MINNESOTA RULES OF CRIMINAL PROCEDURE
(Effective August 1, 1983)

RULE 1. SCOPE, APPLICATION, GENERAL PURPOSE AND CONSTRUCTION

Rule 1.01. Scope and Application

These rules govern the procedure in prosecutions for felonies, gross misdemeanors, misdemeanors, and petty misdemeanors in the municipal, county and district courts in the State of Minnesota. Except where expressly provided otherwise, misdemeanors as referred to in these rules shall include state statutes, local ordinances, charter provisions, rules or regulations punishable either alone or alternatively by a fine or by imprisonment of not more than 90 days.

The term "County Court" as used in these rules shall include a Municipal Court, except where expressly stated otherwise.

Rule 1.02. Purpose and Construction

These rules are intended to provide for the just, speedy determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Comment

By Rule 1.01, these rules govern the procedure in prosecutions for felonies, gross misdemeanors, misdemeanors, and petty misdemeanors in the municipal, county and district courts in the State of Minnesota. Except where expressly provided otherwise, misdemeanors as referred to in these rules shall include state statutes, local ordinances, charter provisions, rules or regulations punishable either alone or alternatively by a fine or by imprisonment of not more than 90 days.

The term "county court" as used in the rules includes the municipal courts of Hennepin and Ramsey Counties which are governed under Minn. Stat. Ch. 488A as well as those courts governed by the County Court Act (Minn. Stat. Ch. 487).

Rule 1.02 governing the general purpose and construction of the rules is taken from F.R.Crim.P. 2.

RULE 2. COMPLAINT

Rule 2.01. Contents; Before Whom Made

The complaint is a written signed statement of the essential facts constituting the offense charged.

Except as provided in Rules 11.06 and 15.08, it shall be made upon oath before a judge or judicial officer of the county or district court. Provided, however, when authorized by court rule, the oath may be made before the clerk or deputy clerk of court when the offense alleged to have been committed is punishable by fine only.

Except as provided in Rules 11.06 and 15.08, the facts establishing probable cause to believe that an offense has been committed and that the defendant committed it shall be set forth separately in writing in or with the complaint, or in supporting affidavits, and may be supplemented by sworn testimony of witnesses taken before the issuing officer. If such testimony is taken, a note so stating shall be made on the face of the complaint by the issuing officer. The testimony shall be recorded by a reporter or recording instrument and shall be transcribed and filed.

Rule 2.02. Approval of Prosecuting Attorney

A complaint shall not be filed or process issued thereon without the written approval, endorsed on the complaint, of the prosecuting attorney authorized to prosecute the offense charged, unless such judge or judicial officer as may be authorized by law to issue process upon the offense certifies on the complaint that the prosecuting attorney is unavailable and the filing of the complaint and issuance of process thereon should not be delayed.

Comment

Under these rules (See Rules 10.01, 8.01, 17.01), the complaint, tab charge and indictment are the only accusatory pleadings by which a prosecution may be initiated and upon which it may be based. The complaint will take the place of the information under existing practice (Minn. Stat. §§ 628.29-628.33 (1971)).

By Rule 2.01 the complaint shall consist of a written signed statement of the essential facts constituting the offense charged. This language is taken

from F.R.Crim.P. 3. (Present Minnesota statutory law (Minn. Stat. §§ 629.42, 633.03 (1971)) simply provides for the complaint of an offense to be reduced to writing, but does not specify what the complaint shall contain.) The complaint shall otherwise conform to the provisions of Rules 17.02, 17.03. Minn. Stat. §§ 487.25, subd. 3; 488A.10, subd. 3, and 488A.27, subd. 3 govern the procedure for the issuance of complaints in the County Courts, Hennepin County Municipal Court and St. Paul Municipal Court, respectively, but also do not specify what the complaint shall contain.

Except as provided in Rules 11.06 and 15.08 authorizing the substitution of a new complaint to permit a plea to a misdemeanor or different offense, the complaint shall be made on oath before any judge or judicial officer of a county or district court.

Where the alleged offense is punishable only by a fine, as for a petty misdemeanor, the complaint may also be made on oath before a clerk or deputy clerk of court if court rule authorizes this procedure. Except for this requirement of authorization by court rule, this provision is consistent with present Minnesota law under Minn. Stat. §§ 629.42 (1971); 487.25, subd. 3 (1973) (governing county courts); 488A.10, subd. 3 (1971) (governing Hennepin County Municipal Court); 488A.27, subd. 3 (1971) (governing St. Paul Municipal Court); and 488.17, subd. 3 (1971) (governing all other municipal courts). This power may be constitutionally exercised by a detached and neutral clerk or deputy clerk under Shadwick v. City of Tampa, 407 U.S. 345 (1972). See Rule 3.01 as to the issuance of a summons by a clerk or deputy clerk of court.

The probable cause statement shall be set forth separately in or with the complaint or in supporting affidavits, and the complaint or the supporting affidavits may be supplemented by sworn recorded testimony. If supplemental testimony is taken a note so stating shall be made on the face of the complaint so that an interested party or attorney examining the complaint will have notice that such testimony was taken.

Rules 11.06 and 15.08 authorizing the substitution of a new complaint to permit a plea to a misdemeanor or different offense do not require a showing of probable cause. Rule 3.01 does not attempt to define probable

cause for the purpose of obtaining a warrant of arrest or to prescribe the evidence that may be considered upon that issue. That is determined by federal constitutional law under the Fourth Amendment. (See e.g., State ex rel. Duhn v. Tahash, 275 Minn. 377, 147 N.W.2d 382 (1967); State v. Burch, 284 Minn. 300, 170 N.W.2d 543 (1969).

Rule 2.02 requires the prosecuting attorney's written approval of the filing of a complaint. This is in accord with ABA Standards, Prosecution Function 3.4 (Approved Draft, 1968) that the decision to institute criminal proceedings shall be initially and primarily the responsibility of the prosecutor. Similar provisions are contained in ALI Model Code of Pre-Arraignment Procedures, § 6.02 (T.D. §1, 1966) and Wis.Stat. § 968.02(1), (3).

The prosecuting attorneys referred to in Rule 2.02 are those authorized by law to prosecute the offense charged. (See Minn. Stat. § 487.25, subd. 10 (1971) (county courts); Minn. Stat. §§ 488A.10, subd. 11, 488A.101 (1971) (Municipal Court of Hennepin County); Minn. Stat. § 488A.27, subd. 11 (1971) (Municipal Court of St. Paul); Minn. Stat. 488A.41 (1971) (Municipal Court of Duluth); Minn. Stat. § 488.17, subd. 9 (1971) (Municipal Courts in Ramsey and St. Louis Counties); Minn. Stat. §§ 8.01, 8.03 (1971) (Attorney General); Minn. Stat. § 388.05 (1971) (County Attorney).)

If the prosecuting attorney is unavailable and it is necessary that the complaint be filed at once, the municipal court or county court judge authorized to issue process on the complaint or the judicial officer of a county court with that power may permit the complaint to be filed and upon a finding of probable cause, issue process thereon.

Rule 2.02 leaves to other laws the question of the available remedy when a local prosecutor refuses to approve a complaint.

Because the documents supporting the statement of probable cause may contain irrelevant material, material that is injurious to innocent third persons, and material prejudicial to defendant's right to a fair trial, it is the recommended practice that a statement be drafted containing the facts establishing probable cause, in or with the complaint, and that irrelevant material, material injurious to innocent third persons and material prejudicial to defendant's right to a fair trial be omitted therefrom.

Rule 2.03. Complaint Forms--Felony or Gross Misdemeanors

For all complaints charging a felony or gross misdemeanor offense the prosecuting attorney or such judge or judicial officer authorized by law to issue process pursuant to Rule 2.02 shall use an appropriate form authorized and supplied by the State Court Administrator. If for any reason such form is unavailable, failure to comply with this rule shall constitute harmless error under Rule 31.01.

Comment

Rule 2.03 requires the use by the prosecuting attorney, judge or judicial officer of the uniform complaint forms supplied by the State Court Administrator when charging a felony or gross misdemeanor offense. All efforts shall be made to obtain and implement these forms, but in the event the form is unavailable at the time the offense is charged, failure to use the specific form is to constitute harmless error under Rule 31.01.

Exemplary copies of the mandatory forms are contained in the general form section of these Rules.

RULE 3. WARRANT OR SUMMONS UPON COMPLAINT

Rule 3.01. Issuance

If it appears from the facts set forth separately in writing in or with the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed and that the defendant committed it, a warrant for the arrest of the defendant shall be issued to any person authorized by law to execute it, or a summons for the appearance of the defendant shall issue in lieu thereof.

The warrant or summons shall be issued by a judge or judicial officer of the county or district court. Provided that when the offense is punishable by fine only, the clerk or deputy clerk of court may also issue the summons when authorized by court rule.

When the offense is punishable by fine only, in misdemeanor cases, a summons shall be issued in lieu of a warrant.

For all other misdemeanors, a summons shall be issued rather than a warrant unless it reasonably appears that there is a substantial likelihood that the defendant will fail to respond to a summons, or the whereabouts of the defendant is unknown, or the arrest of the defendant is necessary to prevent imminent bodily harm to himself or another.

The issuing officer may issue a summons instead of a warrant whenever he is satisfied that a warrant is unnecessary to secure the appearance of the defendant, and shall issue a summons whenever requested to do so by the prosecuting attorney authorized to prosecute the offense charged in the complaint.

If a defendant fails to appear in response to a summons, a warrant shall issue.

If a defendant corporation charged with a felony or gross misdemeanor fails to appear in response to a summons, the case shall be transferred to the district court for further proceedings.

Rule 3.02. Contents of Warrant or Summons

Subd. 1. Warrant. The warrant shall be signed by the issuing officer and shall contain the name of the defendant, or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint, and the warrant and complaint may be combined in one form. For felonies and gross misdemeanors, the amount of bail and other conditions of release may be set by the issuing officer and endorsed on the warrant. For misdemeanors, the amount of bail shall and other conditions of release may be set by the issuing officer and endorsed on the warrant.

Subd. 2. Directions of Warrant. The warrant shall direct as follows:

(1) Issuance by County or Municipal Court. When the warrant is issued by a county or municipal court, that the defendant be brought promptly before the court that issued the warrant if it is in session.

(2) Available Judge or Judicial Officer. If the county or municipal court specified in Rule 3.02, subd. 2(1) is not in session, that the defendant be brought before a judge or judicial officer of such court, without unnecessary delay, and in any event not later than 36 hours after the arrest exclusive of the day of arrest, or as soon thereafter as such judge or judicial officer is available.

Subd. 3. Summons. The summons shall summon the defendant to appear at a stated time and place to answer the complaint before the court issuing it and shall be accompanied by a copy of the complaint.

Rule 3.03. Execution or Service of Warrant or Summons; Certification

Subd. 1. By Whom. The warrant shall be executed by an officer authorized by law. The summons may be served by any officer authorized to serve a warrant, and if served by mail, it may also be served by the clerk of the court from which it is issued.

Subd. 2. Territorial Limits. The warrant may be executed or the summons may be served at any place within the State except where prohibited by law.

Subd. 3. Manner. The warrant shall be executed by the arrest of the defendant. If the offense charged is a misdemeanor the defendant shall not be arrested on Sunday, or on a legal holiday, or between the hours of 9:00 o'clock p.m. and 9:00 o'clock a.m. on any other day unless the offense is punishable by incarceration, and then only by direction of the issuing officer, endorsed on the warrant when exigent circumstances exist. The officer need not have the warrant in his possession at the time of the arrest, but shall inform the defendant of the existence of the warrant and of the charge against him.

The summons shall be served on an individual defendant by delivering a copy to him personally or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address. A summons directed to a corporation shall be issued and served in the manner prescribed by law for service of summons on corporations in civil actions or by mail addressed to the corporation at its principal place of business or to an agent designated by the corporation to receive service of process.

Subd. 4. Certification; Unexecuted Warrant or Summons. The officer executing the warrant shall certify the execution thereof to the court before which the defendant is brought.

On or before the date set for appearance the officer or clerk of court to whom a summons was delivered for service shall certify the service thereof to the court before which the defendant was summoned to appear.

At the request of the prosecuting attorney made at any time while the complaint is pending, a warrant returned unexecuted or a summons returned unserved or a duplicate thereof may be delivered by the issuing officer to any authorized officer or person for execution or service.

Rule 3.04. Defective Warrant, Summons or Complaint

Subd. 1. Amendment. A person arrested under a warrant or appearing in response to a summons shall not be discharged from custody or dismissed because of any defect in form in the warrant or summons, if the warrant or summons is amended so as to remedy the defect.

Subd. 2. Issuance of New Complaint, Warrant or Summons. During pre-trial proceedings affecting any person arrested under a warrant or appearing in response to a summons issued upon a complaint, the proceedings may be continued to permit a new complaint to be filed and a new warrant or summons issued thereon, provided the prosecuting attorney promptly moves for such continuance on the ground:

(a) that the initial complaint does not properly name or describe the defendant or the offense with which he is charged; or

(b) that on the basis of the evidence presented at the proceeding it appears that there is probable cause to believe that the defendant has committed a different offense from that charged in the complaint and that he intends to charge the defendant with such offense.

If the proceedings are continued, the new complaint shall be filed and process issued thereon as soon as possible. In misdemeanor cases, if the defendant during the continuance is unable to post any bail which might be required under Rule 6.02, subd. 1, then he must be released subject to such non-monetary conditions as deemed necessary by the court under that Rule.

Comment

When probable cause in accordance with Rule 2.01 appears from the evidence set forth separately in or with the complaint and any supporting affidavits or supplemental testimony, Rule 3.01 authorizes the issuance of a warrant or summons. This rule is similar to F.R.Crim. P. 4 and in authorizing issuance of a summons follows ABA Standards, Pre-Trial Release 3.1 (Approved Draft, 1968) and ALI Model Code of Pre-Arraignment Procedures § 6.04(1) (T.D. §1, 1966). Except in the case of a corporate defendant (Minn. Stat. § 630.15 (1971)), present Minnesota statutory law has no provision for issuance of a summons in lieu of a warrant.

A summons must be issued instead of a warrant when the defendant is charged with a misdemeanor offense punishable by fine only. This stringent restriction on the issuance of warrants is considered justified to prevent the incarceration, even temporarily, of a defendant pending arraignment on a charge which the state or other governmental unit has decided does not even merit incarceration upon conviction. If the defendant fails to respond to the summons, a warrant may be issued.

Additionally, a summons may be issued in any case whenever the issuing officer is satisfied that a warrant is unnecessary to secure the appearance of the defendant and shall be issued if the prosecuting attorney requests it. A summons may be issued, therefore, although the prosecuting attorney has requested a warrant, but shall be issued if he requests it.

Where the defendant is charged with a misdemeanor offense for which he could be sentenced upon conviction to incarceration and not just to a fine, the issuing officer must still issue a summons instead of a warrant unless there is a substantial likelihood that the accused will not respond to a summons, or the defendant cannot be located, or the arrest of the defendant is necessary to prevent bodily harm to himself or another. This standard is consistent with that in Rule 6 governing the mandatory issuance of citations for misdemeanors in lieu of making an arrest, and is taken substantially from ABA Standards, Pre-Trial Release 3.2 (Approved Draft, 1968). See also Rule 4.02, subd. 5(3) for restrictions on the issuance of a warrant for an offense for which the prosecution has obtained a valid complaint after the time in which the court had ordered the complaint to be prepared.

For felonies and gross misdemeanors, Rule 3.01 does not prescribe specific standards that shall govern the decision of whether to issue a summons, but leaves the determination to the discretion of the issuing officer and prosecuting attorney. Issuance of a warrant instead of a summons should not be grounds for objection to the arrest, to the jurisdiction of the court, or to any subsequent proceedings. In exercising this discretion in felony and gross misdemeanor cases, the issuing officer or prosecuting attorney may take into account the nature and circumstances of the offense, the defendant's residence, employment, family relationships, past history of response to legal process, and criminal record. (See ABA Standards, Pre-Trial Release 3.3(b) (Approved Draft, 1968).) The remedy of a defendant who has been arrested by warrant is to request the imposition of conditions of release under Rule 6.02, subd. 1 upon his initial court appearance.

By Rule 3.01 the warrant shall be issued to any person authorized by law to execute a warrant. (See Rule 3.03, subd. 1 for service of a summons by any officer authorized by law to execute a warrant.) (For authorized persons and officers, see Minn. Stat. § 488.11 (1971) (municipal courts not in county court districts); Minn. Stat. §§ 487.25, 633.035 (1971) (county courts and justices of the peace); Minn. Stat. § 488A.06 (1971) (Municipal Court of Hennepin County); Minn. Stat. § 488A.27, subd. 12 (1971) (Municipal Court of St. Paul); Minn. Stat. § 629.30 (1971) (peace officers); Minn. Stat. § 411.27 (1971) (cities of the fourth class); Minn. Stat. §§ 412.61, 412.861 (villages).)

The provision of Rule 3.01 that if an individual defendant fails to appear in response to a summons, a warrant shall issue follows F.R.Crim.P. 4(a).

If a corporate defendant charged with a felony or gross misdemeanor fails to appear in response to a summons, the case shall be transferred to the district court for further proceedings upon the complaint. (See Rule 14.02, subd. 4 which provides that if a defendant corporation fails to appear, judgment of conviction may be entered upon proof of the commission of the offense charged.) If the offense charged is not a felony or gross misdemeanor, the municipal or county court may proceed in the same manner as the district court upon failure of a corporation to appear.

Rule 3.02, subd. 1 prescribing the contents of a warrant follows the language of F.R.Crim.P. 4(b)(1), with the added provision that the warrant and complaint may be combined in one form. This is the present practice in the Municipal Court of Hennepin County. (See also Wis.Stat. § 968.04, subd. 3(a)(8)). This rule also provides that conditions of release may be endorsed on the warrant. If so endorsed, the defendant should be released on meeting those conditions. In misdemeanor cases, the issuing officer must set and endorse on the warrant the amount of bail which the defendant may pay to obtain his release. Upon payment to the jailer of the bail so set, the defendant should be released pending court appearance. The officers authorized to issue warrants or summons are the same as those authorized to issue complaints. See Rule 2.01 and the comments thereon as to those officers so authorized. Clerks or deputy clerks of court are authorized to issue a summons only for offenses which are punishable, upon conviction, by a fine. This is constitutionally permissible under Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119 (1972) and is presently authorized under Minn. Stat. § 629.42 (1971); Minn. Stat. § 488.17, subd. 6 (1971) (Municipal Courts outside of Hennepin County and St. Paul which are not part of the County Court system); Minn. Stat.

§ 488A.10, subd. 7 (1971) (Hennepin County Municipal Court); and 488A.27, subd. 7 (1971)(St. Paul Municipal Court). The clerk or deputy clerk, however, may not issue warrants for any offense.

The words "issuing officer" in Rules 3.01 and 3.02, subd. 1, refer to the judge or judicial officer who issues process upon the complaint and does not refer to the arresting officer. Rule 3.02, subd. 2 sets forth the directions the warrant shall contain for the time of the defendant's first court appearance after his arrest.

Present Minnesota law requires that he be taken before the court "without unreasonable delay" (See e.g., Stromberg v. Hansen, 177 Minn. 307, 225 N.W. 148 (1929); See also Minn. Stat. §§ 629.42, 629.401 (1971).) F.R.Crim.P. 5(a) contains a similar provision.

Rule 3.02, subd. 2 imposes more definite time limitations while permitting a degree of flexibility.

The first limitation (Rule 3.02, subd. 2(1)) is that if the county or municipal court which issued the warrant is in session when the defendant is arrested, he shall be brought promptly before that court. The 36-hour time period provided by Rule 3.02, subd. 2(2) is not applicable to this first limitation under Rule 3.02, subd. 2(1). Ordinarily the the defendant shall be brought directly before the court if it is in session.

The second limitation (Rule 3.02, subd. 2(2)) is that if the county or municipal court which issued the warrant is not then in session, the defendant shall be taken before the nearest available judge or judicial officer of the issuing county court or judge of the issuing municipal court without unnecessary delay, but in any event not more than 36 hours after the arrest or as soon after the 36-hour period as a judge or judicial officer of the issuing county court or judge of the issuing municipal court is available. (This rule changes Minn. Stat. § 629.46 (1971) in that it does not require that the defendant be brought before a judge or judicial officer of the issuing court in the county from which the warrant was issued. The rule requires only that the defendant be brought before a judge or judicial officer of the issuing court.)

This second limitation (Rule 3.02, subd. 2(2)) does not provide an automatic 36-hour period during which the defendant

may be held without a court appearance. It is the intention of the rule that the defendant be brought before a proper judge or judicial officer as soon as one becomes available within the 36 hours. The rule recognizes, however, that there may be unusual circumstances in which a proper judge or judicial officer may not become available within that period and provides for that contingency.

In computing the 36-hour time limit in Rule 3.02, subd. 2(2), the day of arrest is not to be counted. The 36 hours begin to run at midnight following the arrest. Also, Rule 34.01 expressly does not apply to Rule 3.02, subd. 2(2). Saturdays, Sundays, and legal holidays, therefore, are to be counted in computing the time limit under this rule.

Rule 3.02, subd. 3 prescribing the form of summons follows substantially F.R.Crim.P. 4(b)(2) except that Rule 3.02, subd. 3 requires that the summons shall be accompanied with a copy of the complaint. Failure to attach a copy of the complaint does not constitute a jurisdictional defect. (See Hetland and Adamson, Minnesota Practice (1970), Comments, Minn.R.Civ.P. 3.02, pp. 228, 229.)

Under Rule 3.03, subd. 1, a warrant may be executed by any officer authorized by law (See Comment to Rule 3.01) (See also F.R.Crim.P. 4(c)(1)), and a summons may be served by any officer authorized to serve a warrant except that a summons may be served by mail by the clerk or deputy clerk of the issuing court. (F.R.Crim.P. 4(c)(1) provides that a summons may be served by anyone authorized to serve a summons in a civil action. It was the opinion of the Advisory Committee that criminal process should be served by someone in an official court-connected capacity.)

The provisions of Rule 3.03, subd. 2 that a warrant may be executed or a summons served at any place within the State is in accord with existing law governing service of criminal process (Minn. Stat. §§ 629.40-629.43, 488.05, subd. 3, 488A.01, subd. 8, 488A.18, subd. 9, 487.22). The phrase "except where prohibited by law" was added to exclude those places, such as federal reservations, where state service of process may be prohibited by law.

Rule 3.03, subd. 3 provides that the warrant shall be executed by arresting the defendant. The prohibition against an arrest on Sunday or between the hours of 9 p.m. and 9 a.m. unless expressly authorized on the warrant adopts Minn. St. § 629.31 (1971) and further extends the prohibition to legal holidays (See Rule 34.01 as to the

definition of "legal holidays"). The minor nature of misdemeanors should not ordinarily justify an arrest during the proscribed period of time, and under Rule 3.03, subd. 3, an arrest on a warrant for a misdemeanor punishable by a fine only may not be made during the proscribed times under any circumstances. The issuing officer may not, therefore, give blanket authorization on the warrant for all such arrests, but rather shall endorse his authorization on the warrant only when such an arrest is required by exigent circumstances.

Otherwise, the time and manner of making the arrest is left to existing statutory law. (See Minn. Stat. §§ 629.31 (as to time in the case of felonies and gross misdemeanors), 629.32, 629.33 (1971) (as to manner).) The provision of Rule 3.03, subd. 3 that the arresting officer need not have the warrant in his possession is in accord with Minn. Stat. § 629.32 (1971). The provision that the defendant shall be informed of the existence of the warrant and of the charge against him follows F.R.Crim.P. 4(c)(3). In Rule 3.03, subd. 3 there is no specific requirement as in Minn. Stat. § 629.32 (1971) and F.R.Crim.P. 4(c)(3) that the defendant be shown the warrant upon request as soon as possible. When brought promptly before a judge or judicial officer following arrest the warrant and complaint will be available to him.

The provision of Rule 3.03, subd. 3 that summons may be served by mail follows ABA Standards, Pre-Trial Release, 3.4 (Approved Draft, 1968), F.R.Crim.P. 4(3), and ALI Model Code of Pre-Arraignment Procedure, § 120.4 (Proposed Official Draft # 1, 1972). The provision for personal or substituted service comes from F.R.Crim.P. 4(c)(4).

For service of summons on corporations Rule 3.03, subd. 3 adopts the method prescribed by law for service of process in civil actions. (See Minn.R.Civ.P. 4.03(c).)

Rule 3.03, subd. 4 providing for proof of the execution of a warrant or service of a summons to be made by the certificate of the officer executing the warrant or serving the summons is taken from F.R.Crim.P. 4(c)(4) as is the provision for execution or service of an unexecuted warrant or unserved summons.

Rule 3.04, subd. 1 permitting an amendment of a warrant or summons for defects in form is taken from Uniform Rules of Criminal Procedure 5(e)(1) (approved 1952.)

Rule 3.04, subd. 2 adopts the substance of Uniform Rules of Criminal Procedure 5(e)(2) (approved 1952). This rule

permits the court to continue any pretrial proceedings to enable the prosecuting attorney to file a new complaint when a motion is made for that purpose upon any of the grounds specified in the rule, and contemplates that if the proceedings are continued the prosecuting attorney shall move promptly to file a new complaint. For similar provisions see Rule 11.05 (Amendment of Complaint at Omnibus Hearing), Rule 17.05 (Amendment of Indictment or Complaint), and Rule 17.06, subd. 4 (Effect of Determination of Motion to Dismiss an Indictment or Complaint).

RULE 4. PROCEDURE UPON ARREST UNDER WARRANT FOLLOWING A COMPLAINT OR WITHOUT A WARRANT

Rule 4.01. Arrest Under Warrant

A defendant arrested under a warrant issued upon a complaint shall be taken before a court, judge or judicial officer as directed in the warrant.

Rule 4.02. Arrest Without a Warrant

Following an arrest without a warrant:

Subd. 1. Release by Arresting Officer. If the arresting officer or his superior determines that further detention is not justified, such officer or his superior shall immediately release the arrested person from custody.

Subd. 2. Citation. The arresting officer or his superior may issue a citation to and release the arrested person as provided by these rules, and must do so if so ordered by the prosecuting attorney or by a judge or judicial officer of the county court of the county where the alleged offense occurred or by a judge of a municipal court in such county or by any person designated by the court to perform that function.

Subd. 3. Notice to Prosecuting Attorney. As soon as practical after the arrest, the arresting officer or his superior shall notify the prosecuting attorney of the arrest.

Subd. 4. Release by Prosecuting Attorney. The prosecuting attorney may order the arrested person released from custody.

Subd. 5. Appearance Before Judge or Judicial Officer.

(1) Before Whom and When. If an arrested person is not released pursuant to this rule or Rule 6, he shall be brought before the nearest available judge of the county court of the county where the alleged offense occurred or judicial officer of such court or judge of a municipal court in such county. He shall be brought before such judge or judicial

officer without unnecessary delay, and in any event, not more than 36 hours after the arrest, exclusive of the day of arrest, Sundays, and legal holidays, or as soon thereafter as such judge or judicial officer is available. Provided, however, in misdemeanor cases, if the defendant is not brought before a judge or judicial officer within the 36-hour limit, he shall be released upon citation as provided in Rule 6.01, subd. 1.

(2) Complaint Filed; Order of Detention; Felonies and Gross Misdemeanors. At or before the time of the defendant's appearance as required by Rule 4.02, subd. 5(1), a complaint shall be presented to the judge or judicial officer referred to in Rule 4.02, subd. 5(1) or to any judge or judicial officer authorized to issue criminal process upon the offense charged in the complaint. The complaint shall be filed forthwith except as provided by Rule 33.04 and an order for detention of the defendant may be issued, provided (1) the complaint contains the written approval of the prosecuting attorney or the certificate of the judge or judicial officer as provided by Rule 2.02; and (2) the judge or judicial officer determines from the facts set forth separately in writing in or with the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed and that defendant committed it. Otherwise, the defendant shall be discharged, the complaint and any supporting papers shall not be filed, and no record made of the proceedings.

(3) Complaint or Tab Charge; Misdemeanors. If there is no complaint made and filed by the time of the defendant's first appearance in court as required by this rule for a misdemeanor charge, the clerk shall enter upon the records a brief statement of the offense charged including a citation of the statute, rule, regulation, ordinance or other provision of law which the defendant is alleged to have violated. This brief statement shall be a substitute for the complaint and is referred to as a tab charge in these rules. However, if the judge orders, or if requested by the person charged or his attorney, a complaint shall be made and filed. Such complaint shall be made and filed within 48 hours after the demand therefor, if the defendant is in custody or within thirty (30) days of such demand if the defendant is not in custody. If no valid complaint has been made and filed within the time required by this rule, the defendant shall be discharged, the proposed complaint, if any, and any supporting papers shall not be filed, and no record shall be made of the proceedings. A complaint is valid when it (1) complies with the requirements of Rule 2, and (2) the judge has determined from the complaint and any supporting affidavits or supplemental sworn testimony that there

is probable cause to believe that an offense has been committed and that the defendant committed it. Upon the filing of a valid complaint, the defendant shall be arraigned. When a charge has been dismissed for failure to file a valid complaint and a valid complaint is thereafter filed, a warrant shall not be issued on that complaint unless a summons has been issued first and either could not be served, or, if served, the defendant failed to appear in response thereto.

Comment

By Rule 4.01 a defendant arrested following a complaint shall be dealt with as directed by Rule 3.02, subd. 2.

