The problems under this rule relate to the sometimes-inconsistent provisions of the rule and the related statutes governing taxation of costs. *See* MINN. STAT. ch. 549. The Court recently confronted one set of these conflict issues in *Borchert v. Maloney*, 581 N.W.2d 838 (Minn. 1998). In addition, there have been potentially significant developments in the practice under the not-identical federal version of Rule 68. The committee would like to monitor these issues over a period of time.

Removal of Judges. The Committee looked at a number of instances of concern about the removal of trial judges. At this time, based on the reports received, the Committee is not prepared to recommend amendments that address these problems and does not believe that the rules should be modified in a piecemeal manner. This is an ongoing area of concern to the bench and bar, however, and it is often of great importance to the litigants. This Court has addressed one of these problems in the context of criminal cases in *State v. Erickson*, 589 N.W.2d 481 (Minn. 1999).

The Committee is aware of a number of diverse situations where problems arise, or may arise, including the following:

- Removal in a case specially assigned by the Minnesota Supreme Court, such as the asbestos litigation, the silicone breast implant litigation, etc.
- Removal of a judge who has been assigned by the Chief Judge of the district.
- Removal in multiple-party litigation where multiple plaintiffs or defendants could exercise a right to remove *seriatim* and thereby accomplish an extraordinary level of judge shopping and, in some counties, remove any local judges from the case.
- Removal of a judge in related litigation where the judge has already heard a companion case between the same parties.
- Removal after a case is removed to federal court fewer than ten days after a judge is assigned, and the case is later returned to state court.
- Cases where new parties are brought in by amendment or supplementation of the pleadings.

- Cases where a judge may be assigned before all parties have appeared, including cases where *ex parte* relief is granted. This is a difficult situation, because the court enters an order which may give rise to a judge-shopping incentive not intended by the rule

Uncertainty about whether a notice to remove will operate as intended limits the value of the procedure and can prejudice the interests of litigants. The courts have a clear need to allow removal of judges to occur with a minimum disruption of the normal judicial assignment processes, and the current rule may not work optimally in this regard. The committee intends to monitor this balance, and determine whether rule amendments may be warranted in the future.

A Concern for Further Consideration.

One additional subject warrants comment to the Court. This committee is increasingly asked to deal with questions of court procedure that are significantly impacted by the existence of legislation that either purposely or inadvertently affects matters of court procedure. In some instances, these legislative acts present potential separation of powers issues; in others, less readily characterized problems are presented. Some of these statutes undoubtedly represent appropriate legislative action; others may be unwise or even unconstitutional intrusions into the judicial branch's prerogatives. Some of these conflicts are discussed in this report, others are not.

This committee does not make any specific recommendations about these issues, but believes they are significant, and are getting more so. The committee intends to continue to consider them; this Court may want to provide guidance on these problems to the Legislature to work on suitable resolution, or may consider taking appropriate cases to provide guidance to the courts and litigants on how they should deal with statutes that create procedures that are inconsistent with those established by court rules.

Effective Date

The Advisory Committee recommends that these amendments be scheduled for a public hearing and that the Court attempt to issue any order on these recommendations so the amendments can take effect on January 1, 2000. The Committee believes this will facilitate the disclosure of these rules and distribution of them to the bench and bar well in advance of the effective date.

The Committee believes the new provisions can be applied to actions pending on January 1, 2000, as well as those filed thereafter.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
CIVIL PROCEDURE

Recommendation 1: Amend Rule 11 to Conform to its Federal Counterpart.

Introduction

The Committee believes Rule 11 should be amended to conform to its federal counterpart, FED. R. CIV. P. 11. By way of background, the Committee last recommended to the Court that these changes not be made, for the reason that the federal amendments made in 1993 did not seem necessary in Minnesota. Because the federal changes seem to be working well in federal court, and to a lesser degree because the Minnesota Legislature has adopted similar standards for sanctions by statute under MINN. STAT. § 549.211, the Committee believes it is appropriate to bring the rule into conformity with the federal rule.

Specific Recommendation

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

(a) Signature. Every pleading, written motion, and other paper ~~[of a party represented by an attorney]~~ shall be ~~[personally]~~ signed by at least one attorney of record in the attorney's individual name ~~[and shall state the attorney's address, telephone number, and attorney registration number. A party who]~~, or, if the party is not represented by an attorney, shall ~~[personally sign]~~ be signed by the ~~[pleading, motion or other]~~ party. Each paper ~~[and]~~ shall state the ~~[pleader's]~~ signer's address and telephone number, if any, and attorney registration number if signed by an attorney. Except when otherwise specifically provided by rule or statute, pleadings need not be verified ~~[by affidavit]~~or accompanied by affidavit. ~~[The signature of an]~~ An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party ~~[constitutes a certification that the pleading, motion or other paper has been read;]~~.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the ~~[signer's]~~ person's knowledge, information, and belief, 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]~~ an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to 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. 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,]~~;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction ~~[, which may include an order to pay to the other party or parties the amount of]~~ upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses ~~[incurred because of the filing of the pleading, motion or other paper, including]~~ and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or

settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

ADVISORY COMMITTEE COMMENTS—1999 AMENDMENTS

Rule 11 is amended to conform it completely to the federal rule. While Rule 11 has worked fairly well in its current form under the Supreme Court's guidance in *Uselman v. Uselman*, 464 N.W.2d 130 (Minn. 1990), the federal rules have been amended and create both procedural and substantive differences between state and federal court practices. Additionally, the Minnesota Legislature has created a statutory mechanism that follows the federal procedure, resulting in a confusing array of practice requirements and remedies. *See* MINN. STAT. § 549.211. On balance, the Committee believes that the amendment of the Rule to conform to its federal counterpart makes the most sense, given this Committee's long-standing preference for minimizing the differences between state and federal practice unless compelling local interests or long-entrenched reliance on the state procedure makes changing a rule inappropriate.