Rule 4.02, subd. 1 directs an officer who makes an arrest without a warrant or his superior to release the arrested person before his initial appearance in court without proceeding further against him, if the officer determines that further detention is not justified. This might occur when, for example, further investigation disclosed to the satisfaction of the officer that the defendant did not commit the offense for which he was arrested. (See similar provisions in ALI Model Code of Pre-Arraignment Procedure, § 120.9(2) (Proposed Official Draft #1, 1972), Wis.Stat. § 968.08).

Rule 4.02, subd. 4 similarly authorizes the prosecuting attorney to order the release of a person arrested without a warrant without proceeding further against him. This would occur, for example, if the prosecuting attorney decides not to file a complaint.

Rule 4.02, subd. 3 provides that the prosecuting attorney shall be notified of an arrest without a warrant as soon as practical in order that he may determine whether to continue the prosecution and if so, to draw a complaint.

Rule 4.02, subd. 2 provides that the officer arresting without a warrant or his superior may issue a citation as provided by Rule 6.01 and that he must do so if ordered by the prosecuting attorney or by a judge or judicial officer described in the rule.

Rule 4.02, subd. 5(1) prescribing the time within which a person arrested without a warrant shall be first brought before the court recognizes that additional time is needed to determine whether to continue the prosecution and to draw the complaint. So there is no requirement that the defendant be brought promptly before the appropriate court after his arrest if the court is in session, but it is

necessary under Rule 4.02, subd. 5(1) that the defendant be brought before such court without "unnecessary delay". (Compare Rule 3.02, subd. 2.) The 36-hour period does not include the day of arrest, Sundays, or legal holidays. Otherwise the intent of Rule 4.02, subd. 5(1) and Rule 3.02, subd. 2 is the same, namely, that the 36-hour period is not an automatic holding period and that the defendant shall be brought before the court at the earliest possible time within the period. In exceptional cases, however, the prosecuting attorney shall not be precluded by this section from seeking relief pursuant to Rule 34.02. The effect of failure to comply with Rules 4.02, subd. 5(1) and 3.02, subd. 2 on the admission of confessions or other evidence or on the jurisdiction of the court is left to case-by-case development. In State v. Wiberg, 296 N.W.2d 388 (Minn. 1980) the Supreme Court held that violation of the time limits set forth in Rule 4.02, subd. 5(1) does not require the automatic exclusion of statements made which have a reasonable relationship to the violation. Rather, the admissibility of the statements depends on such factors as the reliability of the evidence, the length of the delay, whether the delay was intentional, and whether the delay compounded the effects of other police misconduct. In Wiberg the Supreme Court found a violation of Rule 4.02, subd. 5(1) even though 36 hours had not yet elapsed exclusive of the day of arrest. The court noted that such unexplained delays as occurred in Wiberg should weigh heavily in the trial court's determination of whether to exclude any statements. For the application of this same suppression test to identification evidence see Meyer v. State, 316 N.W.2d 545 (Minn. 1982).

Where the defendant agrees, Rule 4.02, subd. 5(3) provides the procedure for initiating misdemeanor proceedings without the necessity of issuing a complaint or obtaining an indictment as is required for felonies and gross misdemeanors. This is provided to avoid the unnecessary delay for a defendant and to aid a prosecutor in those cases where the defendant may not even desire a complaint if he is sufficiently informed in some other way of the charges against him. When a defendant makes his first appearance in court following a warrantless misdemeanor arrest, the clerk shall enter on the records a brief statement (tab charge) of the offense charged, including a citation to the statute, ordinance, rule, regulation or provision of law which the defendant is alleged to have violated. This statement shall be a substitute for the complaint and is sufficient to initiate the misdemeanor

proceedings under Rule 10.01 unless the defendant, his attorney or the court requests that a complaint be filed. This provision for tab charges is substantially consistent with present Minnesota law although under the present statutes the right to a complaint varies from court to court. See Minn. Stat. § 487.25, subd. 4, and Minn. Stat. § 488A.10, subd. 4 (In the county courts and in Hennepin County Municipal Court, a tab charge is sufficient unless the judge orders or the defendant requests a complaint); Minn. Stat. § 488A.27, subd. 4 (In St. Paul a tab charge is sufficient unless the judge orders a complaint); and Minn. Stat. § 488.17, subd. 4 (In any other municipal court the tab charge is sufficient where the defendant is in custody when appearing before the court, unless the court orders a complaint).

Under Rule 5.01 a defendant must be advised of his right to demand a complaint. It is anticipated that complaints will be requested by defendants in only a small percentage of misdemeanor cases because discovery is permitted under Rule 7.03, and most defendants will not wish to make an additional appearance to receive the complaint.

If a complaint is required under this rule, the prosecutor must file a valid complaint within 48 hours if the defendant is in custody or within 30 days if the defendant is not in custody or the tab charge must be dismissed. A longer time limit than 48 hours for those defendants in custody would encourage defendants who are in jail pending issuance of a complaint to waive that right in order to speed up the disposition of the charges. Time limits, of course, can be waived by a defendant. Where the defendant is not in custody, he may wish to request a later time to receive the complaint, for his convenience and that of the defense counsel and the prosecutor.

A complaint to be valid must comply with the requirements of Rule 2 and the issuing officer must have made a determination of probable cause.

Where a charge has been dismissed by the court for failure of the prosecutor to file a valid, timely complaint (Rule 4.02, subd. 5(3)) as required and the prosecutor subsequently files a valid complaint, a summons must be issued instead of a warrant. If it is impossible to locate the defendant to serve the summons or if he fails to respond to the summons, a warrant may be issued. (See also Rule 3.01). This restriction is considered justified since it is unfair to subject a defendant to a possibly unnecessary arrest when he has appeared in court once to answer the minor charge, and, through no fault of his own, a complaint was not issued at that time.

Where the tab charge has been dismissed for failure to file a valid, timely complaint as required, the prosecutor must file a valid complaint within the time specified by Rule 17.06, subd. 4(3) or any further prosecution is barred if so ordered by the court.

When a valid complaint has been filed or waived, defendant will be arraigned pursuant to Rule 5.

Rule 4.02, subd. 5(2) provides that on or before the first appearance of a person arrested without a warrant a complaint shall be filed provided it has the written approval of the prosecuting attorney or the certificate of the court as provided in Rule 2.02 and the judge or judicial officer has made a finding of probable cause. Otherwise the defendant shall be discharged. The rule is not intended to cover the effect of the discharge on subsequent prosecution for the same offense or conduct. (See State v. Uglum, 175 Minn. 607, 222 N.W. 280 (1928).)

Rule 4.02, subd. 5(2) permits the complaint to be presented either to the judge or judicial officer before whom the defendant will appear or to any judge or judicial officer authorized to issue a warrant of arrest upon the complaint. If the judge or judicial officer to whom the complaint is presented determines that there is probable cause to believe that defendant committed the offense charged, he shall file the complaint, and in lieu of a warrant of arrest (which is the present practice), he shall issue an order for detention of the defendant pending further proceedings.

RULE 5. PROCEDURE ON FIRST APPEARANCE

Rule 5.01. Statement to the Defendant

When a defendant arrested with or without a warrant or served with a summons or citation appears initially before a judge or judicial officer, he shall be advised of the nature of the charge against him. If the defendant has not previously received a copy of the complaint, if any, and supporting affidavits and the transcription of any supplementary testimony, he shall be provided with copies thereof. Upon motion of the prosecuting attorney, the court shall require that the defendant be booked, photographed, and fingerprinted. In cases of felonies and gross misdemeanors, the defendant shall not be called upon to plead.

The judge, judicial officer, or other duly authorized personnel shall advise the defendant substantially as follows:

(a) That he is not required to say anything or submit to interrogation and that anything he says may be used against him in this or in any subsequent proceedings;

(b) That he has a right to counsel in all subsequent proceedings, including police line-ups and interrogations, and if he appears without counsel and is financially unable to afford counsel, that counsel will forthwith be appointed without cost to him if he is charged with an offense punishable upon conviction by incarceration;

(c) That he has a right to communicate with his counsel and that a continuance will be granted if necessary to enable defendant to obtain or speak to counsel;

(d) That he has a right to a jury trial or a trial to the court;

(e) That if the offense is a misdemeanor, he may either plead guilty or not guilty, or demand a complaint prior to entering a plea.

The judge, judicial officer, or other duly authorized personnel may advise a number of defendants at once of these rights, but each defendant shall be asked individually before he is arraigned whether he heard and understood these rights as explained earlier.

Rule 5.02. Appointment of Counsel

Subd. 1. Felonies and Gross Misdemeanors. If the defendant is not represented by counsel and is financially unable to afford counsel, the judge or judicial officer shall appoint counsel for him.

Subd. 2. Misdemeanors. Unless the defendant charged with a misdemeanor punishable upon conviction by incarceration voluntarily waives counsel in writing or on the record, the court shall appoint counsel for him if he appears without counsel and is financially unable to afford counsel. The court shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of his rights. If the court is not so satisfied, it shall not proceed until the defendant is provided with counsel either of his own choosing or by assignment.

Notwithstanding the waiver, the court may designate counsel to be available to assist a defendant who cannot afford counsel and to consult with him at all stages of the proceedings.

A defendant who proceeds at the arraignment without counsel does not waive his future right to counsel and the court must inform him that he continues to have that right at all stages of the proceeding. Provided that for misdemeanor offenses not punishable upon conviction by incarceration, the court may appoint an attorney for a defendant financially unable to afford counsel when requested by the defendant or interested counsel or when such appointment appears advisable to the court in the interests of justice to the parties.

Subd. 3. Standard of Indigency. A defendant is financially unable to obtain counsel if he is financially unable to obtain adequate representation without substantial hardship for himself or his family.

Subd. 4. Financial Inquiry. An inquiry to determine financial eligibility of a defendant for the appointment of counsel shall be made whenever possible prior to the court appearance and by such persons as the court may direct. This inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3.

Subd. 5. Partial Eligibility and Reimbursement. The ability to pay part of the cost of adequate representation at any time while the charges are pending against a defendant shall not preclude the appointment of counsel for the defendant. The court may require a defendant, to the extent of his ability, to compensate the governmental unit charged with paying the expense of appointed counsel.

Rule 5.03. Date of Appearance in District Court; Consolidation of Appearances Under Rule 5 and Rule 8

If the defendant is charged with a felony or gross misdemeanor and has not waived his right to a separate appearance under Rule 8 as provided in this rule, the judge or judicial officer shall set a date for and order the appearance of the defendant before the district court having jurisdiction to try the offense charged in accordance with a schedule or other directive established by order of the district court, which appearance date shall not be later than fourteen (14) days after defendant's initial appearance before such judge or judicial officer.

The defendant shall be informed of the time and place of such appearance. The time for appearance may be extended by the district court for good cause.

Notwithstanding any rule to the contrary, in felony and gross misdemeanor cases, if it has been mutually agreed between the district court and the county court or if ordered by the Supreme Court, the defendant may be permitted to waive the separate initial appearance otherwise required by this rule and Rule 8. Any such waiver shall be made either in writing or orally on the record in open court. If a separate initial appearance is waived by the defendant, all of the functions and procedures provided for by both Rule 5 and Rule 8 shall take place at the one consolidated appearance.

Rule 5.04. Plea in Misdemeanor Cases

Subd. 1. Entry of Plea. When a valid complaint has been made and filed, or a brief statement entered on the record as authorized under Rule 4.02, subd. 5(3), the defendant shall be called upon to plead or be given time to plead. The arraignment shall be conducted in open court. A defendant may appear by counsel and a corporation shall appear by counsel or by a duly authorized officer.

Subd. 2. Guilty Plea; Offenses From Other Jurisdictions. If he enters a plea of guilty, the presentencing and sentencing procedures provided by these rules shall be followed. Following a plea of guilty, the defendant may be permitted upon his or his attorney's request, to plead guilty to other misdemeanor offenses committed within the jurisdiction of other county courts in the state provided that such plea has been approved by the prosecuting attorney of the governmental unit in which the offenses are or could be charged. Prior to the acceptance of such a plea, the defendant shall be tab charged with the offense pursuant to Rule 4.02, subd. 5(3). Entry of such a plea constitutes a waiver of venue.

Any fines imposed and collected upon a guilty plea entered under this rule to an offense arising in another jurisdiction shall be remitted by the clerk of the court imposing the fine to the clerk of the court which originally had jurisdiction over the offense. The clerk of the court of original jurisdiction upon receiving the remittance shall disburse it as required by law for all other similar fines.

Subd. 3. Not Guilty Plea and Jury Trial. If the defendant enters a plea of not guilty to a charge on which he is entitled to a jury trial, he shall be asked whether he wishes to exercise

or waive that right. The defendant may waive jury trial either personally in writing or orally on the record in open court. If the defendant fails to waive or demand a jury trial, a jury trial demand shall be entered in the record.

Subd. 4. Demand or Waiver of Evidentiary Hearing. If the defendant pleads not guilty and a notice of evidence and identification procedures has been given by the prosecution as required by Rule 7.01, the defendant and the prosecution shall each either waive or demand an evidentiary hearing as provided by Rule 12.04. Such demand or waiver may be made either orally on the record or in writing and shall be made at the first court appearance after the notice has been given by the prosecution.

Subd. 5. Special Appearances Abolished. Special Appearances are abolished and any challenge to the personal jurisdiction of the court shall be decided as provided in Rule 10.02.

Rule.5.05. Bail or Release

The judge or judicial officer shall set and advise the defendant of the conditions under which he may be released under these rules for appearance.

Rule 5.06. Record

Minutes of the proceedings shall be kept unless the judge or judicial officer directs that a verbatim record thereof shall be made, and provided that any plea of guilty to an offense punishable by incarceration shall comply with the requirements of Rule 13.05 and Rule 15.03.

Rule 5.07. Transmission to District Court

If the defendant is charged with a felony or gross misdemeanor, the record and all papers in the proceeding shall be transmitted to the clerk of the district court having jurisdiction to try the offense charged in the complaint.

Rule 5.08. First Appearance in District Court

Notwithstanding any rule to the contrary, in felony and gross misdemeanor cases, if it has been mutually agreed between the district court and the county court or if ordered by the Supreme Court, or if a judge or judicial officer of the county court is not available, the first appearance in court of defendants pursuant to Rule 5 may be held before a judge of district court.

Comment

Rule 5 prescribes the procedure upon the defendant's initial appearance before a judge or judicial officer following an arrest with or without a warrant under Rules 3 and 4.01 or in response to a summons under Rule 3 or a citation under Rule 4.02, subd. 2. In most misdemeanor cases, the initial appearance will also be the time of arraignment and, often, the time of disposition as well.

Rule 5.01 sets forth the statements and advice to be given to the defendant upon his initial court appearance. Similar provisions appear in ABA Standards, Pre-Trial Release, 4.3 (Approved Draft, 1968), F.R.Crim.P. 5(c), and ALI Model Code of Pre-Arraignment Procedure § 310.1(4)(a) (T.D. #5, 1972).

Rule 5.01 requires that the defendant be provided with copies of the complaint and any supporting affidavits and a copy of the transcript of any supplemental testimony. Ordinarily, the facts showing probable cause will be set forth separately in or with the complaint or in supporting affidavits or both, but in the unusual case when supplemental testimony is taken, the defendant shall be provided with a copy of the transcript as soon as it is available. Of course, in misdemeanor cases where no complaint has been issued and prosecution is pursuant to a tab charge this requirement does not apply.

In misdemeanor cases this statement as to a defendant's rights may be combined with the questioning required under Rule 15.02 prior to acceptance of a guilty plea. In order to save time and avoid repetition, the judge or judicial officer may advise a number of defendants at the same time of these rights, but the statement must be recorded and each defendant upon approaching the court must be asked on the record whether he has heard and understood the rights explained earlier.

The warning as to the defendant's right to counsel continues the requirements of Minn. Stat. §§ 611.15 and 630.10 (1971). (See St. Paul v. Whidby, 295 Minn. 129, 203 N.W.2d 823 (1972), recognizing that misdemeanors authorizing a sentence of incarceration are criminal offenses and criminal procedures must be followed.)

Rule 5.02 requires the appointment of counsel for indigent defendants (See ABA Standards, Pre-Trial Release, 4.2 (Approved Draft, 1968).)

Under Rule 5.02, subd. 1, counsel must be appointed for a defendant financially unable to afford counsel in a felony or gross misdemeanor case even if a defendant exercises his

constitutional right under Faretta v. California, 422 U.S. 806 (1975), to refuse the assistance of counsel and represent himself. In such a situation the appointed counsel would remain available for assistance and consultation if requested by the defendant.

As suggested in Von Moltke v. Gillies, 332 U.S. 708 (1948) to ensure a knowing and intelligent waiver of counsel, the court should make a penetrating and comprehensive examination of the defendant as to his comprehension of the

(1) Nature of the charges;

(2) Statutory offenses included within them;

(3) The range of allowable punishments;

(4) The possible defenses;

(5) The possible mitigating circumstances; and

(6) All other facts essential to a broad understanding of the consequences of the waiver.

Another way for the court to assure itself that the waiver of counsel is voluntary and knowledgeable is to appoint temporary counsel to advise and consult with the defendant as to the waiver. This is in accord with ABA Standards, Providing Defense Services, 5-7.3 (1980).

The waiver of counsel may be in writing (Minn. Stat. § 611.19 (1971); ABA Standards, Providing Defense Services, 7.3 (Approved Draft, 1968)), or orally on the record.

Even though the defendant waives counsel, Rule 5.02, subd. 2 provides for the designation of counsel to be available for assistance and consultation.

Also, despite a waiver of counsel at arraignment, the defendant continues to have the right to counsel at all further stages of the proceedings, and the court must so inform him. See ABA Standards, Providing Defense Services, 7.3 (Approved Draft, 1968).

For misdemeanors not punishable by incarceration, the court may, upon request of the defendant or interested counsel or upon the court's own motion when in the interests of justice to the parties, appoint an attorney to represent the defendant. The United States Supreme Court in Argersinger v. Hamlin, 405 U.S. 348 (1972) did not decide that counsel was not required whenever incarceration was not authorized. Considerations other than the possibility of incarceration may

make the case sufficiently serious to warrant the appointment of counsel and this rule provides for that possibility.

Rule 5.02, subd. 3 prescribes the standard to be applied by the court in determining whether a defendant is sufficiently indigent to require the appointment of counsel. This standard is taken from ABA Standards, Providing Defense Services, 6.1 (Approved Draft, 1968).

In determining whether a defendant is financially unable to afford counsel in a misdemeanor case the Advisory Committee strongly recommends that the following standards be employed as guidelines so that the decision to appoint counsel for indigent defendants can be more efficiently and uniformly reached:

STANDARDS

(1) A defendant will be presumed to be financially unable to afford counsel if;

(a) his cash assets are less than $300.00 when entitled to only a court trial; or

(b) his cash assets are less than $500.00 when entitled to a jury trial; and

(c) his current weekly net income does not exceed forty times the federal minimum hourly wage as prescribed by federal law in effect at the time, if he is unmarried and without dependents; or,

(d) his current weekly net income and that of his spouse do not exceed sixty times the federal minimum hourly wage as prescribed by federal law in effect at the time, if he is married and without dependents. In determining the amounts specified under either section (c) or section (d), for each dependent the amount shall be increased by $25.00 per week.

(2) A defendant who has cash assets or income exceeding the amounts specified in paragraph (1) shall not be presumed to be financially able to obtain counsel. The determination shall be made by the court as a practical matter, taking into account such other factors as the defendant's length of employment or unemployment, prior income, the value and nature of his assets, number of children and other family responsibilities, number and nature of debts arising from any source, the amount customarily charged by members of the practicing bar for representation of the type in question, and any other relevant factor.

(3) In determining whether a defendant is financially able to obtain adequate representation without substantial hardship to himself or his family:

(a) cash assets include those assets which may be readily converted to cash by sale or loan without jeopardizing the defendant's ability to maintain his home or employment. A single family automobile shall not be considered a cash asset.

(b) the fact that the defendant has posted or can post bail is irrelevant except insofar as it represents a cash asset belonging to him which could be assigned to retain counsel. The amount of bail which is or can be posted shall not in itself render a defendant financially able to obtain counsel.

(c) the fact that the defendant is employable but unemployed shall not be in itself proof that he is financially able to obtain counsel without substantial hardship to himself or his family.

(d) the fact that parents or other relatives of the defendant have the financial ability to obtain counsel for the defendant is irrelevant except under the following circumstances:

(i) where the defendant is unemancipated, under the age of 21 years, living with his parents or other relatives, and such parents or other relatives have the clear ability to obtain counsel; or

(ii) where the parents or other relatives of the defendant have the financial ability to obtain counsel for the defendant but are unwilling to do so only because of the relatively minor nature of the charge.

Under part (1) of the recommended standards a defendant will be presumed to be financially unable to retain his own attorney and counsel shall be appointed for him when his income and assets fail to meet the specified minimum levels. The minimum income level referred to in the recommended standards is a weekly "net" figure and is keyed to the federal minimum hourly wage in effect at the time the appointment of counsel is requested. By reference to the minimum wage law, the standard will hopefully provide a realistic gauge of a defendant's ability to hire counsel which will vary with the economy. As made clear by part (2) of the recommended standard, part (1) provides a

presumption of indigency and is not to be taken as indicating that a defendant with a higher income and assets must obtain his own attorney. A defendant with a higher income or assets should still be appointed counsel if he is unable under part (2) to obtain adequate representation without substantial hardship to himself or his family. In making this determination the court shall consider the factors listed in parts (2) and (3) of the standard, as well as any other relevant factors.

To assist the court in deciding whether to appoint counsel, Rule 5.02, subd. 4 provides that whenever possible a financial inquiry should be conducted before the defendant's appearance in court. Such an inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3.

Rule 5.02, subd. 5 provides that the ability of a defendant to pay part of the cost of adequate representation when charges are pending against him shall not preclude the court from appointing counsel for him. This provision is included to make clear that counsel can be appointed for the person of moderate means who would be subject to substantial financial hardship if forced to pay the full cost of adequate representation. In such circumstances the court may require the defendant to the extent of his ability to compensate the governmental unit charged with paying the expense of the appointed counsel.

Rule 5.02, subd. 5 is in accord with ABA Standards, Providing Defense Services, 6.3 (Approved Draft, 1968) and with Minn. Stat. § 611.20.

Under Rule 5.03, if the defendant is charged with a felony or gross misdemeanor, a date shall be fixed by the county court judge or judicial officer or municipal court judge for the defendant's appearance in the district court under Rule 8, where he will be arraigned upon the complaint (Rules 8.01, 12), and if he does not then plead guilty, a date will be fixed by the district court (Rule 8.04) for the Omnibus Hearing provided for by Rule 11.

The date fixed by the county court judge or judicial officer or municipal court judge (Rule 5.03) for the defendant's first appearance before the district court under Rule 8 shall be not more than 14 days after the defendant's initial appearance (Rule 5), but the district court may extend the time for good cause (Rule 5.03). The county court judge or judicial officer or municipal court judge shall set the date in accordance with a time schedule or other order or directive previously furnished or made by the district court (Rule 5.03).

In certain circumstances a separate appearance to fulfill the requirements of Rule 8 may serve very little purpose. This is particularly so if the appearance required by Rule 5 and that required by Rule 8 are to be held in the same court. Originally these rules required the appearance under Rule 5 to be in the county court and the appearance under Rule 8 to be in the district court. Now, if mutually agreed between the district court and the county court or if ordered by the Supreme Court, Rule 5.08 also permits the Rule 5 appearance to be held in the district court and Rule 8 also permits the appearance under that rule to be held in the county court. When these options are used, the additional time and judicial resources invested in a separate appearance under Rule 8 may yield little or no benefit. Therefore, if agreed by the district court and the county court or if ordered by the Supreme Court, Rule 5.03 permits the appearances required by Rule 5 and Rule 8 to be consolidated upon request of the defendant.

When the appearances are consolidated under Rule 5.03, all of the provisions in Rule 8 are applied to the consolidated hearing. This means that under Rule 8.04 the Omnibus Hearing provided for by Rule 11 must be scheduled for a date not later than 14 days after the consolidated hearing. This requirement is subject however to the power of the court under Rule 8.04(c) to extend the time for good cause upon motion of the defendant or the prosecution or upon the court's own motion. Also, the notice of evidence and identification procedures required by Rule 7.01 must be given at or before the consolidated hearing.

By Rule 5.04, after a complaint has been issued or a tab charge entered on the record as authorized under Rule 4.02, subd. 5(3), the defendant shall be arraigned in open court under Rule 5.04 or may be given time to plead. This is in accord with Minn. Stat. § 630.13 (1971). The defendant has an absolute right to appear by counsel to enter a plea of not guilty and set a trial date.

To the extent Minn. Stat. § 630.01 (1971) might require the permission of the court to make such an appearance by counsel, it is superseded. See also Rule 14.02, subd. 2 (plea of guilty by counsel); Rule 15.03, subd. 2 (petition to plead guilty); Rule 26.03, subd. 1(3) (defendant's presence at trial and sentencing); and Rule 27.03, subd. 2 (defendant's presence at sentencing). The requirement that the arraignment be conducted in open court is taken from F.R.Crim.P. 10 and follows Minn. Stat. § 630.01 (1971). The appearance of a corporation by counsel or an officer continues present Minnesota practice under Minn. Stat. § 630.16 (1971).

If the defendant pleads guilty in a misdemeanor case the procedure prescribed by Rule 15 shall be followed and thereafter the pre-sentencing and sentencing procedures provided by these rules shall be followed.

Following a plea of guilty a defendant or his attorney under Rule 5.04, subd. 2 may request permission for the defendant to enter a plea of guilty to any other misdemeanor committed within the state which is under the jurisdiction of another county or municipal court. If the defendant has permission to enter the plea from the prosecuting attorney of the governmental unit authorized to prosecute the offense, then the court may accept the plea provided it is otherwise proper. Before accepting the plea, a tab charge of the offense shall be entered on the record pursuant to Rule 4.02, subd. 5(3). It is not necessary that the defendant has been charged in the court which would otherwise have jurisdiction over the offense. By entering a plea under Rule 5.04, subd. 2 the defendant waives any right to object to the venue of the court which is accepting the plea. Following acceptance of the plea, the court has the power to sentence the defendant just as if it originally had jurisdiction over the offense. This rule is taken from ABA Standards, Pleas of Guilty, 1.2 (Approved Draft, 1968) and permits a defendant to dispose of a number of minor charges pending against him throughout the state without the necessity and expense of being taken to each court personally while in custody. If any fines are collected upon entry of a guilty plea to an offense arising in another jurisdiction, the money is to be forwarded to the clerk of the court which originally had jurisdiction over the offense. Disbursement of such fines by the clerk of the court of original jurisdiction shall be as if the plea had actually been entered and the fine collected in the court of original jurisdiction. As to disbursement of such fines see Minn. Stat. §§ 487.31 and 487.33, subds. 1 and 5 (County Courts); 488A.03, subd. 6(a) and (d) and 488A.03, subd. 11(d) (Hennepin County Municipal Court); and 488A.20, subd. 4 (Ramsey County Municipal Court).

If the defendant pleads not guilty and is entitled to a jury trial he shall be asked under Rule 5.04, subd. 3 whether he wishes to exercise that right. The defendant with the approval of the court has an absolute right to waive a jury trial under Rules 5.04, subd. 3 and 26.01, subd. 1(2)(a) in a misdemeanor case. If the prosecutor objects to the judge selected to try the case he may file an affidavit of prejudice as permitted under State v. Kraska, 294 Minn. 540, 201 N.W.2d 742 (1972). See also Rule 26.01, subd. 1(2)(b) as to waiver of jury trial when there is prejudicial publicity and Rule 26.01, subd. 1(3) as to withdrawal of the waiver. Rule 5.04, subd. 3 permits a defendant to waive a jury trial either in writing or orally

in open court on the record. This is contrary to Minn. Stat. § 631.01 which permitted only a written waiver. See Rule 26.01(1) as to a misdemeanor defendant's right to a jury trial and Rule 6.06 as to the time within which a trial must be held on a misdemeanor charge.

Under Rule 5.04, subd. 4 if the defendant pleads not guilty in a misdemeanor case and the prosecution has given the notice of evidence and identification prescribed by Rule 7.01, then both the defendant and the prosecution shall either waive or demand a Rasmussen (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) hearing. The waiver or demand is necessary only in cases where a jury trial is to be held since the notice is not required under Rule 7.01 if no jury trial is to be held in a misdemeanor case. Under Rule 7.01 the notice must be given at least 7 days before trial or by the conclusion of the pretrial conference if held. The waiver or demand shall be made at the first court appearance after notice is given and if given during a court appearance the waiver or demand should be made at that appearance. If no court appearance intervenes between the giving of notice and the trial, then waiver or demand shall be made immediately before trial. The waiver or demand of a hearing may be made either in writing or orally on the record. See Rule 12.04, subd. 3 as to the time of any evidentiary hearing demanded.

Rule 5.04, subd. 5 abolishes special appearances in misdemeanor cases. The purpose of such an appearance in the past has been to avoid waiver of a challenge to the personal jurisdiction of the court. Rules 10.02 and 17.06, subd. 4(1), however, reverse prior case law and provide a procedure for challenging the personal jurisdiction of the court after a complaint has been issued and a not guilty plea entered. See the Comments to Rule 10.02 as to this procedure.

By Rule 5.05 the judge or judicial officer shall set the conditions for the defendant's release under Rule 6.02. Under Rule 5.06 minutes of the proceedings at an arraignment or first appearance in court must be kept unless the judge or judicial officer directs that a verbatim record shall be made. The method of taking the minutes is within the discretion of the court. Where a guilty plea is entered to a misdemeanor offense punishable by incarceration, however, Rules 13.05 and 15.03 require either that a verbatim record be made or a petition to plead guilty be filed. This requirement is prescribed in light of State v. Casarez, 295 Minn. 534, 203 N.W.2d 406 (1973) where the court applied the holding of Boykin v. Alabama, 395 U.S. 238 (1969) to misdemeanor cases saying, "A guilty plea must appear on the record to have been voluntarily

and intelligently made. If not, the plea must be vacated." In the case of a felony or gross misdemeanor the record shall be transmitted to the district court (Rule 5.07).

From the time of the defendant's initial appearance in municipal or county court under Rule 5 until the Omnibus Hearing (Rule 11), the following schedule of events shall take place in felony and gross misdemeanor cases in which the appearances under Rule 5 and Rule 8 have not been consolidated pursuant to Rule 5.03:

1. Defendant's Initial Appearance before municipal or county court (Rule 5).

2. Service of Rasmussen (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) notice (Rule 7.01) on the defendant on or before the date of his initial appearance in the district court under Rule 8.

3. Initial Appearance in the district court (Rule 8) (within 14 days after his initial appearance in county or municipal court (Rule 5)).

4. Service of Spreigl (State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965)), State v. Billstrom, 275 Minn. 525, 149 N.W.2d 281 (1967) notice on the defendant (Rule 7.02) on or before the date of the Omnibus Hearing (Rule 11).

5. Completion of discovery required of prosecution and defendant without order of court (Rules 9.01, subd. 1; 9.02, subd. 1) before the Omnibus Hearing (Rule 7.03).

6. Service of pretrial motions (Rules 10, 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 3; 18.02, subd. 2; 17.03, subd. 3 and subd. 4; 17.06; 20.01, subd. 2; 20.03, subd. 1) to be heard at the Omnibus Hearing (3 days before the Omnibus Hearing (Rule 10.04, subd. 1).)

7. Omnibus Hearing under Rule 11 within 14 days after defendant's initial appearance in the district court (Rule 8) and within 28 days after defendant's initial appearance in the municipal or county court.

From the time of the defendant's initial appearance in court until the trial, the following schedule of events shall take place in misdemeanor cases:

1. Defendant's initial appearance (Rule 5).

2. Arraignment (Rule 5).

3. Notice of challenge to jurisdiction of the court following issuance of complaint and entry of not guilty plea. Notice must be given within 7 days after entry of not guilty plea (Rule 10.02).

4. Service of Rasmussen notice (Rule 7.01) on or before the pretrial conference if held under Rule 12.01, or seven days before trial if no such conference is held.

5. Waiver or demand of Rasmussen hearing by prosecution and defendant at first court appearance following service of the Rasmussen notice (Rule 5.04, subd. 6).

6. Service of Spreigl (State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965), State v. Billstrom, 275 Minn. 525, 149 N.W.2d 281 (1967)) notice on the defendant (Rule 7.02) on or before the date of the pretrial conference (Rule 5.04, subd. 6) if held or at least seven days before trial if no such conference is held.

7. Service of pretrial motions (Rules 10; 17.03, subds. 3 and 4; 17.06; 17.06, subd. 3 and motions to suspend criminal proceedings for mental incompetency and motions to disclose medical reports under Rule 20.04) at least three days before the pretrial conference or three days before trial if no pretrial conference is held, but no more than 30 days after the arraignment unless the court extends the time for good cause (Rule 10.04).

8. Pretrial conference may be held at such time as the court may order (Rule 12.01).

9. Pretrial motions heard at pretrial conference or just before trial if no such conference is held (Rule 10.04, subd. 2).

10. Discovery may be conducted at any time before trial as permitted by Rule 7.03.

11. Rasmussen hearing held immediately prior to jury trial unless otherwise ordered by the court for good cause and upon a trial to the court the hearing may be held as part of the trial (Rule 12.04, subd. 3).

12. Trial to be held within 60 days from the date of demand or within 10 days of demand if the defendant is in custody.

To provide flexibility in scheduling and thereby to assist the courts in meeting the time limits for the first appearance, Rule 5.08, under certain conditions, permits the first appearance to be held in district court rather than in county court. In such cases, the 36-hour time limit prescribed by Rules 3.02, subd. 2(3), and 4.02, subd. 5(1), for warrant and warrantless arrests, respectively, still govern as do all the other procedural rules that would apply if the appearance were in county court.

RULE 6. PRE-TRIAL RELEASE

Rule 6.01. Release on Citation by Law Enforcement Officer Acting Without Warrant

Subd. 1. Mandatory Issuance of Citation.
(1) For Misdemeanors.

(a) By Arresting Officers. Law enforcement officers acting without a warrant, who have decided to proceed with prosecution, shall issue citations to persons subject to lawful arrest for misdemeanors, unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation. The citation may be issued in lieu of an arrest, or if an arrest has been made, in lieu of continued detention. If the defendant is detained, the officer shall report to the court the reasons for the detention. Ordinarily, for misdemeanors not punishable by incarceration, a citation shall be issued if the accused signs the citation agreeing to appear as provided in Rule 6.01, subd. 3.

(b) At Place of Detention. When a person arrested without a warrant for a misdemeanor or misdemeanors, is brought to a police station or county jail, the officer in charge of the police station or the county sheriff in charge of the jail or an officer designated by the sheriff shall issue a citation in lieu of continued detention unless it reasonably appears to the officer that detention is necessary to prevent bodily harm to the accused or another or further criminal conduct or that there is a substantial likelihood that the accused will fail to respond to a citation. If the defendant is detained, the officer in charge shall report to

the court the reasons for the detention. Provided, however, that for misdemeanors not punishable by incarceration, a citation shall be issued if the accused signs the citation agreeing to appear as provided in Rule 6.01, subd. 3.

(2) For Misdemeanors, Gross Misdemeanors and Felonies When Ordered by Prosecuting Attorney or Judge. An arresting officer acting without a warrant or the officer in charge of a police station or other authorized place of detention to which a person arrested without a warrant has been brought shall issue a citation in lieu of continued detention if so ordered by the prosecuting attorney or by the judge of a district, county or municipal court or by any person designated by the court to perform that function.

Subd. 2. Permissive Authority to Issue Citations for Gross Misdemeanors and Felonies. When a law enforcement officer acting without a warrant is entitled to make an arrest for a felony or gross misdemeanor or a person arrested without a warrant for a felony or gross misdemeanor is brought to a police station or county jail, the officer in charge of the police station or the county sheriff in charge of the jail or an officer designated by the sheriff may issue a citation in lieu of arrest or in lieu of continued detention if an arrest has been made, unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct or that the accused may fail to appear in response to the citation.

Subd. 3. Form of Citation. A citation shall direct the accused person to appear before a designated court or violations bureau at a specified time and place, and need not be issued if the accused refuses to sign the citation promising to appear at that time and place. The citation shall state that if the defendant fails to appear in response to the citation, a warrant of arrest may issue.

Subd. 4. Lawful Searches. The issuance of a citation does not affect a law enforcement officer's authority to conduct an otherwise lawful search.

Subd. 5. Persons in Need of Care. Notwithstanding the issuance of a citation, a law enforcement officer may take the cited person to an appropriate medical facility if he appears mentally or physically unable to care for himself.

Rule 6.02. Release by Judge, Judicial Officer or Court

Subd. 1. Conditions of Release. Any person charged with an offense shall be released without bail pending his first court appearance when ordered by the prosecuting attorney, the judge of a district or county court, or by any person designated by the court to perform that function. At his appearance before a judge, judicial officer, or court, a person so charged shall be ordered released pending trial or hearing on his personal recognizance or on order to appear or upon the execution of an unsecured appearance bond in a specified amount, unless the court, judge or judicial officer determines, in the exercise of his discretion, that such a release will be inimical of public safety or will not reasonably assure the appearance of the person as required. When such a determination is made, the court, judge or judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or hearing, or when otherwise required, or, if no single condition gives that assurance, any combination of the following conditions:

(a) Place the person in the care and supervision of a designated person or organization agreeing to supervise him;

(b) Place restrictions on the travel, association or place of abode during his period of release;

(c) Require the execution of an appearance bond in an amount set by the court with sufficient solvent sureties, or the deposit of cash or other sufficient security in lieu thereof; or

(d) Impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

In any event, the court shall also fix the amount of money bail without other conditions upon which the defendant may obtain his release.

The defendant's release shall be conditioned on his appearance at trial or hearing, including the Omnibus Hearing, evidentiary hearing and the pretrial conference prescribed by these rules, or at the taking of any deposition that may be ordered by the court.

Subd. 2. Determining Factors. In determining which conditions of release will reasonably assure such appearance, the judge, judicial officer or court shall on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, his record of appearance at court proceedings or flight to avoid prosecution, and the safety of any other person or of the community.

Subd. 3. Pre-Release Investigation. In order to acquire the information required for determining the conditions of release, an investigation into the accused's background may be made prior to or contemporaneously with the defendant's appearance before the court, judge or judicial officer. The court's probation service or other qualified facility available to the court may be directed to conduct the investigation. Any information obtained from the defendant in response to an inquiry during the course of the investigation and any evidence derived from such information, shall not be used against the defendant at trial. This shall not preclude the use of evidence obtained by other independent investigation.

Subd. 4. Review of Conditions of Release. Upon motion, the court before which the case is pending shall review the conditions of release.

Rule 6.03. Violation of Conditions of Release

Subd. 1. Warrant. Upon an application of the prosecuting attorney alleging that a defendant has violated the conditions of his release, the judge, judicial officer or court that released the defendant may issue a warrant directing that the defendant be arrested and taken forthwith before such judge, judicial officer or court. A summons directing the defendant to appear before such judge, judicial officer or court at a specified time shall be issued instead of a warrant unless it reasonably appears that there is a substantial likelihood that the defendant will fail to respond to the summons or when the whereabouts of the defendant is unknown.

Subd. 2. Arrest Without Warrant. A law enforcement officer having probable cause to believe that a released defendant has violated the conditions of his release may, if it is impracticable to secure a warrant or summons as provided in this rule, arrest the defendant and take him forthwith before such judge, judicial officer or court. In a misdemeanor case, a citation shall be issued in lieu of an arrest or continued detention unless it reasonably appears that the arrest or detention is necessary to prevent bodily harm to the accused or another or to prevent further criminal

conduct, or that there is a substantial likelihood that the defendant will fail to respond to the citation.

Subd. 3. Hearing. After hearing and upon finding that the defendant has violated conditions imposed on his release, the judge, judicial officer or court shall continue the release upon the same conditions or impose different or additional conditions for defendant's possible release as provided for in Rule 6.02, subd. 1.

Subd. 4. Commission of Crime. When it is shown that a complaint has been filed or indictment returned charging a defendant with the commission of a crime while released pending adjudication of a prior charge, the court with jurisdiction over the prior charge may, after notice and hearing, review and revise the conditions of his possible release as provided for in Rule 6.02, subd. 1.

Rule 6.04. Forfeiture

The procedure for forfeiture of an appearance bond shall be as provided by the law.

Rule 6.05. Supervision of Detention

The trial court shall exercise supervision over the detention of defendants within the court's jurisdiction for the purpose of eliminating all unnecessary detention. The officer in charge of a detention facility shall make at least bi-weekly reports to the prosecuting attorney and to the court having jurisdiction over the prisoners listing each defendant who has been held in custody pending criminal charges, arraignment, trial, sentence or revocation of probation or parole for a period in excess of ten (10) days in felony and gross misdemeanor cases, and in excess of two (2) days in misdemeanor cases.

Rule 6.06. Trial Date in Misdemeanor Cases

A defendant shall be tried as soon as possible after entry of a not guilty plea. On demand made in writing or orally on the record by the prosecuting attorney or the defendant, the defendant shall be tried within sixty (60) days from the date of the demand unless good cause is shown by the prosecution or defendant why he should not be brought to trial within that period. The time period shall not begin to run earlier than the date of the not guilty plea. Where the defendant is in custody, he shall be tried within ten (10) days of his demand and if not so tried, he shall be released subject to such nonmonetary release conditions as may be required by the court under Rule 6.02, subd. 1.

Comment

In misdemeanor cases, if the defendant agrees to sign a citation, it must be issued if the misdemeanor charged is not punishable by incarceration. It is the opinion of the Advisory Committee that where possible, a person should not be taken into custody for an offense for which he could not be incarcerated even if found guilty.

Rule 6.01 adopts the policy expressed in ABA Standards, Pre-Trial Release, 2.1 (Approved Draft, 1968) favoring the issuance of citations in lieu of arrest or of continued custody after an arrest by an officer acting without a warrant.

Rule 6.01. subd. 1(1)(a) and (b) make it mandatory upon the arresting or detaining officer and officer-in-charge of the stationhouse to issue a citation to any person who is subject to lawful arrest without a warrant for misdemeanors, including ordinance violations, or who has been arrested without a warrant for those offenses, unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or to prevent further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation. The uniform traffic ticket may be used for this purpose. Minn. Stat. § 169.99 (1971).

The initial determination of whether to issue a citation is to be made by the arresting or detaining officer in the field from the information available to him on the spot. If he decides not to issue a citation, the officer-in-charge of the stationhouse will then make his determination from all the information that may then be available to him, including any additional information disclosed by further interrogation and investigation.

In making their determination of whether to issue a citation, the officers may take into account the defendant's place and length of residence, his family relationships, references, present and past employment, his criminal record, past history of response to criminal process, and such facts as have a bearing on the likelihood of harmful or criminal conduct. (See ABA Standards, Pre-Trial Release 2.2, 2.3 (Approved Draft, 1968).)

By Rule 6.01, subd. 1(1), if a citation is not issued, the officer shall report to the court his reasons for not issuing it, but the failure to issue a citation is not

jurisdictional. The reasons for failing to issue a citation need be specified no more definitely than the words of the rule and may be in the form of a checklist.

Under present Minnesota statutory law (Minn. Stat. §§ 492.01 to 492.06, 487.28 (1971)), citations may be issued for traffic and specified ordinance violations for which a traffic and ordinance violations bureau has been established. Traffic tickets for traffic violations may be issued under Minn. Stat. § 169.91 (1971). Rule 6.01, subd. 1 extends the authority to issue citations for all misdemeanors and ordinance violations and makes it mandatory unless it reasonably appears to the arresting or detaining officer or officer-in-charge of the stationhouse that detention is necessary to prevent harmful or criminal conduct or that there is substantial likelihood that the defendant will not appear in response to a citation.

Rule 6.01, subd. 1(2) requires that a citation be issued for any offense whenever ordered by the prosecuting attorney or by a county, municipal or district court judge.

Rule 6.01, subd. 2 gives the officer-in-charge of the stationhouse permissive authority to issue citations for gross misdemeanors and felonies unless it reasonably appears that detention is necessary to prevent harmful or criminal conduct or that the defendant may not appear in response to a citation. (This follows in substance the recommendation of ABA Standards, Pre-Trial Release 2.3(a) (Approved Draft, 1968).)

The form of citation prescribed by Rule 6.01, subd. 3 follows ABA Standards, Pre-Trial Release 1.4(a) (Approved Draft, 1968).

Rule 6.01, subd. 4 that the issuance of a citation does not prevent or affect an otherwise lawful search adopts ABA Standards, Pre-Trial Release 2.4 (Approved Draft, 1968).

Rule 6.01, subd. 5 authorizing an officer who issues a citation to take the accused to a medical facility adopts ABA Standards, Pre-Trial Release 2.5 (Approved Draft, 1968). Rule 6.01, subd. 5 is intended merely to stress that the issuance of a citation in lieu of a custodial arrest or continued detention does not affect the statutory rights of a law enforcement officer to transport a person in need of care to an approprate medical facility. The extent of a law enforcement officer's powers to transport a person for such purposes will still be governed by statute and is neither expanded nor contracted by Rule 6.01, subd. 5. See, e.g., Minn. Stat. § 609.06(8) regarding the right to use reasonable

force, in certain situations, toward mentally ill or mentally defective persons and Minn. Stat. § 253A.04, subd. 2 governing the right of a health or peace officer to transport mentally ill or intoxicated persons to various places for care.

These rules do not prescribe the consequences of a failure to obey a citation. The remedy available is the issuance of a warrant or summons upon a complaint.

These rules do not require the adoption of a bail schedule. The purpose of these rules is to assure that whenever reasonably possible defendant will be released without bail. Any bail schedule adopted pursuant to Minn. Stat. § 629.71 (1971) should be applied only in those cases where the defendant would not otherwise be released without bail or upon issuance of a citation under these rules. The maximum cash bail which can be required for misdemeanors will continue to be twice the highest possible cash fine upon conviction as prescribed by Minn. Stat. § 629.47 (1971).

Rule 6.02, subd. 1 specifying the conditions of release that may be imposed upon a defendant at his first appearance before a judge, judicial officer, or court (Rule 5.05, See also Rules 6.02, subd. 4, 19.05) is taken from the Bail Reform Act of 1966, 18 U.S.C. §§ 3141-3152, and in general follows ABA Standards, Pre-Trial Release 5.1, 5.3 (Approved Draft, 1968). If conditions of release are endorsed on the warrant (Rule 3.02, subd. 1), the defendant should be released on meeting those conditions.

Rule 6.02, subd. 1 substantially follows the language of § 3146(a). The rule directs that the defendant shall be released on his personal recognizance, or on order to appear, or on the execution of an unsecured appearance bond unless the judge or judicial officer determines, in the exercise of discretion, that release by one of those methods will not reasonably assure the defendant's appearance.

Release on "personal recognizance" is a release without bail upon defendant's written promise to appear at appropriate times. (See ABA Standards, Pre-Trial Release 1.4(d) (Approved Draft, 1968).) An "Order to Appear" is an order issued by the court releasing the defendant from custody or continuing him at large pending disposition of his case, but requiring him to appear in court or in some other place at all appropriate times. (See ABA Standards, Pre-Trial Release, 1.4(c) (Approved draft, 1968).)

If the court determines that release on personal recognizance, order to appear, or on an unsecured appearance bond will be inimical of public safety or will not reasonably secure the defendant's appearance, the court shall in lieu of or in addition to those methods of release impose the first or any combination of the four conditions specified in Rule 6.02, subd. 1 that will assure appearance.

Basically these conditions are taken from 18 U.S.C. § 3146 and ABA Standards, Pre-Trial Release, 5.2, 5.3 (Approved Draft, 1968). They emphasize that the conditions of release should proceed from the least restrictive to the ultimate imposition of cash bail depending on the circumstances in each case. Release on monetary conditions should be reduced to minimal proportions. It should be required only in cases in which no other conditions will reasonably insure the defendant's appearance. When monetary conditions are imposed, bail should be set at the lowest level necessary to ensure the defendant's reappearance.

Rule 6.02, subd. 1 requires that even though the court sets conditions other than money bail upon which the defendant may be released, or even though the court prescribes other conditions in addition to money bail, the court shall also fix the amount of money bail (secured by cash, property, or qualified sureties) without any other conditions upon which the defendant may obtain his release. The Advisory Committee was of the opinion that this is required by the defendant's constitutional right to bail. Minn. Const. Art. 1, § 5 makes all persons bailable by sufficient sureties for all offenses.

Under Rule 6.02, subd. 1, defendant's release, in whatever form, shall be conditioned on his appearance at trial or hearing, including the Omnibus Hearing under Rule 11, and at the taking of depositions under Rule 21.01.

Rule 6.02, subd. 2 enumerates the factors that a court shall take into account in determining the conditions of release (including personal recognizance, order to appear, or unsecured bond) that will reasonably assure the defendant's appearance. This rule follows the language of 18 U.S.C. § 3146(b) and ABA Standards, Pre-Trial Release, 5.1 (Approved Draft, 1968). It also permits the court to consider the safety of any other person or the community in determining the conditions of release to be imposed.

Rule 6.02, subd. 3 authorizing a pre-release investigation to obtain the necessary information for making the release decision is in accord with ABA Standards, Pre-Trial Release, 4.5 (Approved Draft, 1968).

Under Rule 6.02, subd. 4 the court which initially set conditions of release may on motion re-examine them if the case is still pending before that court, and may continue or revise the conditions in accordance with Rule 6.02, subds. 1 and 2. If the case is not pending before that court, the conditions of release may on motion be reviewed and continued or revised under the provisions of Rule 6.02, subds. 1 and 2 by the court before which the case is then pending. This is generally in accord with 18 U.S.C. § 3147(a) and ABA Standards, Pre-Trial Release, 5.9(b) (Approved Draft, 1968).

NOTE: The rule does not cover appeal of the release decision nor does it include release following a conviction. Appeal of the release decision is permitted under Rules 28 and 29. These rules also set standards and procedures for the release of a defendant following conviction.

Rule 6.03 prescribes the procedures to be followed upon violation of conditions of release. The rule is substantially in accord with the ABA Standards, Pre-Trial Release, 5.6, 5.7, 5.8 (Approved Draft, 1968), except that by Rule 6.03, subd. 3, the court is not authorized to revoke the defendant's release without setting bail because such action is not permitted under Minn. Const. Art. 1, § 5. The court must continue or revise the release conditions, governed by the considerations set forth in Rule 6.02, subds. 1 and 2. Under those rules, the court may increase the defendant's bail. If the defendant is unable to post the increased bail or to meet alternative conditions of release, he may be kept in custody. Also, Rule 6.03 requires the issuance of a summons rather than a warrant and the issuance of a citation rather than an arrest under the same circumstances upon which they would be required under Rules 3.01 and 6.01, respectively. Rule 6.03, subd. 3 requires only an informal hearing and does not require a showing of willful default, but leaves it to the discretion of the court to determine under all of the circumstances whether to continue or revise the conditions of possible release.

There are no provisions similar to Rule 6.03 in existing Minnesota statutory law except Minn. Stat. § 629.58 (1971) which provides that if a defendant fails to perform the conditions of a recognizance, process shall be issued against the persons bound thereby. Rule 6.03, subds. 1 and 2 take the place of that statute.

Minn. Stat. § 629.63 (1971) providing for surrender of the defendant by his bondsman is not affected by Rule 6.03. To the extent that it is inconsistent with Rule 6.03 and Rule 6.02, subds. 1 and 2, however, Minn. Stat. § 629.64, requiring

that in the event a defendant is surrendered by his bondsman money bail shall be set, is superseded.

Rule 6.03, subd. 4 follows in substance ABA Standards, Pre-Trial Release, 5.8 (Approved Draft, 1968). The rule provides for a review of release conditions when the defendant has been subsequently charged by complaint or indictment with a crime (other than that upon which he was initially released). The rule provides that the court with jurisdiction over the prior charge shall review the release conditions upon that charge and may continue or revise them (governed by the considerations set forth in Rule 6.02, subds. 1 and 2).

Rule 6.04 continues the existing procedures for forfeiture of an appearance bond (Minn. Stat. §§ 629.48, 629.58-60 (1971)).

Rule 6.05 providing for the trial court's supervision and review--on the court's own motion--of the detention of defendants under the court's jurisdiction, is in accord with ABA Standards, Pre-Trial Release, 5.9(c) (Approved Draft, 1968).

Rule 6.06 provides that in misdemeanor cases a defendant shall be brought to trial within 60 days after demand therefor is made by the prosecuting attorney or defendant, unless good cause is shown for a delay, but regardless of a demand the defendant shall be tried as soon as possible. In misdemeanor cases Rule 6.06 supersedes Minn. Stat. § 611.04 (1971) requiring the defendant to be brought to trial at the next term of court. As to the right to a speedy trial generally, see the comments to Rule 11.10.

RULE 7. NOTICE BY PROSECUTING ATTORNEY OF EVIDENCE AND IDENTIFICATION PROCEDURES; COMPLETION OF DISCOVERY

Rule 7.01. Notice of Evidence and Identification Procedures

In any case where a jury trial is to be held, when the prosecution has (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping or any form of electronic or mechanical eavesdropping; (2) any confessions, admissions or statements in the nature of confessions made by the defendant; (3) any evidence against the defendant discovered as a result of confessions, admissions or statements in the nature of confessions made by the defendant; or (4) when in the investigation of the case against the defendant, any identification procedures were followed, including but not limited to lineups or other observations of

the defendant and the exhibition of photographs of the defendant or of any other persons, the prosecuting attorney shall notify the defendant or his counsel of such evidence and identification procedures. In felony and gross misdemeanor cases notice shall be given in writing on or before the date set for the defendant's initial appearance in the district court as provided by Rule 5.03. In misdemeanor cases, notice shall be given either in writing or orally on the record in court on or before the date set for the defendant's pretrial conference if one is scheduled or seven (7) days before trial if no pretrial conference is to be held.

Such written notice may be given either personally or by ordinary mail to the defendant's or his counsel's last known residential or business address or by leaving it at such address with a person of suitable age and discretion then residing or working there.

Rule 7.02. Notice of Additional Offenses

The prosecuting attorney shall notify the defendant or his counsel in writing of any additional offenses, the evidence of which may be offered at the trial under any exceptions to the general exclusionary rule. In cases of felonies and gross misdemeanors, the notice shall be given at the Omnibus Hearing under Rule 11 or as soon thereafter as the offenses become known to the prosecuting attorney. In misdemeanor cases, the notice shall be given at or before the pretrial conference under Rule 12 if held or as soon thereafter as the offense becomes known to the prosecuting attorney. If no pretrial conference is held, then the notice shall be given at least seven (7) days before trial or as soon thereafter as known to the prosecuting attorney. Such additional offenses shall be described with sufficient particularity to enable the defendant to prepare for trial. The notice need not include offenses for which he has been previously prosecuted or those that may be offered in rebuttal of the defendant's character witnesses or as a part of the occurrence or episode out of which the offense charged against defendant arose.

Rule 7.03. Completion of Discovery

Before the date set for the Omnibus Hearing, in felonies and gross misdemeanor cases, the prosecution and defendant shall complete the discovery that is required by Rule 9.01, subds. 1 and 2 to be made without the necessity of an order of court.

In misdemeanor cases, without order of the court the prosecuting attorney on request of the defendant or his attorney shall, prior to arraignment or at any time before trial, permit the defendant or his attorney to inspect the police investigatory reports. Any other discovery shall be by consent of the parties or by motion to the court.

Comment

Under Rule 7.01 the Rasmussen notice (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) of evidence obtained from the defendant and of identification procedures shall be given on or before the defendant's initial appearance in the district court (Rule 8) (within 10 days after his first appearance in the municipal or county court (Rule 5)) in order that he may determine at the time of his appearance in the district court (Rule 8) whether to waive or demand a Rasmussen hearing (Rule 8.03). If he then demands a Rasmussen hearing, it will be included in the Omnibus Hearing (Rule 11) 14 days later.

In misdemeanor cases under Rule 7.01, the Rasmussen notice of evidence obtained from the defendant and of identification procedures may be given at arraignment and in such a case the waiver or demand of a hearing takes place at that time (Rule 5.04, subd. 5). However, since misdemeanor arraignments are often within one day or even a few hours of an arrest, a prosecutor may not have sufficient knowledge of his case to issue a Rasmussen notice at that time. Rather than discourage such prompt arraignments, this rule provides that the Rasmussen notice may be served as late as the pre-trial conference, if held, or at least seven days before trial if no pre-trial conference is held. The Rasmussen notice procedure is required only where a jury trial is to be held. This continues present law under City of St. Paul v. Page, 285 Minn. 374, 173 N.W.2d 460 (1969). Even where no notice is required, however, it is anticipated that the discovery permitted by Rule 7.03 will give the defendant and his attorney notice of any evidentiary or identification issues that would have been the subject of a formal Rasmussen notice.

The notice required by Rule 7.01 must be in writing in felony and gross misdemeanor cases and may be either in writing or oral on the record in misdemeanor cases. Any written notice may be delivered either personally or by ordinary mail to the defendant's or his counsel's last known residential or business address or by leaving it at such address with a person of suitable age and discretion then residing or working there. If the notice is not actually received, the court may grant a continuance to prevent any prejudice due to surprise.

Rule 7.02 requires that the Spreigl notice (State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965), State v. Billstrom, 275 Minn. 525, 149 N.W.2d 281 (1967)) of additional offenses be given on or before the date of the Omnibus Hearing (Rule 11) in order that any issues that may arise as to the admissibility of the evidence of these offenses at trial may be ascertained and determined at the Omnibus Hearing. (Rule 11.04.) If he learns of any such offenses after the Omnibus Hearing, he shall immediately give notice thereof to the defendant.

Rule 7.03 requires that the discovery provided by Rules 9.01, subd. 1; 9.02, subd. 1 to be made without order of court shall be completed by the prosecution and defense before the Omnibus Hearing (Rule 11). This will permit the court to resolve at the Omnibus Hearing any issues that may have arisen between the parties with respect to discovery (Rules 9.03, subd. 8; 11.04). It may also result in a plea of guilty at the Omnibus Hearing (Rule 11.07). All notices under Rule 7 shall also be filed with the court (Rule 33.04).

Rule 7.03, in misdemeanor cases, requires the prosecutor upon request of the defendant or his attorney at any time before trial to permit inspection of the police investigatory reports in the case. Under this rule the prosecutor should reveal not only the reports physically in his possession, but also those concerning the case which are yet in the possession of the police. This disclosure of investigatory reports is already the practice of many prosecutors and in most misdemeanor cases should be sufficient discovery. This type of discovery is particularly important in misdemeanor cases where prosecution can be initiated upon a tab charge (Rule 4.02, subd. 5(3)) without a complaint or indictment. A defendant, of course, may request a complaint under Rule 4.02, subd. 5(3) to be better informed of the charges against him, but it is expected that complaints will seldom be requested when the investigatory reports are disclosed to the defendant.