It is the intention of the Committee that the revised Rule would modify the procedure for seeking sanctions, but would not significantly change the availability of sanctions or the conduct justifying the imposition of sanctions. Courts and practitioners should be guided by the *Uselman* decision, cited above, and should continue to reserve the seeking of sanctions and their imposition for substantial departures from acceptable litigation conduct.

Recommendation 2: Amend Rule 26 to Adopt Some of the Recommendations Made by this Committee in 1996 but Not Acted upon by the Court.

Introduction

The Committee recommends that Rule 26 be amended to adopt certain of the recommendations made in its 1996 Report to the Court but which were not adopted at that time. The 1996 Report included recommendations relating to disclosure of experts, which recommendations proved controversial, as well as certain recommendations relating to judicial control of discovery, the preparation of privilege logs, and the supplementation of responses, that were not controversial. The Committee recommends that the latter group of changes be made at this time. Consistent with the Committee's overall recommendation that the broader issues relating to discovery and disclosure which are awaiting resolution within the federal courts be deferred until the federal courts have acted, the remaining portions of the 1996 recommendations should not be adopted at this time.

Specific Recommendation

RULE 26 GENERAL PROVISIONS GOVERNING DISCOVERY

* * *

26.02 Discovery, Scope and Limits

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

(a) 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~~ The information sought need not be admissible at the trial if ~~that~~ 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:~~

~~(1) 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;~~

~~(2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or~~

~~(3) 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 Rule 26.03 motion.~~

The court may establish or alter the limits on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. 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; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed

discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

* * *

(c) Trial Preparation: Materials. Subject to the provisions of Rule 26.02(d) a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a party or other person may obtain without the required showing a statement concerning the action or its subject matter previously made by that person who is not a party. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in ~~connection with~~ relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

* * *

(e) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

* * *

26.05 Supplementation of Responses

A party ~~whose response to a request for discovery was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:~~ who has responded to a request for discovery is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the court or in the following circumstances:

~~(a) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony; and~~

~~(b)~~ A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party ~~obtains information upon the basis of which (1) the party knows that the response was incorrect when made, or (2) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~ learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert, the

duty extends to information contained in interrogatory responses, in any report of the expert, and to information provided through a deposition of the expert.

~~(c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

* * *

ADVISORY COMMITTEE COMMENTS—1999 AMENDMENTS

The changes made to Rule 26 include some of the recent amendments to the federal rule made in 1993. The changes made to the Minnesota rule have been modified to reflect the fact that Minnesota practice does not include the automatic disclosure mechanisms that have been adopted in some federal courts; the resulting differences in the rules are minor, and the authorities construing the federal rule should be given full weight to the extent applicable.

The changes in Rule 26.02(a) adopt similar amendments made to FED. R. CIV. P. 26(b) in 1993. The new rule is intended to facilitate greater judicial control over the extent of discovery. The rule does not limit or curtail any form of discovery or establish numeric limits on its use, but does clarify the broad discretion courts have to limit discovery.

Rule 26.02(e) is a new rule adopted directly from its federal counterpart. The requirement of a privilege log is necessary to permit consideration, by opposing counsel and ultimately by the courts, of the validity of privilege claims. Privilege logs have been in use for years and are routinely required when a dispute arises. *See generally Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 122 & n.6 (D. Nev. 1993) (deficiencies in log enumerated); *Allendale Mutual Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992) (ordering privilege log and specifying requirements); *Grossman v. Schwarz*, 125 F.R.D. 376, 386-87 (S.D.N.Y. 1989)(failure to provide privilege log deemed "presumptive evidence" claim of privilege not meritorious). The requirement of the log should not, however, be an invitation to require detailed identification of every privileged document within an obviously privileged category. Courts should not require a log in all circumstances, especially where a request seeks broad categories of non-discoverable information. *See, e.g.*, *Durkin v. Shields (In re Imperial Corp. of Am.)*, 174 F.R.D. 475 (S.D. Cal. 1997)(recognizing document-by-document log would be unduly burdensome). It is the intention of the rule, however, to require the production of logs routinely to encourage the earlier resolution of privilege disputes and to discourage baseless assertions of privilege.

FED. R. CIV. P. 45(d)(2) expressly requires production of a privilege log by a non-party seeking to assert a privilege in response to a subpoena. Although the Committee does not recommend adoption of the extensive changes that have been made in federal Rule 45, this recommendation is made to minimize disruption in existing Minnesota subpoena practice. The difference in rules should not prevent a court from ordering production of a privilege log by a non-party in appropriate cases. The cost of producing a privilege log may be properly shifted to the party serving the subpoena under Rule 45.06.

Rule 26.05 is amended to adopt in Minnesota the same supplementation requirement as exists in federal court. It is a more stringent and more explicit standard, and reflects a sounder analysis of when supplementation is necessary. It states affirmatively the duty to disclose. The Committee believes it is particularly desirable to have state supplementation practice conform to federal practice in order that compliance with the requirements is more common and sanctions can more readily be imposed for failure

to supplement. The rule relaxes the supplementation requirement to obviate supplementation where the information has been disclosed either in discovery (i.e., in other discovery responses or by deposition testimony) or in writing. The writing need not be a discovery response, and could be a letter to all counsel identifying a witness or correcting a prior response.