In those rare cases where additional discovery is considered necessary by either party, it shall be by consent of the parties or by motion to the court. In such cases it is expected that the parties and the court will be guided by the extensive discovery provisions of these Rules.

RULE 8. DEFENDANT'S INITIAL APPEARANCE BEFORE THE DISTRICT OR COUNTY COURT FOLLOWING THE COMPLAINT IN FELONY AND GROSS MISDEMEANOR CASES

Rule 8.01. Place of Appearance and Arraignment

The defendant's initial appearance under this rule shall be held in the district court of the judicial district where the alleged offense was committed. If it has been mutually

agreed between the district court and the county court, or if ordered by the Supreme Court, the appearance may be referred to the county court of the county where the alleged offense was committed. The procedures upon an initial appearance in county court shall be the same as in district court.

Unless the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to a grand jury, or the offense is punishable by life imprisonment, the defendant shall be arraigned upon the complaint or the complaint as it may be amended, but may only enter a plea of guilty at that time. If the defendant does not wish to plead guilty, he shall not be called upon to enter any other plea and the arraignment shall be continued until the Omnibus Hearing when pursuant to Rule 11.10 he shall plead to the complaint or the complaint as amended or be given additional time within which to plead. If the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to the grand jury, or if the offense is punishable by life imprisonment, the presentation of the case to the grand jury shall commence within 14 days from the date of defendant's appearance in the court under this rule, and an indictment or report of no indictment shall be returned within a reasonable time. If an indictment is returned, the Omnibus Hearing under Rule 11 shall be held as provided by Rule 19.04, subd. 5.

Rule 8.02. Plea of Guilty

At an initial appearance, whether in district court or in county court pursuant to Rule 8.01, the defendant may enter a plea of guilty to a felony, a gross misdemeanor, or a misdemeanor as permitted under Rule 15. If he enters a plea of guilty, the pre-sentencing and sentencing procedures provided by these rules shall be followed.

Rule 8.03. Demand or Waiver of Hearing

If the defendant does not plead guilty, the defendant and the prosecution shall each either waive or demand a hearing as provided by Rule 11.02 on the admissibility at trial of any of the evidence specified in the notice given by the prosecuting attorney under Rule 7.01 or the admissibility of any evidence obtained as a result of such evidence.

Rule 8.04. Plea and Time and Place of Omnibus Hearing

(a) If the defendant does not plead guilty, the Omnibus Hearing on the issues as provided for by Rules 11.03 and 11.04,

shall be held within the time hereinafter specified.

(b) If hearing on either of the issues set forth in Rule 8.03 is demanded, the Omnibus Hearing shall also include the issues provided for by Rule 11.02.

(c) The Omnibus Hearing provided for by Rule 11 shall be scheduled for a date not later than fourteen (14) days after the defendant's initial appearance before the court. The court may extend such time for good cause upon motion of the defendant or the prosecution or upon the court's own motion.

Rule 8.05. Record

A verbatim record shall be made of the proceedings at the defendant's initial appearance before the court under this rule.

Rule 8.06. Conditions of Release

In accordance with the rules governing bail or release, the court may continue or amend those conditions for defendant's release set by the court previously.

Comment

Unless the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to a grand jury, or the offense is punishable by life imprisonment, upon the defendant's initial appearance before the court under this rule following a complaint charging a felony or gross misdemeanor (within 14 days after his first appearance under Rule 5), he shall, upon his request, be permitted to plead guilty to the complaint or amended complaint (See Rules 3.04, subd. 2; 17.05) as provided by Rule 15. At this stage of the proceeding, the complaint which was filed in the county or municipal court, or that complaint as it may be amended (Rule 17.05) or superseded (Rule 3.04, subd. 2), takes the place of the information under existing Minnesota law (Minn. Stat. §§ 628.29-628.33 (1971)) and provides the basis for the court's jurisdiction over the prosecution and the offenses charged in the complaint.

If the defendant pleads guilty to the complaint the procedures provided by Rule 15 shall be followed.

The defendant is not required to enter a plea upon his appearance in court under Rule 8. He may, however, plead guilty.

Under Rule 8.03, if the defendant does not plead guilty, and if the prosecution has given the notice prescribed by Rule 7.01 both the defendant and the prosecution shall be required to either waive or demand a Rasmussen (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) hearing. (Rule 8.03).

If the Rasmussen hearing is waived by both the prosecution and the defense, the Omnibus Hearing provided by Rule 11 shall be held without a Rasmussen hearing. (See the initial comments to Rule 11 describing the three parts of an Omnibus Hearing.)

If the Rasmussen hearing is demanded, the hearing shall be held as part of the Omnibus Hearing as provided by Rule 11.02.

The Omnibus Hearing shall be scheduled not later than 14 days after the defendant's initial appearance in court under Rule 8 unless the time is extended for good cause. (Rule 8.04).

The Omnibus Hearing shall be held preferably in the district court--since it is the trial court and most of the issues that will be disposed of at the Omnibus Hearing will directly affect the trial--but the district court may refer it under Rule 11.01 to a county or municipal court in the county where the offense charged occurred.

The rule (Rule 11.01) does not permit a part of an Omnibus Hearing to be referred.

Under Rule 8.01, if the offense charged in the complaint is punishable by life imprisonment, or if it is a homicide and the prosecuting attorney notifies the court the case will be presented to the grand jury, the defendant shall not be arraigned upon the complaint, and the case shall be presented to the grand jury as provided by Rule 8.01. If an indictment is returned, the Omnibus Hearing shall be held as provided by Rule 19.04, subd. 5.

Rule 8.05 provides for a verbatim record of the proceedings under Rule 8.

Under Rule 8.06 the court may in accordance with the provisions of Rule 6.02 continue or amend the bail or conditions of release set by the court previously.

RULE 9. DISCOVERY IN FELONY AND GROSS MISDEMEANOR CASES

Rule 9.01. Disclosure by Prosecution

Subd. 1. Disclosure by Prosecution Without Order of Court. Without order of court, the prosecuting attorney on request of defense counsel shall, before the date set for Omnibus Hearing provided for by Rule 11, make the following disclosures:

(1) Trial Witnesses; Grand Jury Witnesses.

(a) The prosecuting attorney shall disclose to defense counsel the names and addresses of the persons whom he intends to call as witnesses at the trial together with their prior record of convictions, if any, within his actual knowledge. He shall permit defense counsel to inspect and reproduce such witnesses' relevant written or recorded statements and any written summaries within his knowledge of the substance of relevant oral statements made by such witnesses to prosecution agents.

(b) The fact that the prosecution has supplied the name of a trial witness to defense counsel shall not be commented on in the presence of the jury.

(c) If the defendant is charged by indictment, the prosecuting attorney shall disclose to defense counsel the names and addresses of the witnesses who testified before the grand jury in the case against the defendant.

(2) Statements of Defendants and Accomplices. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any relevant written or recorded statements made by defendants and accomplices within the possession or control of the prosecution, the existence of which is known by the prosecuting attorney, and shall provide defense counsel with the substance of any oral statements made by defendants and accomplices, whether before or after arrest, which the prosecution intends to offer in evidence at the trial.

(3) Documents and Tangible Objects. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce books, papers, documents, photographs and tangible objects which the prosecuting attorney intends to introduce in evidence at the trial, or which were obtained from or belong to the defendant, or concerning which the prosecuting attorney intends to offer evidence at the trial; and the prosecuting attorney shall

also permit defense counsel to inspect and photograph buildings or places concerning which the prosecuting attorney intends to offer evidence at the trial.

(4) Reports of Examinations and Tests. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case.

(5) Criminal Record of Defendant and Defense Witnesses. The prosecuting attorney shall inform defense counsel of the records of prior convictions of the defendant and of any defense witnesses disclosed under Rule 9.02, subd. 1(3)(a) that are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of any such records known to the defendant.

(6) Exculpatory Information. The prosecuting attorney shall disclose to defense counsel any material or information within his possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

(7) Scope of Prosecutor's Obligations. The prosecuting attorney's obligations under this rule extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

Subd. 2. Discretionary Disclosure Upon Order of Court. Upon motion of the defendant with notice to the prosecuting attorney, the trial court at any time before trial or a county or municipal court at the Omnibus Hearing provided by Rule 11 may, in its discretion, require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged. If the motion is denied, the court upon application of the defendant shall inspect and preserve any such relevant material and information.

Subd. 3. Information Non-Discoverable. The following information shall not be discoverable by the defendant:

(1) Work Product.

(a) Opinions, Theories or Conclusions. Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his staff or officials or official agencies participating in the prosecution.

(b) Reports. Except as provided in Rules 9.01, subd. 1(1) to (6), reports, memoranda or internal documents made by the prosecuting attorney or members of his staff or by prosecution agents in connection with the investigation or prosecution of the case against the defendant.

(2) Prosecution Witnesses Under Prosecuting Attorney's Certificate. The information relative to the witnesses and persons described in Rules 9.01, subd. 1(1), (2) shall not be subject to disclosure if the prosecuting attorney files a written certificate with the trial court that to do so may subject such witnesses or persons or others to physical harm or coercion, provided, however, that non-disclosure under this rule shall not extend beyond the time the witnesses or persons are sworn to testify at the trial.

Rule 9.02. Disclosure by Defendant

Subd. 1. Information Subject to Discovery Without Order of Court. Without order of court, the defendant on request of the prosecuting attorney shall, before the date set for the Omnibus Hearing provided for by Rule 11, make the following disclosures:

(1) Documents and Tangible Objects. The defendant shall disclose and permit the prosecuting attorney to inspect and reproduce books, papers, documents, photographs, and tangible objects which the defendant intends to introduce in evidence at the trial or concerning which the defendant intends to offer evidence at the trial, and shall also permit the prosecuting attorney to inspect and photograph buildings or places concerning which the defendant intends to offer evidence at the trial.

(2) Reports of Examinations and Tests. The defendant shall disclose and permit the prosecuting attorney to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments and comparisons made in connection with the particular case within the possession or control of the defendant which he intends to introduce in evidence at the trial or which

were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(3) Notice of Defense and Defense Witnesses and Criminal Record.

(a) Notice of Defense. The defendant shall inform the prosecuting attorney in writing of any defense, other than that of not guilty, on which the defendant intends to rely at the trial, including but not limited to the defense of self-defense, entrapment, mental illness or deficiency, duress, alibi, double jeopardy, statute of limitations, collateral estoppel, defense under Minn. Stat. § 609.035, or intoxication. The defendant shall supply the prosecuting attorney with the names and addresses of persons whom the defendant intends to call as witnesses at the trial together with their record of convictions, if any, within his actual knowledge.

If the defendant gives notice that he intends to rely on the defense of mental illness or mental deficiency he shall also notify the prosecuting attorney whether he also intends to rely on the defense of not guilty.

(b) Statements of Defense and Prosecution Witnesses. The defendant shall permit the prosecuting attorney to inspect and reproduce any relevant written or recorded statements of the persons whom the defendant intends to call as witnesses at the trial and also statements of prosecution witnesses obtained by the defendant, defense counsel, or persons participating in the defense, and which are within the possession or control of the defendant and shall permit the prosecuting attorney to inspect and reproduce any written summaries within his knowledge of the substance of any oral statements made by such witnesses to defense counsel or obtained by the defendant at the direction of his counsel.

(c) Alibi. If the defendant intends to offer evidence of an alibi, the defendant shall also inform the prosecuting attorney of the specific place or places where the defendant contends he was when the alleged offense occurred and shall

inform the prosecuting attorney of the names and addresses of the witnesses he intends to call at the trial in support of the alibi.

As soon as practicable, the prosecuting attorney shall then inform the defendant of the names and addresses of the witnesses the prosecuting attorney intends to call at the trial to rebut the testimony of any of the defendant's alibi witnesses.

(d) Criminal Record. Defense counsel shall inform the prosecuting attorney of any prior convictions of the defendant provided the prosecuting attorney informs defense counsel of the record of prior convictions known to the prosecuting attorneys.

(e) Entrapment. If the defendant gives notice of intention to rely on the defense of entrapment, he shall include in the notice a statement of the facts forming the basis for the defense, and whether he elects to have the defense submitted to the court or to the jury.

The entrapment defense may not be submitted to the court unless the defendant waives jury trial upon that issue as provided by Rule 26.01, subd. 1(2).

If the entrapment defense is submitted to the court, the hearing thereon shall be included in the Omnibus Hearing under Rule 11 or in the evidentiary hearing provided for by Rule 12. The court shall make findings of fact and conclusions of law on the record supporting its decision.

Subd. 2. Discovery Upon Order of Court.

(1) Disclosures Permitted. Upon motion of the prosecuting attorney with notice to defense counsel and a showing that one or more of the discovery procedures hereafter described will be of material aid in determining whether the defendant committed the offense charged, the trial court at any time before trial, or the county or municipal court, either when the defendant is admitted to bail or otherwise released, or at the Omnibus Hearing prescribed by Rule 11 may, subject to constitutional limitations, order a defendant to:

(a) Appear in a lineup;

(b) Speak for identification by witnesses to an offense or for the purpose of taking voice prints;

(c) Be fingerprinted or permit his palm prints or footprints to be taken;

(d) Permit measurements of his body to be taken;

(e) Pose for photographs not involving re-enactment of a scene;

(f) Permit the taking of samples of his blood, hair, saliva, urine, and other materials of his body which involve no unreasonable intrusion thereof; provided, however, that the court shall not permit a blood test to be taken except upon a showing of probable cause to believe that the test will aid in establishing the guilt of the defendant;

(g) Provide specimens of his handwriting; and

(h) Submit to reasonable physical or medical inspection of his body.

(2) Notice of Time and Place of Disclosures. Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place thereof shall be given by the prosecuting attorney to defense counsel.

(3) Medical Supervision. Blood tests shall be conducted under medical supervision, and the court may require medical supervision for any other test ordered pursuant to this rule when the court deems such supervision necessary. Upon motion of the defendant, the court may order the defendant's appearance delayed for a reasonable time or may order that it take place at his residence, or some other convenient place.

(4) Notice of Results of Disclosure. Unless otherwise ordered by the court, the prosecuting attorney, within five (5) days from the date the results of the discovery procedures provided by this rule become known to him, shall make available to defense counsel a report of the results.

(5) Other Methods Not Excluded. The discovery procedures provided for by this rule do not exclude other lawful methods available for obtaining the evidence discoverable under the rule.

Subd. 3. Information Not Subject to Disclosure by Defendant; Work Product. Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent they contain the opinions, theories, or conclusions of the defendant or his counsel or persons participating in the defense are not subject to disclosure.

Subd. 4. Failure to Call Witness. The fact that a witness' name is on a list furnished by defendant to the prosecution under this rule shall not be commented on in the presence of the jury.

Rule 9.03. Regulation of Discovery

Subd. 1. Investigations Not to be Impeded. Except as otherwise provided as to matters not subject to discovery or covered by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel or from showing opposing counsel any relevant materials, nor shall they otherwise impede opposing counsel's investigation of the case.

Subd. 2. Continuing Duty to Disclose.

(a) If subsequent to compliance with any discovery rule or order, a party discovers additional material, information or witnesses subject to disclosure, he shall promptly notify the other party of the existence of the additional material or information and the identity of the witnesses.

(b) Each party shall have a continuing duty at all times before and during trial to supply the materials and information required by these rules.

Subd. 3. Time, Place and Manner of Discovery and Inspection. An order of the court granting discovery shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

Subd. 4. Custody of Materials. Any materials furnished to an attorney under discovery rules or orders shall remain in his custody and be used by him only for the purpose of conducting his side of the case, and shall be subject to such other terms and conditions as the court may prescribe.

Subd. 5. Protective Orders. Upon a showing of cause, the trial court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate. All material and information to which a party is entitled must be disclosed in time to afford his counsel the opportunity to make beneficial use of it.

Subd. 6. In Camera Proceedings. Upon application of any party with notice to the adverse party, the trial court upon a showing of good cause therefor may permit any showing of cause for denial or regulation of discovery, or portion of such showing, to be made in camera. A record shall be made of the proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the reviewing court in the event of an appeal, habeas corpus proceedings, or post-conviction proceedings under Minn. Stat. §§ 590.01-590.06 (1971).

Subd. 7. Excision. When some parts of certain material are discoverable under these rules, and other parts not discoverable, as much of the material shall be disclosed as is consistent with discovery rules. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court to be made available to the reviewing court in the event of an appeal, habeas corpus proceeding, or post-conviction proceedings under Minn. Stat. §§ 590.01-590.06 (1971).

Subd. 8. Sanctions. If at any time it is brought to the attention of the trial court that a party has failed to comply with an applicable discovery rule or order, the court may upon motion and notice order such party to permit the discovery or inspection, grant a continuance, or enter such order as it deems just in the circumstances. Any person who willfully disobeys a court order under these discovery rules may be held in contempt.

Subd. 9. Filing. Unless the court orders otherwise for the purpose of a hearing or trial, discovery disclosures made pursuant to Rule 9 shall not be filed under the provisions of Rule 33.04.

The party making the disclosures shall prepare an itemized descriptive list identifying the disclosures without disclosing their contents and shall file the list as provided by Rule 33.04.

Comment

Rule 9, with Rules 7.01, 19.04, subd. 6(1) (Rasmussen notice of evidence obtained from the defendant and of identification procedures), Rules 7.02, 19.04, subd. 6(2); (Spreigl notice of additional offenses to be offered at trial), and Rule 18.05, subds. 1 and 2 (recorded testimony of grand jury witnesses), provide a comprehensive method of discovery by the prosecution (Rule 9.01) and defendant (Rule 9.02). The rules are intended to give the defendant and prosecution as complete discovery as is possible under constitutional limitations.

It is the object of the rules that these discovery procedures shall be completed so far as possible by the time of the Omnibus Hearing under Rule 11, which will be held within 28 days after the defendant's first appearance in municipal or county court following a complaint (Rule 5), or within 14 days after his first appearance in district court following an indictment (Rule 19.04) and that all issues arising from the discovery process, including the need for additional discovery, will be resolved at the Omnibus Hearing (Rules 11.04; 9.01, subd. 2; 9.03, subd. 8).

While a pre-trial conference is not specifically provided for by these rules (Compare ABA Standards, Discovery and Procedure Before Trial, 5.4 (Approved Draft, 1970) containing a specific provision for a pre-trial conference), Rule 11.04 is broad,enough to permit the court in its discretion to hold a pre-trial conference as a part of the Omnibus Hearing if it determines there is a need for it. (See F.R.Crim.P. 17.1.)

Rule 9.01, subd. 1 provides for the disclosures that shall be made before the Omnibus Hearing by the prosecution upon request of the defense without an order of court. As to the prosecution's duty to disclose under the rule see State v. Smith, 313 N.W.2d 429 (Minn. 1981), State v. Zeimet, 310 N.W.2d 552 (Minn. 1981), State v. Schwantes, 314 N.W.2d 243 (Minn. 1982), and State v. Hall, 315 N.W.2d 223 (Minn. 1982).

No specific form of request is required by Rule 9.01, subd. 1. It is anticipated that the discovery provided for by Rule 9.01, subd. 1 as well as the disclosures required of the defense by Rule 9.02 without order of court will be accomplished informally between the prosecuting attorney and defense counsel. (See ABA Standards, Discovery and Procedure Before Trial 1.3(a), 1.4(b) (Approved Draft, 1970).)

Rule 9.01, subd. 1(1)(a), providing for the discovery of the prosecution's trial witnesses, with their written or recorded statements and written summaries of oral statements, and their criminal records, substantially follows ABA Standards, Discovery and Procedure Before Trial 2.1(a)(i)(ii)(vi) (Approved Draft, 1970) and Preliminary Draft of Proposed Amendments to F.R.Crim.P 16(a)(i)(vi) (1970)(48 F.R.D. 553, 587-589). The policy of this rule is to permit discovery of "written and recorded statements in whatever form they may have been preserved". (See Comments ABA Standards, Discovery and Procedure Before Trial, 2.1, p. 62. (Approved Draft, 1970).)

Discovery under Rule 9.01, subd. 1(1)(a) is subject to the provisions of Rule 9.01, subd. 3(2) (prosecutor's certificate for the protection of witnesses) and Rule 9.03, subd. 5 (protective orders).

Rule 9.01, subd. 1(1)(b), forbidding comment to the jury on the fact that a person was named on the list of prosecution witnesses, is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(4) (1970) (48 F.R.D. 553, 590). This rule is not intended to affect any right defense counsel may have by existing law to comment on the fact that the prosecution has failed to call a particular witness, but prevents him from commenting on the fact that the witness was on the prosecution's list.

Rule 9.01, subd. 1(1)(c), requiring the prosecution to disclose the names and addresses of grand jury witnesses, is in accord with the requirements of existing law (Minn. Stat. 628.08 (1971)). Rule 18.05, subd. 2 provides the method for discovery of their grand jury testimony. (This follows substantially the recommendations of ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(iii) (Approved Draft, 1970).)

Rule 9.01, subd. 1(2), following substantially ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(ii) (Approved Draft, 1970), requires the disclosure of written

or recorded statements of all defendants (including co-defendants) and accomplices (whether or not the statements will be offered in evidence) and also requires disclosure of the substance of any oral statements of the defendant, co-defendants and accomplices which the prosecution intends to offer in evidence at the trial.

Rule 9.01, subd. 1(2) differs from ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(ii) (Approved Draft, 1970) in that the rule covers the written or recorded statements of accomplices and co-defendants whether or not they are to be tried jointly with the defendant.

Rule 9.01, subd. 1(3), providing for discovery of documents and tangible objects, is taken from ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(v) (Approved Draft, 1970), F.R.Crim.P. 16(6), and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(iv) 1970), 48 F.R.D. 553, 588 to 599).

Rule 9.01, subd. 1(4) for discovery of reports of examinations and tests follows F.R.Crim.P. 16(a)(2) and ABA Standards, Discovery and Procedure Before Trial, 2.1 (a)(iv) (Approved Draft, 1970).

Rule 9.01, subd. 1(5) and Rule 9.02, subd. 1(3)(d) providing for reciprocal discovery of the defendant's criminal record between prosecution and defendant is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(a)(1)(iii) (1970) 48 F.R.D. 553, 588.

Rule 9.01, subd. 1(5) also provides for the reciprocal discovery of the criminal records of any defense witness disclosed to the prosecution under Rule 9.02, subd. 1(3)(a). Under Rule 9.03, subd. 2 there is a continuing duty to disclose such information up through trial. If the prosecutor intends to impeach the defendant or any defense witnesses with evidence of prior convictions the prosecutor is required by State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) to request a pretrial hearing on the admissibility of such evidence under the Rules of Evidence. The pretrial hearing may be made a part of the Omnibus Hearing under Rule 11 or the pretrial conference under Rule 12. See Rule 609 of the Minnesota Rules of Evidence for the standards governing the use of criminal convictions to impeach a witness.

Rule 9.01, subd. 1(6) provides for the pre-trial disclosure of exculpatory material which is constitutionally required at trial. (See Brady v. Maryland, 373 U.S. 83, 87-88 (1963); ABA Standards, Discovery and Procedure Before Trial, 2.1(c) (Approved Draft, 1970).)

The scope of the prosecutor's obligations (Rule 9.01, subd. 1(7)) to make the disclosure required by Rule 9.01, subd. 1 is taken from ABA Standards, Discovery and Procedure Before Trial, 2.1(d) (Approved Draft, 1970).)

Rule 9.01, subd. 2, following ABA Standards, Discovery and Procedure Before Trial, 2.5(a) (Approved Draft, 1970), permits disclosure by order of court of relevant material not covered by Rule 9.01, subd. 1. This rule does not permit the discovery of material non-discoverable under Rule 9.01, subd. 3 and is not intended as one of the exceptions referred to in Rule 9.01, subd. 3(1)(a).

Requests or motions for discovery under Rule 9.01, subd. 2 should be made before (Rule 10.04) or at the Omnibus Hearing under Rule 11 (Rules 11.03, 11.04).

Rule 9.01, subd. 3 enumerates the material that is not discoverable from the prosecution.

Rule 9.01, subd. 3(1)(a), defining non-discoverable work product is taken from ABA Standards, Discovery and Procedure Before Trial, 2.6(a) (Approved Draft, 1970) and excludes material containing opinions, theories, or conclusions of the prosecutor and his staff and official investigators with the exception of the material specifically made discoverable by Rule 9.01, subd. 1. Rule 9.01, subd. 2 providing for discretionary discovery by order of court is not intended as one of the exceptions to the work product rule.

Rule 9.01, subd. 3(1)(b), following substantially F.R.Crim.P. 16(b), excludes from discovery internal prosecution reports with the exception of the material specifically covered by Rule 9.01, subd. 1.

Rule 9.01, subd. 3(2), precluding discovery of the identity and statements of prosecution witnesses and those persons referred to in Rule 9.01, subd. 1(1) and (2) if the prosecutor certifies that they or other persons may be subject to harm, is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(vi) (1970) 48 F.R.D. 553, 589. ABA Standards, Discovery and Procedure Before Trial, 2.5(b) (Approved Draft, 1970) authorizes the court to deny discretionary disclosure in similar circumstances. The prohibition contained in this rule does not extend beyond the time when the witnesses are sworn to testify at the trial, thus continuing in Minnesota the application of the Jencks rule (353 U.S. 657 (1957)). (See State v. Thompson, 273 Minn. 1, 139 N.W.2d 490, 508-512 (1966), State v. Grunau, 273 Minn. 315, 141 N.W.2d 815, 823 (1966).) This rule does not prohibit discovery of a defendant's own statement.

Rule 9.02, covering disclosure by the defendant, is based upon ABA Standards, Discovery and Procedure Before Trial, 3.1, 3.2, 3.3 (Approved Draft, 1970). (See also

Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(b)(1) (1970), 48 F.R.D. 553, 591.) The sanctions and remedies for failure of the prosecution or defense to make discovery are provided for by Rule 9.03, subd. 8.

Rule 9.02, subd. 1 lists the information and material the defendant shall disclose without order of court before the Omnibus Hearing (Rule 11) on request of the prosecution.

Rule 9.02, subd. 1(1) for disclosure of documents and tangible objects to be introduced at trial follows the language of the parallel rule (Rule 9.01, subd. 1(3)) for prosecution disclosure of similar material. (See F.R.Crim.P. 16(c); Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(b)(1)(i) (1970), 48 F.R.D. 553, 591.)

Rule 9.02, subd. 1(2) for disclosure of reports of examinations and tests follows the parallel prosecution disclosure rule (Rule 9.01, subd. 1(4)), except that under Rule 9.02, subd. 1(2) the information subject to defense disclosure is restricted to that to be offered at trial. This restriction on mandatory disclosure by the defendant was considered necessary to avoid the possibility of infringement on the privilege against self-incrimination. (See Jones v. Superior Court of Nevada County, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); Williams V. Florida, 399 U.S. 78 (1970); ABA Standards, Discovery and Procedure Before Trial, 3.2 (Approved Draft, 1970); Preliminary Draft of Proposed Amendments to F.R. Crim.P. 16(b)(1)(ii) (1970), 48 F.R.D. 553, 591.)

Rule 9.02, subd. 1(3)(b) for disclosure of the statements of defense trial witnesses also follows the parallel prosecution disclosure Rule 9.01, subd. 1(1)(a).

Rule 9.02, subd. 1(3)(a) requires written notice of any defense other than not guilty on which the defendant intends to rely at the trial with the names and addresses of the witnesses he intends to call at the trial. This rule is based on ABA Standards, Discovery and Procedure Before Trial, 3.3 (Approved Draft, 1970). The defendant is not required to indicate the witnesses he intends to use for each defense except in the case of the defense of alibi (Rule 9.02, subd. 1(3)(c)). Illustrations of the kinds of defenses requiring notice are set forth in Rule 9.02, subd. 1(3)(a). (See Williams v. Florida, 90S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446 (1970) sustaining the constitutionality of the Florida notice-of-alibi statute.) (This rule expands present Minnesota statutory law covering notice of alibi. Minn. Stat. § 630.14 (1971).)

Under Rule 9.02, subd. 1(3)(a), if the defendant gives notice of his intention to rely on the defense of mental illness or mental deficiency, he shall notify the prosecution whether he also intends to rely on the defense of not guilty. This notice is necessary for the purposes of Rule 20.02, subd. 6(1) and (2) governing the procedure following a mental examination when the defense is mental illness or mental deficiency.

In addition to Rule 9.02, subd. 1(3)(a), case law may establish notice requirements with which a defendant must comply in order to raise certain defenses. In State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975), the court established the requirement that a defendant raising the defense of entrapment must notify the trial court and the prosecutor of the basis for the defense in reasonable detail and whether he elects to have the issue of entrapment tried to the court or to a jury.

Rule 9.02, subd. 1(3)(d) for disclosure of the defendant's criminal record is similar to Rule 9.01, subd. 1(4) for prosecution disclosure of the record.

The procedures set forth in Rule 9.02, subd. 1(3)(e) for asserting the entrapment defense are taken from State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975). That case further requires that upon submission of the defense to court or jury, the defendant has the burden of proving by a fair preponderance of the evidence that he was induced by government agents to commit the crime charged, whereupon the burden rests on the state to prove beyond a reasonable doubt that defendant was predisposed to commit the offense.

If the defendant asserts the defense of violation of due process with the entrapment defense or separately, the defense shall be heard and determined by the court. The concept of fundamental fairness inherent in the due process requirement will prevent conviction of even a predisposed defendant if the conduct of the government in participating in or inducing the commission of the crime is outrageous. As to this due process defense see Hampton v. United States, 425 U.S. 484 (1976), State v. Ford, 276 N.W.2d 178 (Minn. 1979), and State v. Morris, 272 N.W.2d 35 (Minn. 1978).

Rule 9.02, subd. 2, requiring the defendant upon order of court to personally submit to the non-testimonial identification and other procedures described in the rule, is based upon ABA Standards, Discovery and Procedure Before Trial, 3.1 (Approved Draft, 1970) and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 41.1 (1971), 52 F.R.D. 409, 462-467. (See also, Schmerber v. California, 384 U.S. 757 (1966), Davis v. Mississippi, 394 U.S. 721, 727-728 (1969).)

This rule is intended to be applicable only after an indictment has been returned, or a complaint filed upon which probable cause for the arrest of the defendant has been found.

Following indictment, the order under Rule 9.02, subd. 2 may be obtained from the district court at any time before trial, but preferably it should be sought at or before the Omnibus Hearing under Rule 11 if one is held before the district court. If the Omnibus Hearing is held before a county or municipal court, the order may be sought at or before the Omnibus Hearing.

Following a complaint charging a felony or gross misdemeanor, the order may be obtained from a county or municipal court at the first appearance of the defendant under Rules 4.02, subd. 5(1) and 5, or at or before the Omnibus Hearing under Rule 11 from the court before which that hearing is held. It may be obtained from the district court at any time before trial, but preferably at or before the Omnibus Hearing.

Rule 9.02, subd. 2(2), requiring notice to defense counsel of the time and place for the personal appearance of the defendant, would include the defendant if he represents himself or is unrepresented. This rule is taken from ABA Standards, Discovery and Procedure Before Trial, 3.1(b) (Approved Draft, 1970).

Rule 9.02, subd. 2(3) providing for medical supervision and for modifications of the order as to time and place is based on Preliminary Draft of Proposed Amendments to F.R.Crim. P. 41.1(e)(i) (1971),52 F.R.D. 409, 464-465.

Rule 9.02, subd. 2(4), providing for notice to defense counsel of the results of the examination, is based on Preliminary Draft of Proposed Amendments to F.R.Crim.P. 41.1(j) (1971), 52 F.R.D. 409, 465.

Rule 9.02, subd. 2(5) provides that the method prescribed by Rule 9.02, subd. 2 for obtaining the identification and other evidence from the defendant under order of court is not intended to exclude other lawful measures, such as a lawful search and seizure, by which the evidence may be obtained.

Rule 9.02, subd. 3, paralleling the language of Rule 9.01, subd. 3(1)(a) governing work product of the prosecution, defines the work product that is not subject to disclosure by the defendant, except as provided in Rules 9.02, subds. 1, 2 and 3.

Rule 9.03, governing the regulation of discovery is based on ABA Standards, Discovery and Procedure Before Trial, 4.1-4.7 (Approved Draft, 1970) and F.R.Crim.P. 16(e)(g).

Rule 9.03, subd. 1 follows substantially the language of ABA Standards, Discovery and Procedure Before Trial, 4.1 (Approved Draft, 1970) protecting interference with discovery.

The first sentence of Rule 9.03, subd. 2 providing for a continuing duty of disclosure is taken from ABA Standards, Discovery and Procedure Before Trial, 4.2 (Approved Draft, 1970) and F.R.Crim.P. 16(g). The second sentence is intended to make it clear that each party has a continuing duty before and at trial to make the disclosures required by Rules 9.01, subd. 1 and 9.02, subd. 1 regardless of whether he has previously made discovery under the rules or on order of court. A party who fails to make discovery when under a duty to do so may be ordered to comply under Rule 9.03, subd. 8.

Rule 9.03, subd. 3, governing court orders for regulation of discovery is taken from F.R.Crim.P. 16(d).

Rule 9.03, subd. 4, providing for the custody of discovered materials, comes from ABA Standards, Discovery and Procedure Before Trial, 4.3 (Approved Draft, 1970).

Rule 9.03, subd. 5, authorizing protective orders, follows ABA Standards, Discovery and Procedure Before Trial, 4.4 (Approved Draft, 1970). (See also F.R.Crim.P. 16(e).) In commenting on this standard (See comment ABA Standards, Discovery and Procedure Before Trial, 4.4, p. 101 (Approved Draft, 1970).) the Committee stated as follows: "This standard permits application by the party concerned to the court for a protective order which can be tailored to the particular circumstances of the case. It is anticipated that it will ordinarily be needed with respect to those matters for which discovery is mandated, rather than matters where the court in the first instance can exercise discretion upon application of the defense and thus take exceptional circumstances into account at that time."

In making protective orders under Rule 9.03, subd. 5 or in ruling on motions to compel discovery under Rules 9.01, subd. 2 and 9.03, subd. 8, the court may avail itself of Rule 9.03, subd. 6 and subd. 7 authorizing in camera proceedings and excision.

Rule 9.03, subd. 6 and subd. 7 are taken from ABA Standards, Discovery and Procedure Before Trial, 4.5 and 4.6 (Approved Draft, 1970) and F.R.Crim.P. 16(e).

Rule 9.03, subd. 8 providing for sanctions follows ABA Standards, Discovery and Procedure Before Trial, 4.7 (Approved Draft, 1970).

RULE 10. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

Rule 10.01. Pleadings and Motions

Pleadings in criminal proceedings shall be by the indictment, complaint or tab charge and the pleas prescribed by these rules. Defenses, objections, issues, or requests which are capable of determination without trial on the merits shall be asserted or made before trial by a motion to dismiss or to grant appropriate relief.

Rule 10.02. Motions Attacking Jurisdiction of the Court in Misdemeanor Cases

A motion to dismiss for want of personal jurisdiction shall not be made until after a complaint is filed and a not guilty plea entered unless the motion is heard and determined summarily. Notice of such a motion shall be given either orally on the record in court or in writing to the prosecution. Such notice shall be given no more than seven (7) days after entry of the not guilty plea or any challenge to the personal jurisdiction of the court is waived unless the court for good cause shown grants relief from the waiver. The motion shall be served, heard and determined.

Rule 10.03. Waiver

The motion shall include all defenses, objections, issues and requests then available to the moving party. Failure to include any of them in the motion constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver. However, lack of jurisdiction over the offense or the failure of the indictment or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding. The defendant does not waive any defenses or objections by including them in any motion with other defenses, objections or issues.

Rule 10.04. Service of Motions; Hearing Date

Subd. 1. Service. In felony and gross misdemeanor cases, motions shall be made in writing and served upon opposing counsel not later than three (3) days before the Omnibus Hearing unless the court for good cause shown permits the motion to be made and served at a later time.

In misdemeanor cases, except as otherwise permitted by Rule 10.04, subd. 2, motions shall be made in writing and along with any supporting affidavits shall be served upon opposing counsel at least three (3) days before they are to be heard and no more than thirty (30) days after the arraignment unless

the court for good cause shown permits the motion to be made and served at a later time.

Subd. 2. Hearing Date. In felony and gross misdemeanor cases, unless the motion is served after the Omnibus Hearing, it shall be heard at that hearing and shall be determined before trial as provided by Rule 11.

In misdemeanor cases, if a pretrial conference is held, the motion shall be heard there unless the court directs otherwise for the purpose of hearing witnesses or for other good cause. If the motion is not heard at a pretrial conference, it shall be heard immediately prior to trial, provided that the court may upon agreement by the prosecutor and defense counsel summarily hear and determine the motion at arraignment. If the motion is heard at the arraignment, it need not be in writing, but a record shall be made of the proceedings and in the court's discretion witnesses may be called. The motion shall be determined before trial as provided by Rule 12.07.

Comment

Under Rule 10.01 the prosecution's pleadings consist of the indictment, complaint or tab charge. (The filing of a complaint does not, however, preclude an indictment (Rule 17.01).) The complaint continues to be the accusatory pleading for misdemeanors and also takes the place of the information (Minn. Stat. § 628.29 (1971)) for felonies and gross misdemeanors.

As provided by Rule 14 the defendant's pleadings are the pleas of guilty, not guilty by reason of mental illness or mental deficiency, and double jeopardy, or that prosecution is barred by Minn. Stat. § 609.035 (1971). The entry of any of these pleas does not relieve the defendant of the requirements of Rule 9.02, subd. 1(3)(a) for service of notice of the defenses on which he intends to rely. Rule 14 adopts the pleas provided by Minn. Stat. § 630.28 except for the bar of § 609.035, and except that the plea of not guilty by reason of mental illness or deficiency is added for the purposes of Rule 20.02 governing the procedures upon a defense of mental illness or mental deficiency.

That portion of Rule 10.01 providing that all pre-trial defenses, objections, and requests, determinable without trial on the merits, shall be asserted by motion to dismiss or to grant appropriate relief is taken from F.R.Crim.P. 12. The motion to dismiss or to grant appropriate relief will take the place of the demurrer (Minn. Stat. §§ 630.22, 630.-23 (1971)) and motion to quash or set aside the indictment (Minn. Stat. § 630.18 (1971).) (See also, Rules 18.02,

subd. 2; 17.06, subd. 2). The rule does not require pre-trial motions to be made before a plea is entered.

Rule 5.04, subd. 5 abolishes special appearances as the method for challenging the personal jurisdiction of the court and Rule 10.02 establishes a different procedure for making such a challenge. As to the basis for such a challenge see City of St. Paul v. Webb, 256 Minn. 210, 97 N.W.2d 638 (1959).

As a general rule under Rule 10.02 no challenge to the personal jurisdiction of the court may be made in a misdemeanor case until after a complaint has been filed. Therefore, if the defendant has been tab charged, he must first demand a complaint under Rule 4.02, subd. 5(3) before he may raise the jurisdictional challenge. If no complaint is issued, the charge must be dismissed under Rule 4.02, subd. 5(3). If a complaint is issued, it will often make any possible challenge moot, since a valid complaint would give the court jurisdiction even if the arrest was illegal. See City of St. Paul v. Webb, supra. Once the complaint is issued, the jurisdictional challenge becomes a question of the sufficiency of the complaint.

Rule 10.02 also provides that a motion to dismiss for want of personal jurisdiction shall be made after entry of a not guilty plea, and the entry of that plea does not waive the jurisdictional challenge. This reverses prior Minnesota case law providing that any plea waived a challenge to the court's jurisdiction. See State v. Stark, 288 Minn. 286, 179 N.W.2d 597 (1970); State v. Mastrian, 285 Minn. 51, 171 N.W.2d 695 (1969); State v. Burch, 285 Minn. 300, 170 N.W.2d 543 (1969). But see also State v. Harbitz, 293 Minn. 224, 198 N.W.2d 342 (1972) where the defendant following a trial on the merits was permitted to challenge on appeal the trial court's denial of his pretrial motion to quash an improper indictment.

To initiate the challenge to the court's personal jurisdiction, notice must be given that a motion to dismiss for want of personal jurisdiction will be made. This notice must be given no more than 7 days after entry of the not guilty plea or the challenge is waived unless the court for good cause shown grants relief from the waiver. The notice may be given either orally in court or in writing directly to the prosecution. The challenge then proceeds as in any other motion to dismiss under Rule 10.04. Therefore, under Rule 10.04, subd. 1, a written motion together with any necessary affidavits must be served at least three days before the motion is to be heard and no more than 30 days after the arraignment. Under Rule 10.04,

subd. 2 if a pretrial is held, the motion is normally heard there based on affidavits if available. If it is necessary to hear testimony on the matter, or for other good cause, the motion need not be heard at the pretrial. If the motion is not heard at the pretrial, it will be heard immediately prior to trial when any necessary witnesses will most likely be present.

If the defendant's motion to dismiss is denied, Rule 17.06, subd. 4(1) provides that he may continue to raise the jurisdictional issue on direct appeal if convicted following a trial. This procedure avoids the necessity of seeking review by an extraordinary writ which oftentimes would delay a trial otherwise ready to proceed. This procedure reverses prior case law. See State v. Stark, supra.

Rule 10.03 providing for waiver of defenses, objections, and requests not included in a motion under Rule 10.01 and then available--except lack of jurisdiction or failure to charge an offense (See also Minn. Stat. § 630.27 (1971).)--is based on ABA Standards, Discovery and Procedure Before Trial, 5.3(b) (Approved Draft, 1970) and substantially follows the language of F.R.Crim.P. 12(b)(2).

The effect of a determination of a motion to dismiss underthis rule is covered by Rule 17.06, subd. 4.

That portion of Rule 10.03 providing that the defendant does not waive defenses and objections by including them with other defenses and objections is based on Minn.R.Civ.P. 12.02.

Under Rule 10.04, subd. 1 and subd. 2, the pre-trial motions shall be in writing and shall be served upon opposing counsel not later than three (3) days before the Omnibus Hearing to be held under Rule 11 (unless the time is extended for good cause) in order that the issues raised by the motion may be heard at that hearing as provided by Rule 11.03. Rule 10.04, subd. 1 should not prevent the court from hearing at the Omnibus Hearing on the court's own motion (See Rule 11.04.) those issues which first appear or arise at that time if the parties do not need additional time to prepare.

Under Rule 10.04, subd. 2, pre-trial motions heard at the Omnibus Hearing and those heard afterward shall be determined before the date set for trial. (See Rule 11.07.) In misdemeanor cases, under Rule 10.04, subd. 2, pre-trial motions shall be determined as provided by Rule 12.07.

Rule 10.04, subd. 2 also provides in misdemeanor cases an alternative method for disposing of a motion to dismiss (including a motion to dismiss for want of personal jurisdiction)

at the time of arraignment. If agreed to by the prosecutor and defense counsel, the court may summarily hear and determine a motion to dismiss at the arraignment. In such cases the motion need not be in writing, but a record shall be made of the proceedings and, in the court's discretion, witnesses may be called. For those cases in which there is no dispute over the facts, and the law can be quickly and adequately argued, this alternative procedure could provide an immediate disposition avoiding the delay and expense of further court appearances.

RULE 11. OMNIBUS HEARING IN FELONY AND GROSS MISDEMEANOR CASES

If the defendant does not plead guilty at his initial appearance before the district court following a complaint, a hearing shall be held as follows:

Rule 11.01. Reference to County or Municipal Court

The hearing shall be held in the district court in the judicial district wherein the alleged offense was committed. In cases wherein it is mutually agreed between the district court and the county or municipal court, or when ordered by the Supreme Court, the hearing may be referred to the county court or municipal court of the county wherein the alleged offense was committed.

Rule 11.02. Hearing on Evidentiary Issues

Subd. 1. Evidence. If the defendant or prosecution has demanded a hearing on either of the issues specified by Rule 8.03, the court shall hear and determine them upon such evidence as may be offered by the prosecution or the defense.

Subd. 2. Cross-Examination. Upon such hearing, the defendant and the prosecution may cross-examine the other's witnesses.

Rule 11.03. Motions

The court shall hear and determine all motions made by the defendant or prosecution, including a motion that there is an insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint, and receive such evidence as may be offered in support or opposition. Each party may cross-examine any witnesses produced by the other. A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part. Evidence considered on the issue of probable cause shall be subject to the requirements of Rule 18.06, subd. 1.

Rule 11.04. Other Issues

The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose.

If the prosecution has given notice under Rule 7.02 of intention to offer evidence of additional offenses, upon motion a hearing shall be held to determine their admissibility under Rule 404(b) of the Minnesota Rules of Evidence and whether there is clear and convincing evidence that defendant committed the offenses.

If the defendant intends to offer evidence of a victim's previous sexual conduct in a prosecution for violation of Minn. Stat. §§ 609.342 to 609.346, a motion shall be made pursuant to the procedures prescribed by Rule 404(c) of the Minnesota Rules of Evidence.

Rule 11.05. Amendment of Complaint

The complaint may be amended as prescribed by these rules.

Rule 11.06. Pleas

At the hearing, whether in the district court or in the county court pursuant to Rule 11.01, the defendant may be permitted to plead to the offense charged in the complaint or to a lesser included offense, or an offense of lesser degree as permitted by Rule 15.

Rule 11.07. Continuances; Determination of Issues

The court may continue the hearing or any part thereof from time to time as may be necessary. All issues presented at the Omnibus Hearing shall be determined before trial. When issues are determined, the court shall make appropriate findings in writing or orally on the record. The issues presented at the Omnibus Hearing shall be consolidated for hearing.

Rule 11.08. Record

Subd. 1. Recording. A verbatim record of the proceedings shall be made.

Subd. 2. Transcript. Upon timely application to the reporter, counsel for the defendant or for the prosecution shall be furnished with a transcript of the proceedings upon the following conditions:

(a) If the transcript is to be furnished to defense counsel, the costs thereof shall be prepaid except when the defendant is represented by the public defender or assigned counsel, or when the defendant makes a sufficient affidavit that he is unable to pay or secure the costs and the court orders that he be supplied with the transcript at the expense of the appropriate governmental unit.

(b) The prosecution shall be furnished with the transcript without prepayment of costs.

(c) When a transcript is furnished to counsel, a copy shall be filed with the clerk of the court.

Subd. 3. Filing. The record and all papers and exhibits in the proceeding shall be filed or placed in the custody of the clerk of the court. Upon order of the court any exhibit may be returned to the party producing it.

Rule 11.09. Review

In the event the hearing is held before a county or municipal court, the findings and determinations on the issues presented shall be given the same force and effect as findings and determinations made by the district court.

Rule 11.10. Plea; Trial Date

If the defendant is not discharged he shall plead to the complaint or be given additional time within which to plead. If he pleads not guilty, a trial date shall then be set. A defendant shall be tried as soon as possible after entry of a not guilty plea. On demand made in writing or orally on the record by the prosecuting attorney or the defendant, the trial shall be commenced within sixty (60) days from the date of the demand unless good cause is shown by the prosecution or defendant why he should not be brought to trial within that period. The time period shall not begin to run earlier than the date of the not guilty plea.

Rule 11.11. Exclusion of Witnesses

Before or during any Omnibus or other pretrial hearing or proceeding, witnesses may be sequestered or excluded from

the courtroom, prior to their appearance, in the discretion of the court.

Comment

If a defendant does not plead guilty at his initial appearance before the district court following a complaint, the Omnibus Hearing provided by Rule 11 shall be held. The initial appearance may be continued, and if he does not then plead guilty, the Omnibus Hearing shall be held as provided by the rule.

The Omnibus Hearing provided by this rule is divided into three parts: (1) the Rasmussen hearing (Rule 11.02); (2) the hearing of pre-trial motions of the defendant and prosecution (Rule 11.04); (3) the hearing on other pre-trial issues brought up on the court's own motion (Rule 11.04). The hearings on any of these parts may be combined and heard simultaneously (Rule 11.07).

The current statutory hearing on probable cause has been replaced under these rules by a motion to dismiss the complaint for lack of probable cause which is to be made in accordance with Rule 10 and heard at the Omnibus Hearing pursuant to Rule 11.03. If such a motion is made, the court shall base its probable cause determination upon the evidence set forth in Rule 18.06, subd. 1. In State v. Florence, 306 Minn. 442, 239 N.W.2d 892 (1976), the Supreme Court discussed the type of evidence that may be presented and considered on a motion to dismiss the complaint for lack of probable cause. Nothing in that case or in the rule prohibits a defendant from calling any witness to testify for the purpose of showing an absence of probable cause. In determining whether to dismiss a complaint under Rule 11.03 for lack of probable cause, the trial court is not simply reassessing whether or not probable cause existed to warrant the arrest. Rather, under Florence the trial court must determine based upon the facts disclosed by the record whether it is fair and reasonable to require the defendant to stand trial.

If the defendant does not plead guilty upon his initial appearance in the district court under Rule 8 following a complaint or upon arraignment in the district court under Rule 19.04, subd. 5 following an indictment, the Omnibus Hearing (See ABA Standards, Discovery and Procedure Before Trial, 1.1, 5.1-5.3 (Approved Draft, 1970).) shall be held as provided by Rule 11 not later than fourteen (14) days after the initial appearance or arraignment, unless the period is extended for good cause (Rules 8.04; 19.04, subd. 5).

By that time, the prosecution will have given the Rasmussen and Spreigl notices (Rules 7.01; 7.02; 19.04, subd. 6(1) and (2)); the Rasmussen hearing will have been either waived or demanded (Rule 8.03); the discovery required without order of court will have been completed (Rules 7.03; 19.04, subd. 7; 9.01, subd. 1; 9.02, subd. 1); and pre-trial motions will have been served (Rules 10.04, subd. 1; 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 8; 18.02, subd. 2; 18.05, subds. 1 and 2; 17.03, subds. 3 and 4; 17.04; 17.06, subd. 3; 20.01, subd. 2; 20.03, subd. 1). (In the case of an indictment the pre-trial motions should include any motion to suppress based on the disclosures contained in the Rasmussen notice under Rule 19.04, subd. 6 (1).)

The purpose of the Omnibus Hearing is to avoid a multiplicity of court appearances and hearings upon these issues with a duplication of evidence and to combine all of the issues that can be disposed of without trial into one appearance and hearing. (See ABA Standards, Discovery and Procedure Before Trial, 1.1, 5.3 (Approved Draft, 1970).)

The Omnibus Hearing should preferably be held in the district court since issues affecting the trial will be heard and disposed of, but the hearing may be referred to the county or municipal court in the manner provided by Rule 11.01. (The rule does not permit reference of a part of an Omnibus Hearing.)

If a Rasmussen hearing has been demanded under Rule 8.03 or other similar evidentiary issues presented by motion or otherwise (Rules 11.02, subd. 1; 11.03; 11.04), they should be combined for hearing if possible (Rule 11.07).

Rule 11.02 covers the Rasmussen hearing demanded under Rule 8.03 (or required by a motion to suppress in the case of an indictment). Upon the Rasmussen hearing under Rule 11.02 both parties may offer evidence and cross-examine the other's witnesses. The rule leaves to judicial interpretation the consequences of the defendant's testimony at a Rasmussen or similar evidentiary hearing, that is, whether it may be used against him at trial substantively (See Simmons v. United States, 390 U.S. 377 (1968).) or by way of impeachment (cf. Harris v. New York, 401 U.S. 222 (1971)).

By Rule 11.03 the court shall also hear all motions made by the parties under Rule 10 (See also Rules 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 5; 9.03, subd. 8; 18.02, subd. 2; 18.05, subd. 1 and subd. 2; 17.03, subd. 3 and subd. 4;

17.04; 17.06; 17.06, subd. 3; 20.01, subd. 2; 20.03, subd. 1.) Motions not made upon grounds then known and available to the parties are waived, except lack of jurisdiction or failure of the complaint or indictment to state an offense, unless the court grants an exception to the waiver (Rule 10.03).

Rule 11.03 specifically permits a motion to dismiss a complaint for lack of probable cause, but does not permit a motion to dismiss an indictment upon this ground. See Rule 19.04, subd. 5.

The court shall also on its own motion under Rule 11.04 ascertain and hear any other issues that can be heard and disposed of before trial and any other matters that would promote a fair and expeditious trial. This would include requests or issues arising respecting discovery (Rule 9), evidentiary issues arising from the Spreigl notice (Rules 7.01, 19.04, subd. 6(2)), or other evidentiary issues, and is broad enough to permit a pre-trial conference if the court considers it necessary. (See F.R.Crim.P. 17.1.)

By Rule 11.05 the complaint may be amended at the Omnibus Hearing as provided by Rule 17.05. (See also Rules 3.04, subd. 2; 17.06, subd. 4.)

One of the issues that should be determined at the Omnibus Hearing is the admissibility of the testimony, of any proposed witness who has been subjected to a hypnotic interview concerning the facts of the case. Ordinarily under State v. Mack, 292 N.W.2d 764 (Minn. 1980) the testimony of a previously hypnotized witness concerning the subject matter adduced at a pretial hypnotic interview may not be admitted in a criminal proceeding. Such testimony may be elicited only to the extent that it covers matters previously and unequivocally disclosed by the witness to the authorities before the hypnosis.

Under State v. Wenberg, 289 N.W.2d 503 (Minn. 1980), if the prosecutor intends to impeach the defendant or any defense witness with evidence of prior convictions, the prosecutor must request a pretrial hearing on the admissibility of such evidence. If possible this issue should be heard at the Omnibus Hearing. See Rule 9.01, subd. 1(5) as to the reciprocal duties of the prosecutor and defense counsel to disclose the criminal records of the defendant and any defense witnesses. As to the standards for determining the admissibility of the impeachment evidence see Rule 609 of the Minnesota Rules of Evidence, State v. Jones, 271 N.W.2d 534 (Minn. 1978), and State v. Brouillette, 286 N.W.2d 702 (Minn. 1979).

If requested by motion under Rule 10, a hearing on the admissibility of evidence of additional offenses shall be held as part of the Omnibus Hearing. Before such evidence

may be considered admissible it must be clear and convincing. Additionally, according to State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) such evidence is admissible only if the prosecution's case is otherwise weak. Because it may not be possible to determine the strength of the prosecution's case until trial, it may be necessary to continue final determination of this issue under Rule 11.07 until that time. The court, however, should determine at the Omnibus Hearing whether the evidence to be presented is clear and convincing. If it does not meet that standard or the other requirements of Rule 404(b) of the Minnesota Rules of Evidence then the court should determine before trial that the evidence is inadmissible. Unless it is not possible to do so, Rule 11.07 requires that all issues presented to the court at the Omnibus Hearing must be decided before trial.

Under Rule 11.06 the defendant may plead to the complaint or indictment or to a lesser or different offense as provided by Rules 14 and 15, whether the Omnibus Hearing is held in the district court or in the county or municipal court pursuant to Rule 11.01. See Rules 15.07 and 15.08 as to the standards and procedure for entering a plea to a lesser or a different offense.

By Rule 11.07 the Omnibus Hearing or any part thereof may be continued if necessary to dispose of the issues presented. All issues presented at the Omnibus Hearing shall be determined before trial. (See also Rule 10.04, subd. 2.)

Rule 11.07 requires appropriate findings upon the determinations made on the issues presented at the Omnibus Hearing in order that the basis for the determinations may clearly appear.

Rule 11.08, subd. 1, requires that a record of the Omnibus Hearing shall be made, and Rule 11.08, subd. 2 prescribes the circumstances in which a transcript may be furnished to the parties. The verbatim record required by Rule 11.08, subd. 1, may be made by a court reporter or recording equipment.

The intent of the Omnibus Hearing rules is that all issues that can be determined before trial shall be heard at the Omnibus Hearing and decided before trial. Consequently, when the Omnibus Hearing is held before a judge other than the trial judge, the trial judge, except in extraordinary circumstances will adhere to the findings and determinations of the Omnibus Hearing judge. See State v. Coe, 298 N.W.2d 770 (Minn. 1980) and State v. Hamling, 314 N.W.2d 224 (Minn. 1982), where this issue was discussed, but not decided.

If the defendant is not discharged following the Omnibus Hearing, he shall plead to the indictment or complaint in the district court or be given additional time within which to plead. If he pleads not guilty, a trial date shall be set. (Rule 11.10.)

Rule 11.10 provides that a defendant shall be brought to trial within 60 days after demand therefor is made by the prosecuting attorney or defendant, unless good cause is shown for a delay, but regardless of a demand the defendant shall be tried as soon as possible. (Rule 11.10 supersedes Minn. Stat. § 611.04 (1971) requiring the defendant to be brought to trial at the next term of court.)

Rule 11.10 does not attempt to set arbitrary time limits (other than those resulting from the demand), because they would have to be circumscribed by numerous specific exclusions (See ABA Standards, Speedy Trial, 2.3 (Approved Draft, 1968).) which are covered in any event by the more general terms of the rule (See ABA Standards, Speedy Trial, 2.3(h) (Approved Draft, 1968).)

Rule 11.10 does not specify the consequences of a failure to bring the defendant to trial within the time limits set by the rule. (This differs from ABA Standards, Speedy Trial, 4.1, Pre-Trial Release, 5.10 (Approved Drafts, 1968) in which the consequences are set forth.)

The consequences and the time limits beyond which a defendant is considered to have been denied his constitutional right to a speedy trial are left to judicial decision. (See Barker v. Wingo, 407 U.S. 514 (1972).) The existence or absence of the demand under Rule 11.10 provides a factor that may be taken into account in determining whether the defendant has been unconstitutionally denied a speedy trial. (See Barker v. Wingo, supra.)

Under Rule 11.10 the time period following the demand does not begin to run earlier than the date of the not guilty plea. The not guilty plea was selected as the crucial date because the defendant is not required to so plead until at or after the Omnibus Hearing (Rules 8.03; 11.06; 11.10) and by that time all discovery and pre-trial proceedings will have been substantially completed. If demand is made before the not guilty plea, the 60-day period starts to run upon entry of the plea. It is contemplated that when the pre-trial proceedings have been completed, the court will require the defendant to enter a plea, if he has not already done so, in order that the defendant cannot delay the trial by intentionally delaying his plea. (Rule 11).

RULE 12. PRETRIAL CONFERENCE AND EVIDENTIARY HEARING IN MISDEMEANOR CASES

Rule 12.01. Pretrial Conference

A pretrial conference may be held in such cases and at such time as the court orders to consider the motions and other issues referred to in Rules 12.02 and 12.03. Such motions and other issues shall be heard immediately prior to trial whenever there has been no pretrial conference or whenever the court has so ordered for the purpose of hearing witnesses or for other good cause.

Rule 12.02. Motions

The court shall hear and determine all motions made by the defendant or prosecution and receive such evidence as may be offered in support or opposition. The defendant may offer evidence in his own behalf, and the defendant and prosecution may cross-examine the other's witnesses.

Rule 12.03. Other Issues

The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose.

If the prosecution has given notice under Rule 7.02 of intention to offer evidence of additional offenses, upon motion a hearing shall be held to determine their admissibility under Rule 404(b) of the Minnesota Rules of Evidence and whether there is clear and convincing evidence that defendant committed the offenses.

Rule 12.04. Hearing on Evidentiary Issues

Subd. 1. Evidence. If the defendant or the prosecution has demanded a hearing on the issue specified by Rule 7.01, the court shall hear and determine the issue upon such evidence as may be offered by the prosecutor or the defense.

Subd. 2. Cross-Examination. Upon such hearing, the defendant and the prosecution may cross-examine the other's witnesses as to the evidentiary and identification issues raised as specified in Rule 7.01.

Subd. 3. Time. Any evidentiary hearing shall be held separately from the trial when the trial is to be before a jury and in the discretion of the court may be held either separately or as part of the trial when the trial is to the court. Any separate hearing shall be held immediately

prior to trial unless the court for good cause otherwise orders.

Rule 12.05. Amendment of Complaint

The complaint, if any, may be amended at the pretrial conference as prescribed by these rules.

Rule 12.06. Pleas

At the pretrial conference the defendant may be permitted to withdraw any prior plea and to enter a plea of guilty to the offense charged or such other different offense as permitted in Rule 15.08.

Rule 12.07. Continuances; Determination of Issues

The court may continue the pretrial conference as necessary and for the purpose of taking testimony or other good cause, and may continue the determination of any issues or motions until the day of trial. All motions and issues including those raised at the evidentiary hearing shall be determined before trial begins unless otherwise agreed to by the prosecution and the defense. When the motions and issues are determined, the court shall make appropriate findings in writing or orally on the record.

Rule 12.08. Record

Subd. 1. Record. Unless waived by counsel, a verbatim record of the proceedings at the evidentiary hearing shall be made.

Subd. 2. Transcript and Filing. Transcript and filing shall be governed by the provisions of Rule 11.08, subd. 2 and subd. 3.

Comment

There will be no Omnibus Hearing required for misdemeanors (see Rule 11). There is no necessity for a probable cause determination for misdemeanors. A Rasmussen hearing usually can be conducted on the same day as the trial.

The multiplicity of court appearances and hearings which prompted the establishment of an Omnibus Hearing for felonies and gross misdemeanors (see the comments to Rule 11) is not a problem in misdemeanor cases. Thus, no Omnibus Hearing is necessary. Rather, this rule prescribes that a pre-trial conference may be held in such cases and at such times as the court may order and any Rasmussen hearing will ordinarily be conducted immediately prior to trial.

Trial courts are encouraged to hold pretrial conferences, especially in jury cases. Since a jury trial would normally last a day or longer, requiring the investment of time and expense, a pretrial conference which may settle the case without a trial, appears justified. If a pretrial conference is scheduled, it should be held at such times as the court orders and ordinarily the courts should order it held before the day of trial so that witnesses and jurors will be spared the inconvenience of appearing for trial in a case that is settled. At the conference the court will consider the same matters upon which an Omnibus Hearing must be held in felony and gross misdemeanor cases (see Rule 11). Under Rule 12.02 the court should hear and determine all motions made under Rule 10 (see also Rules 7.03; 17.03, subds. 3 and 4; 17.04; 17.06; 17.06, subd. 3; and 17) by the prosecutor or the defendant and receive any evidence subject to cross-examination by the other party, unless the court grants an exception to the waiver (Rule 10.03). Motions that are not made upon grounds then known and available to the parties are waived, with the exception of those for lack of jurisdiction over the offense or failure of the complaint to state an offense. At the conference the court on its own motion under Rule 12.03 shall also ascertain and hear any other issues that can be heard and disposed of before trial. This would include requests or issues arising from the Spreigl notice (Rule 7.02), and any other matters which would promote a fair and expeditious trial. If no pretrial conference is held, any motions and issues under Rule 12.02 and 12.03 which arise should be heard (Rule 12.01) and determined (Rule 12.07) immediately prior to trial.

Under State v. Wenberg, 289 N.W.2d 503 (Minn. 1980), if the prosecutor intends to impeach the defendant or any defense witness with evidence of prior convictions, the prosecutor must request a pretrial hearing on the admissibility of such evidence. See Rule 609 of the Minnesota Rules of Evidence, State v. Jones, 271 N.W.2d 534 (Minn. 1978), and State v. Brouillette, 286 N.W.2d 702 (Minn. 1979) as to the standards for determining the admissibility of such impeachment evidence.

If requested by motion under Rule 10, a hearing on the admissibility of evidence of additional offenses shall be held pursuant to Rule 12.03. Before such evidence may be considered admissible it must be clear and convincing. Additionally, according to State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) such evidence is admissible only if the prosecution's case is otherwise weak. Because it may not be possible to determine the strength of the prosecution's case until trial, it may be necessary to continue final determination of this issue under Rule 12.07 until that time. The court, however, should determine before trial whether the evidence to be presented is clear and convincing. If it

does not meet that standard or the other requirements of Rule 404(b) of the Minnesota Rules of Evidence then the court should determine before trial that the evidence is inadmissible. Unless it is not possible to do so, Rule 12.07 requires that all issues presented to the court under Rule 12 must be decided before trial.

Either at or before a pretrial conference, or at least seven days before trial if no conference is held, the prosecutor must serve the Rasmussen and Spreigl notice (Rules 7.01 and 7.02). Any other pretrial motions should be served at least three days before the conference or at least three days before trial if no conference is held (Rules 7.03; 10.04, subd. 1; 17.03, subds. 3 and 4; 17.04; 17.06; 17.06, subd. 3; and 17).

Rule 12.04 covers the Rasmussen hearing demanded under Rule 5.04, subd. 4. Under Rule 12.04, subd. 3 any Rasmussen hearing would be held separately from any jury trial, but may be held either separately or as part of the trial when trial is to the court. Any separate hearing should be held immediately prior to trial unless the court for good cause orders that it be held at a different time. This procedure continues substantially the present practice under City of St. Paul v. Page, 285 Minn. 374, 173 N.W.2d 460 (1969).

At the Rasmussen hearing, both parties may offer evidence (Rule 12.04, subd. 2) and cross-examine the other's witnesses (Rule 12.04, subd. 3). The rule leaves to judicial interpretation the consequences of the defendant's testimony at a Rasmussen or similar evidentiary hearing as to whether it can be used against him at trial substantively (see Simmons v. United States, 390 U.S. 377 (1968)) or by way of impeachment (cf. Harris v. New York, 401 U.S. 222 (1971)).

By Rule 12.05 the complaint may be amended at the pre-trial conference as provided by Rule 17.05 (see also Rules 3.04, subd. 2 and 17.06, subd. 4).

By Rule 12.06 the defendant at the pretrial conference may plead to the complaint or tab charge or to such other different offense as is permitted by Rule 15.08.

Rule 12.07 provides for the continuation of the pretrial conference if necessary to dispose of the issues presented. For the purpose of taking testimony or other good cause the court may continue the determination of issues or motions until the day of trial. Such a continuance, where testimony is required, will save witnesses an additional court appearance where those witnesses would be testifying at trial. Where no pretrial conference is held, any motions raised by the parties shall be heard on the day of trial (Rule 10.04, subd. 2). All motions and issues including those raised at a separate evidentiary hearing shall be determined before trial begins unless

otherwise agreed to by the prosecution and the defense. Findings may be made either in writing or orally on the record.

Rule 12.08, subd. 1 requires that a verbatim record of the evidentiary hearing be made by a court reporter, or recording equipment. Rule 12.08, subd. 2 prescribes the circumstances in which a transcript may be furnished to the parties. The record and all papers shall be filed with the clerk of the court in which the proceedings took place (Rule 12.08, subd. 2).

RULE 13. ARRAIGNMENT IN FELONY AND GROSS MISDEMEANOR CASES

The arraignment shall be conducted as follows:

Rule 13.01. In Open Court

The arraignment shall be conducted in open court.

Rule 13.02. Right to Counsel

If the defendant other than a corporation appears without counsel, the court shall advise him of his right to counsel, and when required, shall appoint counsel pursuant to Rule 5.02.

Rule 13.03. Copy and Reading of Charges

The defendant shall be provided with a copy of the complaint or indictment if he has not previously received a copy. The complaint or indictment shall be read to him unless he waives the reading.

Rule 13.04. Plea

The defendant shall be called on to plead or may be given time to plead.

Rule 13.05. Record

A verbatim record of the arraignment shall be made.

Comment

Arraignment as provided by Rule 13, will take place at the appearance of the defendant in the court under Rule 8 following a complaint charging a felony or gross misdemeanor or under Rule 19.04, subd. 4 and subd. 5 following an indictment. At that time the defendant may enter only a guilty plea. If the defendant does not wish to plead guilty, no

other plea is to be entered then and the arraignment is continued until the Omnibus Hearing when pursuant to Rule 11.10 the defendant shall plead to the complaint or the complaint as amended or be given additional time within which to plead. In the case of a complaint charging a felony or gross misdemeanor, the arraignment in the court under Rule 8.01 shall be held within 14 days after the defendant's initial appearance before a court (Rule 5.03) under Rule 5, and in the case of an indictment, within 7 days after the defendant's first appearance in the district court (Rule 19.04, subd. 1 and subd. 4).

The requirement of Rule 13.01 that the arraignment shall be conducted in open court is taken from F.R.Crim.P. 10 and follows present Minnesota practice (Minn. Stat. § 630.01 (1971)).

Rule 13.02 providing that the court shall advise the defendant of his right to counsel continues the requirements of Minn. Stat. §§ 611.15, 630.10 (1971).

If the defendant has the right to counsel (See ABA Standards, Providing Defense Services, 4.1 (Approved Draft, 1968); State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967)), appears without counsel, and is financially unable to afford counsel, Rule 13.02 requires the court to appoint counsel for him unless he knowingly and voluntarily waives the right (ABA Standards, Providing Defense Services, 7.1, 7.2 (Approved Draft, 1968)). The waiver shall be in writing (Minn. Stat. § 611.19 (1971); ABA Standards, Providing Defense Services, 7.3 (Approved Draft, 1968)) or under Rule 13.02 may be made orally before the court on the record.

Rule 13.03 requiring that the defendant be provided with a copy of the indictment or complaint and that the indictment or complaint be read to him unless he waives the reading continues the practice under Minn. Stat. § 630.11 (1971).

Under Rule 13.04, the defendant shall be called on to plead (see F.R.Crim.P. 10), or shall be given such time as the court determines within which to plead (This follows present Minnesota practice (Minn. Stat. § 630.13 (1971)). If the defendant does not plead guilty, Rules 8.04 and 19.04, subd. 5 provide that an Omnibus Hearing under Rule 11 shall be scheduled within 14 days and 7 days respectively, and he will not be required or permitted to plead earlier than that date.

By Rule 11.06 he may plead at the Omnibus Hearing whether the Omnibus Hearing is held in the district court, the county court, or the municipal court.

By Rule 11.10, if the defendant is not discharged following the Omnibus Hearing, he shall do so promptly or may be given additional time.

When he pleads not guilty, a trial date shall be set (See Rule 11.10).

When he pleads guilty, the procedure prescribed by Rule 15 shall be followed.

RULE 14. PLEAS

Rule 14.01. Pleas Permitted

A defendant may plead as follows:

(a) Guilty.

(b) Not guilty.

(c) Not guilty by reason of mental illness or mental deficiency.

(d) Double jeopardy or that prosecution is barred by Minn. Stat. § 609.035 (1971), either of which may be pleaded with or without the plea of not guilty.

Rule 14.02. Who May Plead

Subd. 1. By an individual in felony and gross misdemeanor cases. A plea to an indictment or complaint by an individual defendant shall be made orally on the record by the defendant in person.

Subd. 2. By an individual in misdemeanor cases. A plea to a complaint or tab charge by an individual defendant shall be made orally on the record or by the petition to plead guilty provided for in Rule 15.03, subd. 2. If the court is satisfied that the defendant has knowingly and voluntarily waived his right to be present, the plea may be entered by counsel.

Subd. 3. By a Corporation. A plea by a corporate defendant shall be made by counsel or a corporate officer, and shall be made orally on the record or in writing.

Subd. 4. Defendant's Refusal to Plead. If the defendant stands mute or refuses to plead, or if the court refuses to accept a plea of guilty, the court shall proceed as if the defendant had entered a plea of not guilty.

If a defendant corporation fails to appear, the court upon proof of the commission of the offense charged may enter judgment of conviction and impose such sentence as may be appropriate.

Rule 14.03. Time of Plea

At any time during the proceedings, except as provided by Rule 8.01, a defendant may appear before the court to enter a plea of guilty to the offense charged or to some other offense pursuant to a plea agreement reached under Rule 15.04. To schedule such an appearance, the defendant shall file a written request with the clerk of court indicating the offense to which he wishes to plead guilty. Upon receiving such a request, the clerk shall schedule an appearance before the court at the earliest available date, which date, in any event, shall be not later than fourteen days after the filing of the request. The clerk shall then notify the defendant and the prosecuting attorney of the time and place of such court appearance.

Comment

Rule 14 adopts the pleas provided by Minn. Stat. 630.28 (1971), and adds the plea of not guilty by reason of mental illness or mental deficiency as defined by Minn. Stat. § 611.026 (1971) with its judicial interpretations, and the plea of the bar provided by Minn. Stat. § 609.035 (1971). Notice of a defense or defenses under Rule 9.02, subd. 1(3)(a) does not obviate the necessity for a plea under Rule 14.

Rule 20.02, subd. 6(2) and (5), governing the procedure upon the defense of mental illness or mental deficiency, contemplate that a defendant shall plead both not guilty and not guilty by reason of mental illness or mental deficiency when he intends to put in issue both his guilt of the elements of the offense charged and his mental responsibility by reason of mental illness or mental deficiency.

A conditional plea of guilty may not be entered whereby the defendant reserves the right to appeal the denial of a motion to suppress evidence or other pretrial order. State v. Lothenbach, 296 N.W.2d 864 (Minn. 1980). One option is to plead not guilty, stipulate the facts, waive the jury trial, and, if there is a finding of guilty, appeal the judgment of conviction.

Rule 14.02, subd. 1 continues the requirement of Minn. Stat. § 630.28 (1971) that the plea shall be made orally on the record.

Rule 14.04, subd. 2, unlike Minn. Stat. § 630.29, permits a plea of guilty or not guilty to a misdemeanor to be made by counsel, with the permission of the court. Otherwise, the plea shall be made in person except in the case of a corporation. In misdemeanor cases, by Rule 14.02, subd. 2, before accepting

such a plea through counsel, the court should determine whether counsel has advised the defendant of the rights and information contained in Rule 15.02, and whether the plea would be acceptable under Rule 15 if the defendant himself were present. The petition to plead guilty provided for in Rule 15.03, subd. 2 and in the Appendix B to Rule 15, if properly completed and filed with the court, constitutes a proper plea. The defendant need not be present when it is filed and accepted. See also Rule 26.03, subd. 1(3) (defendant's presence at trial and sentencing) and Rule 27.03, subd. 2 (defendant's presence at sentencing). If the court is satisfied that the defendant has knowingly and voluntarily decided to enter the plea and to waive his right to be present in court, then the court must allow the plea to be entered in the defendant's absence.

By Rule 14.02, subd. 3, a plea by a corporation may be made orally or in writing by counsel or a corporate officer. (See Minn. Stat. § 630.16 (1971).)

Rule 14.02, subd. 3 provides for the procedure when a corporation fails to appear in response to a summons or an order of court or otherwise. (This changes Minn. Stat. § 630.16 (1971)) (See Rule 3.01 for the procedure when a corporation fails to appear before a county or municipal court in response to a summons upon a complaint charging a felony or gross misdemeanor.)

Rule 14.02, subd. 4 governing the procedure when a defendant refuses to plead or when the court refuses to accept a plea of guilty follows the substance of Minn. Stat. § 630.34 (1971). The court should not refuse to accept a plea merely because the defendant is not present. The procedure upon a plea of guilty is set forth in Rule 15.

RULE 15. PROCEDURE UPON PLEA OF GUILTY; PLEA AGREEMENTS; PLEA WITHDRAWAL; PLEA TO LESSER OFFENSE

Rule 15.01. Acceptance of Plea; Questioning Defendant; Felony and Gross Misdemeanor Cases

Before the court accepts a plea of guilty, the defendant shall be sworn and questioned by the court with the assistance of counsel as to the following:

1. Name, age and date and place of birth.

2. Whether he understands the charge against him.

3. Specifically, whether he understands that he has been charged with the crime of (name of offense) committed on or about (month) (day) (year) in _____ County, Minnesota (and that he is tendering a plea of guilty

to the crime of (name of offense) which is a lesser degree or lesser included offense of the crime charged).

4. a. Whether he has had sufficient time to discuss the case with his attorney.

b. Whether he is satisfied that his attorney is fully informed as to the facts of the case, and that his attorney has represented his interests and fully advised him.

5. Whether he has been told by his attorney and understands that if he wishes to plead not guilty, he is entitled to a trial by a jury of 12 persons, and that he cannot be found guilty unless all 12 persons agree.

6. a. Whether he has been told by his attorney and understands that he will not have a trial by either a jury or by a judge without a jury if he pleads guilty.

b. Whether he waives his right to a trial.

7. Whether he has been told by his attorney, and understands that if he wishes to plead not guilty and have a trial by jury or by a judge, he will be presumed to be innocent until his guilt is proved beyond a reasonable doubt.

8. a. Whether he has been told by his attorney, and understands that if he wishes to plead not guilty and have a trial, the prosecutor will be required to have the witnesses against him testify in open court in his presence, and that he will have the right, through his attorney, to question these witnesses.

b. Whether he waives his right to have these witnesses testify in his presence in court and be questioned by his attorney.

9. a. Whether he has been told by his attorney and understands that if he wishes to plead not guilty and have a trial, he will be entitled to require any witnesses he thinks are favorable to him appear and testify.

b. Whether he waives this right.

10. Whether his attorney has told him and he understands:

a. That the maximum penalty that the court could impose for the crime with which he is charged (taking into consideration any prior conviction or convictions) is imprisonment for _____ years.

b. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for the crime with which he is charged.

11. Whether his attorney has told him that he discussed the case with one of the prosecuting attorneys, and that the respective attorneys agreed that if he entered a plea of guilty the prosecutor will do the following: (state the substance of the plea agreement.)

12. Whether his attorney has told him and he understands that if the court does not approve the plea agreement, he has an absolute right to withdraw his plea of guilty and have a trial.

13. Whether, except for the plea agreement, any policeman, prosecutor, judge, his attorney, or any other person, made any promises to him or any member of his family, or any of his friends, or other persons, or threatened him or any member of his family, or any of his friends, or other persons, in order to obtain a plea of guilty from him.

14. Whether his attorney has told him and he understands that if his plea of guilty is for any reason not accepted by the court, or is withdrawn by him with the court's approval, or is withdrawn by court order on appeal or other review, that he will stand trial on the original charge (charges) against him namely, (state the offense) (which would include any charges that were dismissed as a result of the plea agreement with his attorney) and that the prosecution could proceed just as if there had never been any agreement.

15. a. Whether he has been told by his attorney and understands, that if he wishes to plead not guilty and have a jury trial, he can testify if he wishes, but that if he decided not to testify, neither the prosecutor nor the judge could comment to the jury about his failure to testify.

b. Whether he waives this right, and agrees to tell the court about the facts of the crime.

16. Whether with knowledge and understanding of his rights he still wishes to enter a plea of guilty or whether he wishes to plead not guilty.

17. Whether he makes any claim that he is innocent.

18. Whether he is under the influence of intoxicating liquor or drugs or under mental disability or under medical

or psychiatric treatment.

19. Whether he has any questions to ask or anything to say before he states the facts of the crime.

20. What is the factual basis for his plea.

(NOTE: It is desirable that the defendant also be asked to acknowledge that he has signed the Petition to Plead Guilty, suggested form of which is contained in the appendix A to these rules; that he has read the questions set forth in the petition or that they have been read to him, and that he understands them; that he gave the answers set forth in the petition; and that they are true.)

Rule 15.02. Acceptance of Plea; Questioning Defendant; Misdemeanor Cases

Before the court accepts a plea of guilty to any offense punishable upon conviction by incarceration, any plea agreement shall be explained in open court. The defendant shall then be questioned by the court or counsel in substance as follows:

1. Specifically whether he understands that he has been charged with the crime of (name the offense) committed on or about (Month) (Day) (Year) in _____ County, Minnesota (and that he is tendering a plea of guilty to the crime of (name of offense)).

2. Whether he realizes that the maximum possible sentence is 90 days imprisonment and a fine in the amount allowed by applicable law. (Under the applicable law, if the maximum sentence is less, it should be so stated.)

3. Whether he knows that he has a right to the assistance of counsel at every stage of the proceedings and that counsel will be appointed for him if he cannot afford counsel.

4. Whether he knows that he has a right;

(a) to trial by a jury of 6 persons;

(b) to confront witnesses against him;

(c) to subpoena witnesses for him;

(d) to remain silent at trial or at any other time; and

(e) that he is presumed innocent and the State must prove its case beyond a reasonable doubt.

5. Whether he waives these rights.

6. Whether he understands the nature of the offense charged.

7. Whether he believes that what he did constitutes the offense to which he is pleading guilty.

The court shall then determine whether there is a factual basis for the plea.

Where the guilty plea is being entered at the defendant's first appearance in court, the statement as to his rights required by Rule 5.01 may be combined with the questioning required above prior to entry of a guilty plea.

Rule 15.03. Alternative Methods in Misdemeanor Cases

Subd. 1. Group Warnings. The court may advise a number of defendants at once as to the consequences of a plea and as to their constitutional rights as specified in questions 2, 3 and 4 above. When such a procedure is followed the court's statement shall be recorded and each defendant when called before the court shall be asked whether he heard and understood the statement. He shall then be questioned on the record as to the remaining matters specified in Rule 15.02.

Subd. 2. Petition to Plead Guilty. The defendant or his attorney may file with the court a petition to plead guilty as provided for in the Appendix B to Rule 15 signed by the defendant indicating that he is pleading guilty to the specified misdemeanor offense with the understanding and knowledge required of defendants personally entering a guilty plea under Rule 15.02.

Rule 15.04. Plea Discussion and Plea Agreements

Subd. 1. Propriety of Plea Discussions and Plea Agreements. In cases in which it appears that it would serve the interest of the public in the effective administration of criminal justice under the principles set forth in Rule 15.04, subd. 3(2), the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage in plea discussions and reach a plea agreement with defendant only through defense counsel.

Subd. 2. Relationship Between Defense Counsel and Defendant. Defense counsel shall conclude a plea agreement only with the consent of the defendant and shall ensure that the decision to enter a plea of guilty is ultimately made by the defendant.

Subd. 3. Responsibilities of the Trial Court Judge.

(1) Disclosure of Plea Agreement. If a plea agreement has been reached which contemplates entry of a plea of guilty, the trial court judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea. When such plea is tendered and the defendant questioned, the trial court judge shall reject or accept the plea of guilty on the terms of the plea agreement. The court may postpone its acceptance or rejection until it has received the results of a pre-sentence investigation. If the court rejects the plea agreement, it shall so advise the parties in open court and then call upon the defendant to either affirm or withdraw his plea.

(2) Consideration of Plea in Final Disposition. The court may accept a plea agreement of the parties when the interest of the public in the effective administration of justice would thereby be served. Among the considerations which are appropriate in determining whether such acceptance should be given are:

(a) That the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;

(b) That the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;

(c) That the concessions will make possible the application of alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant;

(d) That the defendant has made trial unnecessary when there are good reasons for not having a trial;

(e) That the defendant has given or offered cooperation which has resulted or may result in the successful prosecution of other offenders engaged in serious criminal conduct;

(f) That the defendant by his plea has aided in avoiding delay in the disposition of other cases and thereby has contributed to the efficient administration of criminal justice.

Rule 15.05. Plea Withdrawal

Subd. 1. To Correct Manifest Injustice. The court shall

allow a defendant to withdraw his plea of guilty upon a timely motion and prove to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice. Such a motion is not barred solely because it is made after sentence. If a defendant is allowed to withdraw his plea after sentence, the court shall set aside the judgment and the plea.

Subd. 2. Before Sentence. In its discretion the court may also allow the defendant to withdraw his plea at any time before sentence if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea.

Subd. 3. Withdrawal of Guilty Plea Without Asserting Innocence. The defendant may move to withdraw his plea of guilty without asserting that he is not guilty of the charge to which the plea was entered.

Rule 15.06. Plea Discussions and Agreements Not Admissible

If the defendant enters a plea of guilty which is not accepted or which is withdrawn, neither the plea discussions, nor the plea agreement, nor the plea shall be received in evidence against or in favor of the defendant in any criminal, civil, or administrative proceeding.

Rule 15.07. Plea to Lesser Offenses

With the consent of the prosecuting attorney and the approval of the court, the defendant shall be permitted to enter a plea of guilty to a lesser included offense or to an offense of lesser degree. Upon motion of the defendant and hearing thereon the court may accept a plea of guilty to a lesser included offense or to an offense of lesser degree, provided the court is satisfied following hearing that the prosecution cannot introduce evidence sufficient to justify the submission of the offense charged to the jury or that it would be a manifest injustice not to accept the plea. In either event, the plea may be entered without amendment of the indictment, complaint or tab charge.

Rule 15.08. Plea to Different Offense

With the consent of the prosecuting attorney and the defendant, the defendant may enter a plea of guilty to a different offense than that charged in the original tab charge, indictment, or complaint. If the different offense is a felony or gross misdemeanor, a new complaint shall be signed by the prosecuting attorney and filed in the district court. The complaint shall be in the form prescribed by Rule 2.01 and Rule 2.03 except that it need not be made upon oath

and the facts establishing probable cause to believe the defendant committed the offense charged need not be provided. If the different offense is a misdemeanor, the defendant may be charged by complaint or tab charge as provided in Rule 4.02, subd. 5(3) with the new offense and the original charge shall be dismissed.

Rule 15.09. Record of Proceedings

Upon a guilty plea to an offense punishable by incarceration, either a verbatim record of the proceedings shall be made, or in the case of misdemeanors, a petition to enter a plea of guilty, as provided in the Appendix B to Rule 15, shall be filed with the court. In felony and gross misdemeanor cases, any verbatim record made in accordance with this rule shall be transcribed. In misdemeanor cases, any such record need not be transcribed unless requested by the court, the defendant or the prosecuting attorney.

APPENDIX A TO RULE 15

STATE OF MINNESOTA
COUNTY OF

IN DISTRICT COURT
JUDICIAL DISTRICT

_____

State of Minnesota,

vs.

PETITION TO ENTER PLEA OF GUILTY

_____

TO: THE ABOVE NAMED COURT

I, _____, defendant in the above entitled action do respectfully represent and state as follows:

1. My full name is _____. I am ____ years old, my date of birth is _____. The last grade that I went through in school is _____.

2. I have received, read and discussed a copy of the (Indictment) (Complaint).

3. I understand the charge made against me in this case.

4. Specifically, I understand that I have been charged with the crime of _____ committed on or about (month) (day) (year) in _____ County, Minnesota, (and that the crime I am talking about is _____ which is a lesser degree or lesser included offense of the crime charged).

5. I am represented by an attorney whose name is _____ and:

a. I feel that I have had sufficient time to discuss my case with my attorney.

b. I am satisfied that my attorney is fully informed as to facts of this case.

c. My attorney has discussed possible defenses to the crime that I might have.

d. I am satisfied that my attorney has represented my interests and has fully advised me.

6. I (have) (have never) been a patient in a mental hospital.

7. I (have) (have not) talked with or been treated by a psychiatrist or other person for a nervous or mental condition.

8. I (have) (have not) been ill recently.

9. I (have) (have not) recently been taking pills or other medicines.

10. I (do) (do not) make the claim that I was so drunk or so under the influence of drugs or medicine that I did not know what I was doing at the time of the crime.

11. I (do) (do not) make the claim that I was acting in self-defense or merely protecting myself or others at the time of the crime.

12. I (do) (do not) make the claim that the fact that I have been held in jail since my arrest and could not post bail caused me to decide to plead guilty in order to get the thing over with rather than waiting for my turn at trial.

13. I (was) (was not) represented by an attorney when I (had a probable cause hearing). (If I have not had a probable cause hearing)

a. I know that I could now move that the complaint against me be dismissed for lack of probable cause and I know that if I do not make such a motion and go ahead with entering my plea of guilty, I waive all right to successfully object to the absence of a probable cause hearing.

b. I also know that I waive all right to successfully object to any errors in the probable cause hearing when I enter my plea of guilty.

14. My attorney has told me and I understand:

a. That the prosecutor for his case against me, has:

i. physical evidence obtained as a result of searching for and seizing the evidence;

ii. evidence in the form of statements, oral or written that I made to police or others regarding this crime;

iii. evidence discovered as a result of my statements or as a result of the evidence seized in a search;

iv. identification evidence from a lineup or photographic identification;

v. evidence the prosecution believes indicates that I committed one or more other crimes.

b. That I have a right to a pre-trial hearing before a judge to determine whether or not the evidence the prosecution has could be used against me if I went to trial in this case.

c. That if I requested such a pre-trial hearing I could testify at the hearing if I wanted to, but my testimony could not be used as substantive evidence against me if I went to trial and could only be used against me if I was charged with the crime of perjury. (Perjury means testifying falsely).

d. That I (do) (do not) now request such a pre-trial hearing and I specifically (do) (do not) now waive my right to have such a pre-trial hearing.

e. That whether or not I have had such a hearing I will not be able to object tomorrow or any other time to the evidence that the prosecutor has.

15. I have been told by my attorney and I understand:

a. That if I wish to plead not guilty I am entitled to a trial by a jury of 12 persons and all 12 persons would have to agree I was guilty before the jury could find me guilty.

b. That if I plead guilty I will not have a trial by either a jury or by a judge without a jury.

c. That with knowledge of my right to a trial I now waive my right to a trial.

16. I have been told by my attorney and I understand that if I wish to plead not guilty and have a trial by jury or

or trial by a judge I would be presumed innocent until my guilt is proved beyond a reasonable doubt.

17. I have been told by my attorney and I understand:

a. That if I wish to plead not guilty and have a trial the prosecutor would be required to have the witnesses testify against me in open court in my presence and that I would have the right, through my attorney, to question these witnesses.

b. That with knowledge of my right to have the prosecution's witnesses testify in open court in my presence and questioned by my attorney, I now waive this right.

18. I have been told by my attorney and I understand:

a. That if I wish to plead not guilty and have a trial I would be entitled to require any witnesses that I think are favorable to me to appear and testify at trial.

b. That with knowledge of my right to require favorable witnesses to appear and testify at trial I now waive this right.

19. I have been told by my attorney and I understand:

a. That a person who has prior convictions or a prior conviction can be given a longer prison term because of this.

b. That the maximum penalty that the court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for _____ years. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for this crime.

c. That a person who participates in a crime by intentionally aiding, advising, counseling and conspiring with another person or persons to commit a crime is just as guilty of that crime as the person or persons who are present and participating in the crime when it is actually committed.

d. That my present probation or parole could be revoked because of the plea of guilty to this crime.

20. I have been told by my attorney and I understand:

a. That he discussed this case with one of the prosecuting attorneys and that my attorney and the

prosecuting attorney agreed that if I entered a plea of guilty, the prosecutor will do the following:

(Give the substance of the agreement)

b. That if the court does not approve this agreement:

i. I have an absolute right to then withdraw my plea of guilty and have a trial.

ii. Any testimony that I have given concerning the guilty plea could not be used against me unless I am charged with the crime of perjury based on this testimony.

21. That except for the agreement between my attorney and the prosecuting attorney:

a. No one--including my attorney, any policeman, prosecutor, judge, or any other person--has made any promises to me, to any member of my family, to any of my friends or other persons, in order to obtain a plea of guilty from me.

b. No one--including my attorney, any policeman, prosecutor or judge, or any other person--has threatened me or any member of my family or my friends or other persons, in order to obtain a plea of guilty from me.

22. My attorney has told me and I understand that if my plea of guilty is for any reason not accepted by the court, or if I withdraw the plea, with the court's approval, or if the plea is withdrawn by court order on appeal or other review:

a. I would then stand trial on the original charge (charges) against me, namely _____ (which would include any charges that were dismissed as a result of the plea agreement entered into by my attorney and the prosecuting attorney).

b. The prosecution could proceed against me just as if there had been no plea of guilty and no plea agreement.

23. My attorney has told me and I understand that if my plea of guilty is accepted by the judge I have the right to appeal, but that any appeal or other court action I may take claiming error in the proceedings probably would be useless and a waste of my time and the court's.

24. My attorney has told me and I understand that a judge will not accept a plea of guilty for anyone who claims to be innocent.

25. I now make no claim that I am innocent.

26. I have been told by my attorney and I understand that if I wish to plead not guilty and have a jury trial:

a. That I could testify at trial if I wanted to but I could not be forced to testify.

b. That if I decided not to testify neither the prosecutor nor the judge could comment on my failure to testify.

c. That with knowledge of my right not to testify and that neither the judge nor the prosecutor could comment on my failure to testify at trial I now waive this right and I will tell the judge about the facts of the crime.

27. That in view of all above facts and considerations I wish to enter a plea of guilty.

Dated this ____ day of _____, 19__

_____

DEFENDANT

APPENDIX B TO RULE 15

STATE OF MINNESOTA
COUNTY OF

IN COUNTY COURT
CIVIL AND CRIMINAL
DIVISION

_____

FILE NO._____

State of Minnesota,
City of _____,

Plaintiff,

PETITION TO ENTER
PLEA OF GUILTY

vs.

_____

Defendant

TO: THE ABOVE NAMED COURT

_____, defendant in the above entitled action respectfully represents and states as follows:

1. That he is charged with (name of offense) in violation of (statute or ordinance);

2. That he hereby pleads guilty to the offense of (name of offense) in violation of (statute or ordinance);

3. That he is pleading guilty because he committed the following acts: (state sufficient facts to establish a factual basis for the plea);

4. That he understands that the maximum possible sentence for the offense he is pleading guilty to is a fine of _____ or 90 days in jail or both;

5. That he has fully discussed the charge(s), his constitutional rights, and this petition with his attorney, (name of attorney);

[OR]

5a. That he understands that he has the right to be represented by an attorney which will be appointed without cost to him if he cannot afford to pay for an attorney and that he hereby waives that right;

6. That he understands he has the following constitutional rights which he hereby knowingly and intelligently waives;

a. the right to a trial to the court or to a jury of six (6) members in which he is presumed innocent until proven guilty beyond a reasonable doubt;

b. the right to confront and cross-examine all witnesses against him;

c. the right to remain silent or to testify for himself.

7. That he is entering his plea freely and voluntarily and without any promises except as indicated in number 8 below.

8. That he is entering his plea of guilty based on the following plea agreement with the prosecutor: (if none so state) _____;

9. That he understands that if the court does not approve this agreement he has the absolute right to withdraw his plea of guilty and have a trial.

Dated this _____ day of _____, 19__

_____

Defendant

(where petition is to be filed in lieu of a personal appearance by defendant, add the following declaration:)

_____ states that he is the attorney for the defendant in the above entitled criminal action; that he personally explained the contents of the above petition to the defendant; that to the best of his knowledge the defendant's constitutional rights have not been violated and no meritorious defense exists to the charge(s) to which defendant is pleading guilty; that he personally observed the defendant date and sign the above petition; and that he concurs in the entry of defendant's plea of guilty.

Dated this _____ day of _____, 19__

_____

Attorney for Defendant.

Comment

Rule 15.01 adopts in principle ABA Standards, Pleas of Guilty, 1.4-1.6 (Approved Draft, 1968) as to the advice which shall be given to and the inquiry that shall be made of a defendant before acceptance of a plea of guilty to provide assurance that he understands the nature of the charge and the consequences of his plea, including the relinquishment of constitutional rights (Boykin v. Alabama, 395 U.S. 238 (1969)); that the plea is voluntary; and that it has a factual basis. See also State v. Johnson, 279 Minn. 209, 156 N.W.2d 218 (1968).

Rule 15.01 differs from the ABA Standards and from F.R.Crim. P. 11 in that the Rule sets forth a detailed inquiry, following substantially that suggested in Jones, Minnesota Criminal Procedure, 3rd Edition, § 31, p. 80. (See also Preliminary Draft of Proposed Amendments to the F.R.Crim.P. 11 (1971), 52 F.R.D. 409, 415.) Although a failure to include all of the interrogation set forth in Rule 15.01 will not in and of itself invalidate a plea of guilty, a complete inquiry as provided for by the rule will in most cases assure and provide a record for a valid plea.

Before entry of a guilty plea, defense counsel should review with the defendant the effect of the Minnesota Sentencing Guidelines on his case. Further, it may be desirable for the court to order a pre-plea sentencing

guidelines worksheet to be prepared so that the court, the defendant, and both counsel will be aware of the effect of the guidelines at the time the guilty plea is entered.

Rule 15.01 requires that the inquiry be made by the court with the assistance of the prosecuting attorney and defense counsel.

It is suggested by the Advisory Committee that it is desirable to have the defendant sign a Petition to Plead Guilty in the form of the petition appearing in the Appendices to these rules (which contain in even more detailed form the information showing the defendant's understanding of his rights and the consequences of his plea), and that the defendant be asked upon the inquiry under Rule 15.01 to acknowledge that he has signed the petition, that he has read the questions set forth in the petition or that they have been read to him and that he understands them, that he gave the answers set forth in the petition, and that they are true. This petition is presently in use in some counties in Minnesota.

Such extensive questioning in a misdemeanor case, Rule 15.02, would not be possible considering the large number of such cases. Nevertheless, where a defendant is subjected to the possibility of a fine and 90 days incarceration, justice requires that the court inform him at least of his fundamental constitutional rights, the elements of the offense charged, and the possible consequences of a guilty plea. The court in State v. Caszrez, 295 Minn. 534, 203 N.W.2d 406 (1973) applied the Boykin standard to misdemeanors, holding that a misdemeanor guilty plea must be vacated where the record does not show a knowing and voluntary waiver of the defendant's constitutional rights. It is clear then that at least some limited inquiry is necessary on the record before a misdemeanor guilty plea is accepted, and Rule 15.02 prescribes the minimal standards for this questioning.

Under Rule 15.03, subd. 1, the inquiry upon entry of a guilty plea may be conducted by the court, defense counsel or the prosecutor as the court may direct. The questioning shall cover in substance the defendant's knowledge of the offense charged; the potential sentence; and the waiver of his rights to counsel, to a jury trial, to confront witnesses, to subpoena witnesses, to remain silent, to the presumption of innocence, and to require proof of guilt beyond a reasonable doubt. The court shall also ask the defendant whether he understands the nature of the offense charged and whether he believes that what he did constitutes the offense to which he is pleading guilty. The court shall determine whether there

is a factual basis for the plea. Since even this minimal inquiry, if conducted for each defendant, would cause much delay and repetition, alternative methods are provided by Rule 15.03, subd. 2. Where a number of defendants are to be arraigned consecutively and are all present in the courtroom, Rule 15.03, subd. 1 provides that the court may advise them as a group of the possible consequences of a guilty plea and of their constitutional rights. If this procedure is followed, each defendant when appearing individually before the court must be asked whether he heard and understood the earlier statement by the court. He must then be individually questioned as to whether he waives the constitutional rights previously explained; as to whether he understands the nature of the offense charged; as to whether he believes that what he did constitutes the offense to which he is pleading guilty; and as to the factual basis for his plea. To further save time, the statement of rights required by Rule 5.01 upon a defendant's first appearance in court may be combined with the questioning required by this rule.

Rule 15.03, subd. 2(2) provides the second alternative method of entering a plea of guilty. Under this rule a "Petition to Enter Plea of Guilty" as provided for in the Appendix B to Rule 15, may be completed and filed with the court. This petition in written form contains in substance the information and questions required by Rule 15.03, subd. 1. When properly completed the petition may be filed by either the defendant or his counsel and it is not necessary for the defendant to personally appear in court when the petition is presented to the court. (See Rule 15.03, subd. 2). See Mills v. Municipal Court, 110 Cal.Rptr. 329 (1973) where the California court approved the use of a similar petition. If the court is satisfied that the plea is being knowingly and voluntarily entered according to the standards of Rule 15.01, subd. 1 it shall dispose of the tendered plea in the same manner as if the defendant were entering the plea orally and in person.

The defendant's right to counsel at the proceedings under Rule 15 is covered by Rule 13.03 (Arraignment In Felony and Gross Misdemeanor Cases).

Rule 15.01, subds. 10, 11, 12, following ABA Standards, Pleas of Guilty, 1.5 (Approved Draft, 1968), requires the court to ascertain whether there has been a plea agreement, what it is, whether the defendant understands it and also understands that if the court disapproves the agreement, the defendant has the absolute right to withdraw his plea. Under Rule 15.04, subd. 3(1), the court shall advise the defendant

if the plea agreement is rejected (unless the court decides to postpone approval or rejection until the pre-sentence report is received), and shall give him an opportunity to withdraw his plea, if one has been entered.

Rule 15.04, subd. 1 regarding the propriety of plea discussions and agreements follows the language of ABA Standards, Pleas of Guilty, 3.1(a) (Approved Draft, 1968). Instead of specifying what the subject matter of a plea agreement shall be (See ABA Standards, Pleas of Guilty, 3.1(b) (Approved Draft, 1968)) Rule 15.04, subd. 1 refers to the more general considerations which under Rule 15.04, subd. 3(2) shall govern the prosecuting attorney in his determination to enter into a plea agreement.

Rule 15.04, subd. 2, which refers to the relationship between defense counsel and the defendant in connection with a plea agreement, follows ABA Standards, Pleas of Guilty, 3.2(a) (Approved Draft, 1968).

Rule 15.04, subd. 3(1) is adapted from ABA Standards, Pleas of Guilty, 3.3(b) (Approved Draft, 1968) and authorizes the trial court to permit disclosure of a plea agreement in advance of the tender of the plea of guilty. When the defendant is questioned under Rule 15.01, the court shall inform the defendant if the plea agreement is rejected unless the court decides to postpone a decision on acceptance or rejection until the pre-sentence report is received, and shall give the defendant an opportunity to withdraw a plea of guilty, if entered. Whenever the court rejects the plea agreement, whether on tender of plea or after receipt of the pre-sentence report, or after plea, the court shall so inform the defendant and give him an opportunity to affirm or withdraw the plea, if entered, and if the defendant has made factual disclosures tending to disclose his guilt of the offense charged, the judge should disqualify himself from the trial of the case.

Rule 15.04, subd. 3(2) sets forth the considerations that shall guide the prosecuting attorney in determining whether to enter into a plea agreement and what the plea agreement shall be, and it also contains the considerations that shall govern the court in deciding whether to accept the agreement. This rule is taken from ABA Standards, Pleas of Guilty, 1.8 (Approved Draft, 1968). Rule 15.04, subd. 3(2)(d) is intended to cover the situations in which innocent witnesses or victims, such as young children involved in sexual offenses, may be protected from unnecessary publicity.

Rule 15.05, subd. 1 authorizing the withdrawal of a plea of guilty to correct manifest injustice follows the principles

set by ABA Standards, Pleas of Guilty, 2.1(a) (Approved Draft, 1968), but does not provide guidelines for determining whether a motion for withdrawal of the plea is timely or whether withdrawal is necessary to correct manifest injustice. (In this respect the rule differs from ABA Standards, Pleas of Guilty, 2.1(a)(i), (ii) (Approved Draft, 1968). This is left by the rule to judicial decision. (See, e.g., Chapman v. State, 282 Minn. 13, 162 N.W.2d 698 (1968).

Whenever a plea agreement has been rejected, the defendant shall be afforded the opportunity to withdraw a plea of guilty, if entered (Rules 15.04, subd. 3(1); 15.01).

The court shall permit withdrawal of a plea of guilty to correct manifest injustice whether the motion is made before or after sentence. (Rule 15.05, subd. 1).

Rule 15.05, subd. 2 permits the court in its discretion to allow the defendant to withdraw a guilty plea before sentence under the conditions specified in the rule. (Compare Minn. Stat. § 630.29 (1971) which does not prescribe guidelines.)

Rule 15.05, subd. 3 permitting a motion to withdraw a plea of guilty without asserting innocence is taken from ABA Standards, Pleas of Guilty, 2.1(a)(iii) (Approved Draft, 1968).

Rule 15.06 making plea discussions and plea agreements inadmissible in evidence follows ABA Standards, Pleas of Guilty, 3.4 (Approved Draft, 1968). Rule 15.06 is consistent with Rule 410 of the Minnesota Rules of Evidence which also governs the admissibility of evidence of a withdrawn plea of guilty. Rule 410 is broader in that it makes inadmissible evidence relating to withdrawn pleas from other jurisdictions including withdrawn pleas of nolo contendere from those jurisdictions which allow such a plea.

Rule 15.07 permits a defendant to plead to a lesser offense with the approval of the court if the prosecuting attorney consents. (This is substantially the same as Minn. Stat. § 630.30 (1971) which requires the approval of the court.)

The rule also authorizes the court on defendant's motion and following a hearing thereon to permit the defendant to plead to a lesser offense without the consent of the prosecuting attorney. In accordance with State v. Carriere, 290 N.W.2d

618 (Minn. 1980), such a plea is permitted only if the court is satisfied, following a hearing, that the prosecution could not present sufficient admissible evidence to justify submission of the offense charged to the jury. Under State v. Carriere, supra, the showing required of the prosecution in order to withstand the defendant's motion would be in the nature of an offer of proof. Further, the hearing must be in open court and the court's order must include a detailed statement of the reasons for its ruling on the motion. Rule 15.07 also permits a plea to a lesser offense over the prosecutor's objection to prevent a manifest injustice. Rule 15.07 does not require that the indictment or complaint be amended. (See State v. Oksanen, 276 Minn. 103, 149 N.W.2d 27 (1967).)

Rule 15.08 permits a plea of guilty in felony and gross misdemeanor cases, to a different offense than that charged in the original complaint or indictment with the consent of the defendant and prosecuting attorney. In that event a new complaint shall be filed, but need not be made on oath and need not provide evidence establishing probable cause. (See also Rule 11.06). In misdemeanor cases, the procedure is also permitted, but the defendant will be tab charged with the new offense as provided by Rule 4.02, subd. 5(3), and the original charge or charges will be dismissed upon entry of the guilty plea to the new charge.

Rule 15.09, requiring a record of the proceedings on a plea of guilty, is in accord with ABA Standards, Pleas of Guilty, 1.7 (Approved Draft, 1968). In misdemeanor cases, the rule provides the alternative, however, of filing a petition to enter a guilty plea as provided for in Rule 15.03, subd. 2 and in the Appendix B to Rule 15. This provision for either a verbatim record or a petition is included to satisfy the constitutional requirement that a plea to a misdemeanor offense punishable by incarceration must be shown on the record to be knowingly and voluntarily entered. See State v. Caszrez, 295 Minn. 534, 203 N.W.2d 406 (1973); Boykin v. Alabama, 393 U.S. 238 (1969); and Mills v. Municipal Court, 110 Cal.Rptr. 329 (1973). The verbatim record may be made by a court reporter or recording equipment (see Minn. Stat. § 487.11, subd. 2 (1971)). In felony and gross misdemeanor cases, any verbatim record made pursuant to this rule shall be transcribed. In misdemeanor cases, any such record need not be transcribed unless requested by the court, the defendant or the prosecuting attorney.

RULE 16. DISTRICT COURT MISDEMEANOR JURISDICTION

The district court shall try any misdemeanor offense prosecuted by indictment or which is joined with a felony or a gross misdemeanor prosecution pursuant to Minn. Stat. § 609.035. Any such prosecutions shall be governed by these rules. In misdemeanor cases prosecuted by indictment, to the extent that Rule 19 conflicts with other rules, Rule 19 shall govern.

Comment

The grand jury, with its power under Minn. Stat. § 628.02 to inquire into all "public offenses," could indict a defendant on misdemeanor charges. In those rare cases, Rule 16 provides that the case shall be tried in district court. Also when a misdemeanor is joined with a felony for prosecution pursuant to Minn. Stat. § 609.035, Rule 16 provides that the alleged misdemeanor offense shall be tried in the district court and prosecution shall be governed by these rules.

RULE 17. INDICTMENT, COMPLAINT AND TAB CHARGE

Rule 17.01. Prosecution by Indictment, Complaint or Tab Charge

An offense which may be punished by life imprisonment shall be prosecuted by indictment, but the prosecution may proceed by a complaint following an arrest without a warrant or as the basis for the issuance of a warrant of arrest. The procedure thereafter shall be in accordance with the provisions of Rules 8 and 19. Any other offense defined by state law may be prosecuted by indictment or by a complaint as provided by Rule 2. Misdemeanors may also be prosecuted by tab charge.

The arrest of a person under a warrant of arrest issued upon a complaint under Rule 3 or the filing of a complaint under Rule 4.02, subd. 5(2) against a person arrested without a warrant shall not preclude an indictment for the offense charged in the complaint or for an offense arising from the conduct upon which the charge in the complaint was based.

Rule 17.02. Nature and Contents

Subd. 1. Complaint. A complaint shall be substantially in the form prescribed by Rule 2.

Subd. 2. Indictment. An indictment shall contain a written statement of the essential facts constituting the offense charged. It shall be signed by the foreman of the grand jury.

Subd. 3. Indictment and Complaint. The indictment or complaint shall state for each count the citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal or for reversal of a conviction if the error or omission did not prejudice the defendant. Each count may charge only one offense. Allegations made in one count may be incorporated by reference in another count. An indictment or complaint may, but need not, contain counts for the different degrees of the same offense, or for any of such degrees, or counts for lesser or other included offenses, or for any of such offenses. The same indictment or complaint may contain counts for murder, and also for manslaughter, or different degrees of manslaughter. When the offense may have been committed by the use of different means, the indictment or complaint may allege in one count the means of committing the offense in the alternative or that the means by which the defendant committed the offense are unknown.

Subd. 4. Bill of Particulars. The bill of particulars is abolished.

Subd. 5. Indictment and Complaint Forms--Felony and Gross Misdemeanors. For all indictments and complaints charging a felony or gross misdemeanor offense the prosecuting attorney or such judge or judicial officer authorized by law to issue process pursuant to Rule 2.02 shall use an appropriate form authorized and supplied by the State Court Administrator. If for any reason such form is unavailable, failure to comply with this rule shall constitute harmless error under Rule 31.01.

Rule 17.03. Joinder of Offenses and of Defendants

Subd. 1. Joinder of Offenses. When the defendant's conduct constitutes more than one offense, each such offense may be charged in the same indictment or complaint in a separate count.

Subd. 2. Joinder of Defendants.

(1) Felony and Gross Misdemeanor Cases. When two or more defendants shall be jointly charged with a felony, they shall be tried separately provided, however, upon written motion, the court in the interests of justice and not solely related to economy of time or expense may order a joint trial for any two or more said defendants. In cases other than felonies, defendants jointly charged may be tried jointly or separately, in the discretion of the court. In all cases any one or more of said defendants may be convicted or acquitted.

(2) Misdemeanor Cases. Defendants jointly charged may be tried jointly or separately, in the discretion of the court. In all cases, any one or more of said defendants may be convicted or acquitted.

Subd. 3. Severance of Offenses or Defendants. Misjoinder of offenses or charges or defendants shall not be grounds for dismissal, but on motion, offenses or defendants improperly joined shall be severed for trial.

Subd. 4. Consolidation of Indictments. Complaints or Tab Charges for Trial. The court on motion of the prosecution or on its own motion may order two or more indictments, complaints, tab charges or any combination thereof to be tried together if the offenses and the defendants, if there is more than one, could have been joined in a single indictment, complaint or tab charge. On motion of the defendant, the court may order two or more indictments, complaints, tab charges, or any combination thereof to be tried together even if the offenses and the defendants, if there be more than one, could not have been joined in a single indictment, complaint or tab charge. The procedure shall be the same as if the prosecution were under such single indictment, complaint or tab charge.

Subd. 5. Dual Representation. When two or more defendants are jointly charged or will be tried jointly under subdivisions 2 or 4 of this rule, and two or more of them are represented by the same counsel, the procedure hereafter outlined shall be followed before plea and trial.

(1) The court shall address each defendant personally on the record, advise the defendant of the potential danger of dual representation, and give the defendant an opportunity to question the court on the nature and consequences of dual representation.

(2) The court shall elicit from each defendant in a narrative statement that the defendant has been advised of his right to effective representation; that the defendant understands the details of his counsel's possible conflict of interest and the potential perils of such a conflict; that the defendant has discussed the matter with his counsel, or if he wishes with outside counsel and that he voluntarily waives his Sixth Amendment protections.

Rule 17.04. Surplusage

The court on motion may strike surplusage from the indictment, complaint, or tab charge.

Rule 17.05. Amendment of Indictment or Complaint

The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Rule 17.06. Motions Attacking Indictment, Complaint or Tab Charge

Subd. 1. Defects in Form. No indictment, complaint or tab charge shall be dismissed nor shall the trial, judgment or other proceedings thereon be affected by reason of a defect or imperfection in matters of form which does not tend to prejudice the substantial rights of the defendant.

Subd. 2. Motion to Dismiss or For Appropriate Relief. All objections to an indictment, complaint or tab charge shall be made by motion as provided by Rule 10.01 and may be based on the following grounds without limitation:

(1) Indictment.

(a) The evidence admissible before the grand jury was not sufficient as required by these rules to establish the offense charged or any lesser or other included offense or any offense of a lesser degree;

(b) The grand jury was illegally constituted;

(c) The grand jury proceeding was conducted before fewer than 16 grand jurors;

(d) Fewer than 12 grand jurors concurred in the finding of the indictment;

(e) The indictment was not found or returned as required by law;

(f) An unauthorized person was in the grand jury room during the presentation of evidence upon the charge contained in the indictment or during the deliberations or voting of the grand jury upon the charge.

(2) Indictment, Complaint or Tab Charge. In the case of an indictment, complaint or tab charge:

(a) The indictment, complaint or tab charge does not substantially comply with the requirements prescribed by law to the prejudice of the substantial rights of the defendant;

(b) The court lacks jurisdiction of the offense charged;

(c) The law defining the offense charged is unconstitutional or otherwise invalid;

(d) In the case of an indictment or complaint, that the facts stated do not constitute an offense;

(e) The prosecution is barred by the statute of limitations;

(f) The defendant has been denied a speedy trial;

(g) There exists some other jurisdictional or legal impediment to prosecution or conviction of the defendant for the offense charged, except as provided by Rule 10.02;

(h) Double jeopardy, collateral estoppel, or that prosecution is barred by Minn. Stat. § 609.035.

Subd. 3. Time for Motion. A motion to dismiss the indictment, complaint or tab charge shall be made within the time prescribed by Rule 10.04, subd. 1 except that an objection to the jurisdiction of the court over the offense or that the indictment, complaint or tab charge fails to charge an offense may be made at any time during the pendency of the proceeding.

Subd. 4. Effect of Determination of Motion to Dismiss.

(1) Motion Denied. If a motion to dismiss the indictment, complaint or tab charge is determined adversely to the defendant, he shall be permitted to plead if he has not previously pleaded. A plea previously entered shall stand. The defendant in a misdemeanor case may continue to raise the issues on appeal if he is convicted following a trial.

(2) Grounds for Dismissal. When a motion to dismiss an indictment, complaint or tab charge is granted for a defect in the institution of prosecution or in the indictment, complaint or tab charge, the court shall specify the grounds upon which the motion is granted.

(3) Dismissal for Curable Defect. If the dismissal is for failure to file a timely complaint as required by Rule 4.02, subd. 5(3), or for a defect that could be cured or avoided by an amended or new indictment, or complaint, further prosecution for the same offense shall not be barred, and the court shall on motion of the prosecuting attorney, made within seven (7) days after notice of the entry of the order granting the

motion to dismiss, order that defendant's bail or the other conditions of his release be continued or modified for a specified reasonable time pending an amended or new indictment or complaint.

In misdemeanor cases, if the defendant is unable to post any bail that might be required under Rule 6.02, subd. 1, then he must be released subject to such non-monetary conditions as the court deems appropriate under that rule. The specified time for such amended or new indictment or complaint shall not exceed sixty (60) days for filing a new indictment or seven (7) days for amending an indictment or complaint or for filing a new complaint. During the seven-day period for making the motion and during the time specified by the order, if such motion is made, dismissal of the indictment or complaint shall be stayed. If the prosecution does not make the motion within the seven-day period or if the indictment or complaint is not amended or if a new indictment or complaint is not filed within the time specified by the order, the defendant shall be discharged and further prosecution for the same offense shall be barred unless the prosecution has appealed as provided by law, or unless the defendant is charged with murder and the court has granted a motion to dismiss on the ground of the insufficiency of the evidence before the grand jury. In misdemeanor cases dismissed for failure to file a timely complaint within the thirty (30) day time limit pursuant to Rule 4.02, subd. 5(3), further prosecution shall not be barred unless additionally a judge or judicial officer of the county court has so ordered.

Comment

The first sentence of Rule 17.01 that an offense punishable by life imprisonment shall be prosecuted by indictment retains existing Minnesota law, which does not permit an information to be filed for that offense. (Minn. Stat. §§ 628.29, 628.32(6) (1971).) All other offenses may be prosecuted by indictment or complaint. The complaint takes the place of the information as an accusatory instrument. (See comment, Rules 2, 8.)

Under Rule 17.01 the fact that a complaint has been filed initially does not preclude an indictment while the complaint is pending or after it has been dismissed (except as provided in Rule 17.06, subd. 4).

Under Rule 17.01, a misdemeanor may be prosecuted by complaint or by tab charge (see Rule 4.02, subd. 5(3)) under these rules. A misdemeanor may also be prosecuted by indictment and, in such cases, rules applicable to indictments shall apply.

The complaint by Rule 2.01 and the indictment by Rule 17.02, subd. 2, shall contain a written statement of the essential facts

constituting the offense charged. (See F.R.Crim.P. 3, 7(c)(1).) The statement of the evidence, or the supporting affidavits, or sworn testimony, showing probable cause required by Rule 2.01 are not a part of the indictment.

Except to the extent that existing statutes (Minn. Stat. §§ 628.10-628.13, 628.15-628.18, 628.20-628.24, 628.27 (1971)), governing the contents of an indictment or information are inconsistent with Rule 17.02, they are not intended to be abrogated by these rules. So, to the extent they are consistent with the provisions of Rule 17.02, they may be followed in drawing complaints and indictments under these rules.

The requirement of Rule 17.02, subd. 3 for the citation of the statute violated but that error in the citation or in its omission is harmless unless the defendant was prejudiced comes from F.R.Crim.P. 7(e)(1)(2). (See also Minn. Stat. § 628.19 (1971).)

Rule 17.02, subd. 3 permits counts to be used but prohibits duplicity by charging more than one offense in a single count.

Allegations by reference is taken from F.R.Crim.P. 7(c)(1).

Rule 17.02, subd. 3, following Minn. Stat. § 628.14 (1971), also permits--but does not require--counts for lesser offenses, and permits allegations in the alternative of the means of committing an offense. (The last sentence of § 628.14 permitting several counts describing the different "clases" to which an offense might belong was not included in the rule because of its ambiguity.)

Rule 17.02, subd. 4 abolishes the bill of particulars. The information supplied by a bill of particulars may be obtained by discovery under Rules 9 or 7.03. If the indictment or complaint is deficient a motion may be made under Rule 17.06, subd. 2(2) and if granted, the indictment or complaint may be amended in accordance with Rule 17.06, subd. 4(3).

If the defect is one that can be cured by an amendment or new indictment or complaint, dismissal is automatically stayed for 7 days during which the prosecuting attorney may move that the stay be continued and the defendant's bail or other conditions of release be continued or modified pending amendment or a new indictment or complaint. (Rule 17.06, subd. 4(3)).

If the motion is made, the further stay for that purpose shall be granted but not for more than 60 days for a new indictment. (See Rules 18.01, subd. 1; 18.09) or more than 7 days for an amendment or new complaint. The 60-day period permitted for a new indictment allows for the additional time needed to draw and summon the grand jurors and witnesses and to present the case to the grand jury.

If the motion is not made within the 7-day time period for making the motion, or if no new indictment is returned within the 60-day period or amendment or new complaint filed within the 7-day period, the case shall be dismissed, the defendant discharged, and further prosecution is barred, unless the prosecution appeals as provided by law (See Minn. Stat. §§ 632.11-632.13 (1971).), or unless the defendant is charged with murder and the court has granted the motion to dismiss on the ground that the evidence before the grand jury was insufficient to establish probable cause. (See Rules 17.06, subd. 2(1)(a); 18.06). It was the opinion of the Advisory Committee that an exception should be made in the case of murder in view of the seriousness of the offense and the absence of a statute of limitations.

Rule 17.03, subd. 1, governing joinder of offenses, adopts the provisions of Minn. Stat. § 609.035 (1971) leaving its judicial interpretations to judicial decision.

Rule 17.03, subd. 2, governing the joinder of defendants in misdemeanor cases, adopts the provisions of Minn. Stat. § 631.03 which permits the joinder of two or more defendants when they are jointly charged with the commission of an offense. The provisions of § 631.03 governing severance or a joint trial of defendants jointly charged with an offense are continued.

Under Rule 17.03, subd. 2, the general rule is that defendants jointly charged with a felony shall be tried separately. However, the court in the interests of justice and not solely related to economy of time or expense may order joinder. It shall be considered an abuse of discretion for a trial judge to refuse to grant a joinder where the interests of justice so require.

Rule 17.03, subd. 3, providing that improper joinder of offenses or defendants it not a ground for dismissal but only for mandatory severance, abrogates Minn. Stat. § 630.23 (3) which lists misjoinder of offenses as a ground for demurrer. When defendants are properly joined, severance is governed by Rule 17.03, subd. 2.

Rule 17.03, subd. 4, permitting consolidation of indictments, complaints and tab charges follows F.R.Crim.P. 13.

The procedures required by Rule 17.03, subd. 5 concerning representation by the same counsel of two or more defendants jointly charged or tried are taken from State v. Olsen, 258 N.W.2d 898 (Minn. 1977). That case requires that the waiver of Sixth Amendment rights obtained from the defendant must be stated in clear and unequivocal language. If a record is not made as required or if the record fails to show that the procedures were followed in every important respect, State v. Olsen, supra, places the burden on the prosecution to establish

beyond a reasonable doubt that a prejudicial conflict of interest did not exist.

The provision of Rule 17.04 for striking surplusage is taken from F.R.Crim.P. 7(d).

Rule 17.05 permitting an amendment of an indictment, complaint or tab charge at any time before verdict or finding unless the defendant will be substantially prejudiced follows F.R.Crim.P. 7(e) and takes the place of the second sentence of Minn. Stat. § 628.19 (1971). The rule leaves to the trial court the determination of whether the defendant will be substantially prejudiced by an amendment and what steps, if any, including a continuance, may be taken to remove any prejudice that might otherwise result from an amendment. Rule 17.05 does not govern the amendment of a complaint after a mistrial and before start of the second trial. Rather, Rule 3.04, subd. 2 which provides for the free amendment of the complaint controls. State v. Alexander, 290 N.W.2d 745 (Minn. 1980).

Rule 17.06, subd. 1, precluding dismissal for defects in form follows the language of the first sentence of Minn. Stat. § 628.19 (1971).

In addition to the motion to dismiss an indictment for disqualification of individual jurors or the jury panel (See Rule 18.02, subd. 2), Rule 17.06, subd. 2 provides that all objections to an indictment, complaint or tab charge shall be by motion to dismiss or for appropriate relief (Rule 10.01), thus abolishing the demurrer (Minn. Stat. § 630.23 (1971)) and motion to quash or set aside (Minn. Stat. § 630.18) provided by existing law, and superseding those statutes to the extent they are inconsistent with the rule.

Grounds for a motion for dismissal of an indictment only and for a motion for dismissal of an indictment or complaint are set forth in Rule 17.06, subd. 2(1) and (2). These grounds are not intended to be exclusive.

Rule 17.06, subd. 2(1)(a) providing for a motion for dismissal of an indictment for lack of admissible evidence showing probable cause is available because of the requirement of Rule 18.05, subd. 1 that a record be made of the evidence taken before the grand jury. (See also the provisions of 18.05, subd. 1 for the conditions in which the record may be disclosed to the defendant. And see also Rule 18.06, subd. 2.) Upon such a motion the admissibility and sufficiency of evidence pertaining to indictments are governed by Rules 18.06, subd. 1, and 18.06, subd. 2.

Rule 17.06, subd. 2(2)(f) listing denial of a speedy trial as a ground for dismissal leaves to judicial decision the constitutional or other requirements of a speedy trial as well as the effect of a denial of defendant's demand for trial under Rule 11.10 and Rule 6.06.

By Rule 10.04, subd. 1, a motion to dismiss an indictment or complaint shall be served not later than 3 days before the Omnibus Hearing under Rule 11 unless the time is extended for good cause. In misdemeanor cases, by Rule 17.06, subd. 3, a motion to dismiss a complaint or tab charge shall be served at least three days before the pretrial conference or, at least three days before the trial if no pretrial conference is held, unless this time is extended for good cause. Rule 17.06, subd. 4(1) provides that if a defendant's motion to dismiss is denied in a misdemeanor case he may continue to raise the issue involved in the motion on direct appeal if he is convicted following a trial. The denial of a motion to dismiss based upon a challenge to the personal jurisdiction of the court could therefore be raised on direct appeal of a misdemeanor judgment of conviction. This reverses prior Minnesota case law, which permitted review in such cases only by writ of prohibition. See State v. Stark, 288 Minn. 286, 179 N.W.2d 597 (1970). Permitting the issue of personal jurisdiction to be raised on direct appeal avoids the inconvenience and delay which would often result from continuing the trial to allow the defendant to seek a writ of prohibition.

The first sentence of Rule 17.06, subd. 4, that if a motion to dismiss is decided adversely to the defendant, he shall be permitted to plead if he has not already done so and that a plea previously entered shall stand, is taken from F.R.Crim. P. 12(b)(5) and takes the place of similar provisions in Minn. Stat. §§ 630.19, 630.26 (1971). (See also Rule 11.10.) This rule contemplates that a defendant may plead not guilty and also make a motion to dismiss if he wishes.

The balance of Rule 17.06, subd. 4 relating to the effect of a determination to dismiss the indictment or complaint supersedes Minn. Stat. §§ 630.19-630.21, 630.25 (1971) and provides uniformity for that purpose. The rule is based on F.R.Crim.P. 12(h)(b). (See also Rule 3.04, subd. 2.)

In order that the basis of a dismissal for a defect in the institution of the prosecution or in the indictment or complaint may be apparent, Rule 17.06, subd. 4 requires the court to specify the grounds for granting the motion. Under Rule 17.06, subd. 4(3) if the dismissal is for failure to file a timely complaint as required by Rule 4.02, subd. 5(3) for misdemeanor cases or for a defect which could be cured by a new complaint, the prosecutor may within 7 days after notice of entry of the order dismissing the case move to continue the

case for the purpose of filing a new complaint. Upon such a motion the court shall continue the case for no more than 7 days pending the filing of a new complaint, or amending of the complaint or indictment or for 60 days pending the filing of a new indictment.

During the time for such a motion and during any continuance, dismissal of the charge is stayed, but in a misdemeanor case, the defendant may not be kept in custody based on that charge. If the defendant cannot post bail in a misdemeanor case, he must be released subject to such nonmonetary conditions as the court deems appropriate under Rule 6.02, subd. 1. If no motion is made or if no new or amended complaint or indictment is filed within the times allowed, the defendant must be discharged and any further prosecution is barred unless the prosecution has appealed or unless the murder case exception applies. However, in misdemeanor cases dismissed for failure to file a timely complaint within thirty (30) days pursuant to Rule 4.02, subd. 5(3), further prosecution is not automatically barred, but is barred only if so ordered by the court. If a misdemeanor case is dismissed for failure to issue a complaint, but the 30-day time limit established by Rule 4.02, subd. 5(3), has not yet run, the prosecutor may still issue the complaint within that 30-day time limit even without bringing a motion under Rule 17.06, subd. 4(3). The court is not authorized under Rule 17.06, subd. 4(3) to bar further prosecution before the 30-day time limit has run. Before this time limit has run, however, the court may order that further prosecution shall be barred if a valid complaint is not issued within the 30-day time limit. If no complaint is then issued within the 30 days, prosecution is barred without the necessity of further motions, court appearances, or orders. Rule 17.06, subd. 4(3), does not govern dismissals for defects that could not be cured at the time of dismissal by a new or amended complaint or indictment. Therefore, when a complaint or indictment has been dismissed because of insufficient evidence to establish probable cause, the prosecutor may re-prosecute if further evidence is later discovered to establish probable cause. The prosecutor may not reinstitute the charge by a tab charge under Rule 4.02, subd. 5(3) even for a misdemeanor. Also under Rule 4.02, subd. 5(3), even if prosecution is reinstituted within the specified period after having been dismissed for failure to file a timely complaint, a summons rather than a warrant must be issued to secure the appearance of the defendant in court.

RULE 18. GRAND JURY

Rule 18.01. Summoning Grand Juries

Subd. 1. When Summoned. The district court, without regard to the beginning or ending of a term of court, shall

order that one or more grand juries be drawn at least annually. The grand jury shall be summoned and convened whenever required by the public interest or whenever requested by the county attorney. Upon being drawn, each juror shall be notified of his selection. The court shall prescribe by order or rule the time and manner of summoning grand jurors. Vacancies in the grand jury panel shall be filled in the same manner as provided by this rule.

Subd. 2. How Selected and Drawn. Except as otherwise provided by this rule with respect to St. Louis County, the grand jury list shall be composed of the names of persons selected at random from a fair cross-section of the residents of the county who are qualified by law to serve as jurors and shall otherwise be selected as provided by law. The grand jury shall be drawn from the grand jury list as prescribed by law.

In St. Louis County a grand jury list shall be selected at random from a fair cross-section of the residents of each of the 3 districts of the St. Louis County Court district as defined by Minn. Stat. § 487.01, subd. 5(1) who are qualified by law to serve as jurors. The grand jury list shall otherwise be selected and the grand jurors shall be drawn from the list as provided by law. Each grand jury so drawn shall serve only in that district of the St. Louis County Court district from which the members of the jury are drawn.

Rule 18.02. Objections to Grand Jury and Grand Jurors

Subd. 1. Challenges Abolished. Challenges to the grand jury panel and to individual grand jurors are aboished. Objections to the grand jury panel and to individual grand jurors shall be made by motion to dismiss the indictment as hereafter provided.

Subd. 2. Motion to Dismiss Indictment. A motion to dismiss an indictment may be based upon any of the following grounds: that the grand jury was not selected, drawn or summoned in accordance with law; or that an individual juror is not legally qualified or that his state of mind prevented him from acting impartially. An indictment shall not be dismissed on the ground that one or more of the grand jurors was not legally qualified if it appears from the jury's records that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 18.03. Organization of Grand Jury

Subd. 1. Members; Quorum. A grand jury shall consist of not more than 23, nor less than 16, persons, and shall not proceed to any business unless at least 16 members are present.

Subd. 2. Organization and Proceedings. The grand jury shall be organized and its proceedings shall be conducted as provided by law except as otherwise provided by these rules.

Subd. 3. Charge. After the grand jury is sworn, the court shall instruct it respecting its duties.

Rule 18.04. Who May Be Present

Attorneys for the State, the witness under examination, interpreters when needed, and for the purpose of recording the evidence, a reporter or operator of a recording instrument may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting. Upon order of court and a showing of necessity for the purpose of security, a designated peace officer may be present while a specified witness is testifying. If a witness before the grand jury so requests and has effectively waived his immunity from self-incrimination, his attorney may be present while the witness is testifying, provided the attorney is then and there available for that purpose or his presence can be secured without unreasonable delay in the grand jury proceedings. The attorney shall not be permitted to participate in the grand jury proceedings except to advise and consult with the witness while he is testifying.

Rule 18.05. Record of Proceedings

Subd. 1. Verbatim Record. A verbatim record shall be made by a reporter or recording instrument of the evidence taken before the grand jury and of all statements made and events occurring while a witness is before the grand jury. The record shall not be disclosed except to the court or prosecuting attorney or unless the court, upon motion by the defendant for good cause shown, or upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, orders disclosure of the record or designated portions thereof to the defendant or his attorneys.

Subd. 2. Transcript. Upon motion of the defendant with notice to the prosecuting attorney, the district court at any time before trial or a county or municipal court at the Omnibus Hearing provided by Rule 11 shall, subject to such protective order as may be granted under Rule 9.03, subd. 5, order that defense counsel may obtain a transcript or copy of: (1) any recorded testimony of the defendant before the grand jury in the case against the defendant; (2) the recorded testimony of any persons before the grand jury whom the prosecution intends to call as witnesses at the defendant's trial; or (3) the recorded testimony of any witness before the grand jury in the case against the defendant, provided that at the hearing on the motion, defense counsel makes an

offer of proof showing that he expects to call the witness at the trial and that he will give relevant testimony favorable to the defendant.

Rule 18.06. Kind and Character of Evidence

Subd. 1. Admissibility of Evidence. An indictment shall be based on evidence that would be admissible at trial, with the following exceptions:

(1) Hearsay evidence offered only to lay the foundation for the admissibility of otherwise admissible evidence shall be admissible provided admissible foundation evidence is available and will be offered at the trial.

(2) A report or a copy of a report made by a person who is a physician, chemist, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison, or test performed by him in connection with the investigation of the case against the defendant may, when certified by such person as a report made by him or as a true copy thereof, be received as evidence of the facts stated therein.

(3) Unauthenticated copies of official records shall be admissible provided the copies were made from the original records and properly authenticated copies will be available at the trial.

(4) Written sworn statements of the persons who claim to have title or an interest in property shall be admitted to prove ownership or that the property was obtained without the owner's consent, and written sworn statements of such persons or of experts shall be admitted to prove the value of the property, provided that admissible evidence to prove ownership, value, or nonconsent is available and will be presented at the trial.

(5) Written sworn statements of witnesses who for reasons of ill health or for other valid reasons are unable to testify in person shall be admitted, provided that such witnesses or otherwise admissible evidence will be available at the trial to prove the facts stated in the statements.

(6) Oral or written summaries made by investigating officers or other persons, who are called as witnesses, of the contents of books, records, papers and other documents which they have examined but which are not

produced at the hearing or previously submitted to defense counsel for examination, provided the documents and summaries would otherwise be admissible. It shall be permissible for a police officer in charge of the investigation to give an oral summary.

Subd. 2. Evidence Warranting Finding of Indictment. The grand jury may find an indictment when upon all of the evidence there is probable cause to believe that an offense has been committed and that the defendant committed it. Reception of inadmissible evidence shall not be grounds for dismissal of an indictment if there is sufficient admissible evidence to support the indictment.

Subd. 3. Presentments Abolished. The grand jury may not find or return a presentment.

Rule 18.07. Finding and Return of Indictment

An indictment may be found only upon the concurrence of 12 or more jurors. When so found, it shall be signed by the foreman, whether he be one of the 12 concurring or not, and delivered to a judge in open court. If 12 jurors shall not concur in finding an indictment, the foreman shall so report in writing to the court forthwith, and any charges filed against the defendant for the offenses considered and upon which no indictment was returned shall be dismissed. The failure to find an indictment or the dismissal of the charge shall not prevent the case from again being submitted to a grand jury as often as the court shall direct.

Rule 18.08. Secrecy of Proceedings.

Every grand juror shall keep secret whatever he or any other juror has said during its deliberations and how he or any other juror has voted. Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to the prosecuting attorney for use in the performance of his duties, and to the defendant or his attorneys pursuant to Rule 18.05 of this rule governing the record of the grand jury proceedings. Otherwise, no juror, attorney, interpreter, stenographer, reporter, operator of a recording device, typist who transcribes recorded testimony, clerk of court, law enforcement officer, or court attache may disclose matters occurring before the grand jury except when directed by the court preliminarily to or in connection with a judicial proceeding. Unless the court directs otherwise, no person shall disclose the finding of an indictment until the defendant is in custody or appears before the court except when necessary for the issuance and execution of a summons or warrant, provided, however, disclosure may be made by the prosecuting attorney by notice to the defendant or his attorney of the indictment and the time of

defendant's appearance in the district court, if in the discretion of the prosecuting attorney such notice is sufficient to insure defendant's appearance.

Rule 18.09. Tenure and Excuse

A grand jury shall be drawn to serve for a specified period of time, not to exceed 12 months, designated by order of court. It shall not be discharged and its powers shall continue: (a) until the specified period of its service is completed or; (b) until its successor is drawn or; (c) until it has completed an investigation, already begun, of a particular offense, whichever is the later.

The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court.

At any time for cause shown the court may excuse a juror either temporarily or permanently, and in either event the court may impanel another person in place of the juror excused.

Comment

Rule 18.01, subd. 1 follows substantially the first sentence of F.R.Crim.P. 6 except that it requires that a grand jury shall be summoned not only whenever required by the public interest but also when requested by the county attorney. In this respect, it also changes Minn. Stat. § 628.42 (1971). Rule 18.01, subd. 1, permits more than one grand jury to be drawn or to serve at one time.

Under Rules 18.01, subd. 1 and 18.09 the grand jury shall be drawn and summoned and shall serve without regard to terms of court. This changes Minn. Stat. 628.42, providing that the grand jury shall be drawn and summoned for a general term of court and requiring the order therefor to be entered 15 days before the term, and also changes Minn. Stat. § 628.46 (1971) which requires the venire for the grand jury panel to be issued 12 days before the first day of the term and summons to be served on the grand jurors 10 days before the beginning of the term. It also changes Minn. Stat. § 484.30 (1971) providing for a grand jury to be ordered for a special term of court.

Rule 18.01, subd. 2 continues statutory law (See Minn. Stat. §§ 593.13, 593.14 (1971).) For the selection of persons for the grand jury list from which the grand jury are to be drawn and summoned, except that, adopting the policy expressed in the Federal Jury Selection Act, 28 U.S.C. § 1861, and to meet constitutional requirements, Rule 18.01, subd. 2 requires that the persons on the grand jury list shall be selected at random from a fair cross section of the qualified residents of the county. The method by which this shall be done is left to the determination of the jury commission or judges

making the selection of persons for the list. This changes the "key-man" selection process now followed in Ramsey, St. Louis and Hennepin Counties.

Rule 18.01, subd. 2 continues special provisions governing St. Louis County. Rule 18.01, subd. 2 continues existing practice provided by law (Minn. Stat. §§ 628.42, 628.45, 628.46 (1971)) for drawing the jurors from the grand jury list. The time and manner of summoning grand jurors shall be prescribed by rule or order of court.

Rule 18.02, subd. 1 abolishes the challenges to the grand jury panel and to individual jurors provided by Minn. Stat. § 628.52 (1971) and provides that objections to the panel and individual jurors shall be made solely by motion to dismiss the indictment. (See also Rule 17.06, subd. 2(1)).

The grounds for objections to the panel or to individual jurors enumerated in Minn. Stat. §§ 628.53, 628.54 (1971) are intended to be preserved by Rule 18.02, subd. 2 together with any other objections based on the grounds specified in Rule 18.02, subd. 2.

The effect of a dismissal of an indictment under Rule 18.02, subd. 2 is covered by Rule 17.06, subd. 4.

The second sentence of Rule 18.02, subd. 2 adopts F.R.Crim. P. 6(b)(2) that the indictment shall not be dismissed for disqualification of individual jurors if 12 or more other jurors concurred in the indictment.

Rule 18.03, subd. 1 continues present statutory law (Minn. Stat. § 628.41) as to the number of grand jury members and the quorum needed to conduct business.

Rule 18.03, subd. 2 continues present statutory law (Minn. Stat. §§ 628.56, 628.57 (1971)) for the organization and conduct of the proceedings of a grand jury except as otherwise provided by these rules. (See Rules 18.03, subd. 3 (charge), 18.04 (who may be present), 18.05, subd. 1 (record), 18.06 (kind and character of evidence).)

Rule 18.03, subd. 3 permits the court to instruct the jury under applicable rules and statutes without reading any particular statutes or rules.

Rule 18.04, specifying the persons who may be present before the grand jury, except when the jurors are deliberating or voting, is intended to take the place of those portions of Minn. Stat. §§ 628.63 and 630.18(3) (1971) which permit only the county attorney to be present at the request of the grand jury to examine the witnesses. The prosecuting attorney is entitled under the rule to be present whether the jury requests it or not.

Rule 18.04 also permits the presence of the following: interpreters when needed; reporters or operators of a recording instrument to make the record required by Rule 18.05, subd. 1 (See F.R.Crim.P. 6(d)); a designated peace officer; and the attorney for a witness who has effectively waived his immunity from self-incrimination.

Rule 18.05, subd. 1, providing for a verbatim record of the evidence taken before the grand jury, supersedes that portion of Minn. Stat. § 628.57 (1971) which provides that the minutes of the evidence taken before the grand jury shall not be preserved. (Minn. Stat. §§ 628.64, 628.65, 628.66 (1971) are not affected.) This rule does not require the recording of statements made or events occurring when no witness is present. However, under State v. Hejl, 315 N.W. 2d 592 (Minn. 1982) it is not in conflict with the rule for a particular judicial district to require that such statements or events be recorded.

Under Rule 18.05, subd. 1, the record may be disclosed to the court or to the prosecuting attorney, and to the defendant for good cause (This would include a "particularized need." Dennis v. United States, 384 U.S. 855, 869-870 (1966).) or on a showing that grounds exist for a motion to dismiss the indictment because of occurrences before the grand jury.

Rule 18.05, subd. 2, supplementing the discovery rules (Rule 9.01, subd. 1), permits the defendant to obtain a transcript of the testimony of grand jury witnesses, subject to protective orders under Rule 9.03, subd. 5. (See ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(iii) (Approved Draft, 1970).) This rule does not preclude the court from ordering that the defendant be supplied with such a transcript during the trial, upon a showing of good cause.

Rule 18.06, subd. 1 supersedes Minn. Stat. § 628.59 (1971).

Rule 18.06, subd. 2, providing that an indictment may be found upon probable cause changes Minn. Stat. § 628.03 (1971) and that part of § 628.02 which is inconsistent with the rule.

Rule 18.06, subd. 3, abolishes the presentment provided by Minn. Stat. §§ 628.03, 628.04 (1971).

Rule 18.07 adopts the substance of Minn. Stat. § 628.08 (1971) except that the indictment shall bear only the signature of the foreman instead of his signed endorsement that it is a "true bill". The requirement of Rule 18.07 that an indictment be "delivered to a judge in open court" is not inconsistent with the general requirement of Rule 18.08 that no person shall disclose the finding of an indictment until the defendant is in custody or appears before the court. Delivery of the indictment does not mean that it must be read

or disclosed in court. Also under Rule 33.04 the prosecuting attorney may request the court to delay the filing of the indictment until the arrest of the defendant involved.

The provision that if an indictment is not voted, the foreman shall so report to the court forthwith in writing (See F.R.Crim.P. 6(f).) is not contained in Minn. Stat. 628.08.

The provisions of the first sentence of Rule 18.08 for secrecy on the part of the grand jurors is taken from Minn. Stat. § 628.64 (1971).

That part of the second sentence of Rule 18.08 providing for disclosures to the prosecuting attorney for use in the performance of his duties comes from F.R.Crim.P. 6(e). The provision in the second sentence for disclosure to the defendant is in accord with Rule 18.05. The third sentence of Rule 18.08 imposing secrecy on the persons named--except as permitted by Rules 18.08 and 18.05--or except when ordered by the court in connection with a judicial proceeding, is taken from F.R.Crim.P. 6(e).

The first part of the last sentence of Rule 18.08 forbidding disclosure of an indictment until the defendant is in custody or appears in court except when necessary for the issuance of a warrant or summons (See Rule 19.01) is taken from F.R. Crim.P. 6(e); and the following proviso adopts the substance of the last sentence of Minn. Stat. § 628.68 (1971). The rule, however, leaves it to the discretion of the prosecuting attorney to determine whether to notify the defendant or his attorney of the indictment without the issuance of a warrant or summons.

Rule 18.09 making the grand jury session independent of the terms of court adopts the substance of F.R.Crim.P. 6(g) and takes the place of Minn. Stat. § 628.58 (1971). (See also Rule 18.01, subd. 1.)

The object of Rules 18.09 and 18.01, subd. 1 is that a grand jury shall always be available, without regard to terms of court, to be summoned into session and convened when required under Rule 18.01 or otherwise.

That portion of Rule 18.09 authorizing the court to excuse a grand juror for good cause is taken from F.R.Crim.P. 6(g) and enlarges the power of the court under Minn. Stat. § 628.49 (1971). The court may excuse grand jurors for the reasons specified in § 628.49 and upon other grounds showing good cause.

RULE 19. WARRANT OR SUMMONS UPON INDICTMENT; APPEARANCE BEFORE DISTRICT COURT

Rule 19.01. Issuance

When an indictment is filed, a warrant for the arrest of each defendant named in the indictment shall be issued by the court upon the request of the prosecuting attorney, except that a summons instead of a warrant shall be issued upon the request of the prosecuting attorney or by direction of the court or if the defendant is a corporation.

If the defendant is in custody, the court may order the officer having the defendant in custody to bring him before the court at a specified time and date.

More than one warrant or summons may be issued for the same defendant. If a defendant other than a corporation for whom a summons has been issued fails to appear in response to a summons, a warrant shall be issued.

Rule 19.02. Form

Subd. 1. Warrant. The warrant shall be signed by the judge; shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainly; shall describe the offense charged in the indictment; and shall command that the defendant be arrested and brought before the court. The amount of bail and other conditions of release may be set by the court and endorsed on the warrant.

Subd. 2. Summons. The summons shall be signed by the judge and shall summon the defendant to appear before the court at a specified time and place to answer to the indictment. A copy of the indictment shall be attached to the summons.

Rule 19.03. Execution or Service; Certification of Execution or Service

Subd. 1. By Whom. The warrant may be executed by any officer authorized by law. The summons may be served by any officer authorized to execute a warrant, and if served by mail, it may be served by the clerk.

Subd. 2. Territorial Limits. The warrant may be executed or the summons may be served at any place within the state except where prohibited by law.

Subd. 3. Manner. The warrant shall be executed or summons served in the manner provided by Rule 3.03, subd. 3.

Subd. 4. Certification. The execution of a warrant or the service of a summons shall be certified as provided by Rule 3.03, subd. 4.

Subd. 5. Unexecuted Warrants. At the request of the prosecuting attorney made at any time while the indictment is pending, a warrant returned unexecuted or a summons returned unserved or a duplicate thereof may be delivered to any authorized officer or person for execution or service.

Rule 19.04. Appearance of Defendant Before Court

Subd. 1. Appearance. The defendant shall be taken promptly before the district court which issued the warrant.

Subd. 2. Statement to Defendant. When the defendant initially appears before the district court under a warrant of arrest or in response to a summons, he shall be advised of the charges against him. If he has not received a copy of the indictment, he shall be provided with a copy.

The court shall also advise the defendant substantially as required by Rule 5.01.

Subd. 3. Appointment of Counsel. If the defendant is not represented by counsel and is financially unable to afford counsel, the court shall appoint counsel for him.

Subd. 4. Date for Arraignment. Upon defendant's initial appearance before the district court, he may be arraigned, upon his request and with the consent of the court. If the defendant is not arraigned at the initial appearance, a date shall be set for his arraignment upon the indictment not more than seven (7) days from the date of such initial appearance. The time for appearance may be extended by the district court for good cause. Upon defendant's arraignment, whether at his initial appearance or at some later appearance prior to the Omnibus Hearing, he may only enter a plea of guilty. If he does not wish to plead guilty, he shall not be called upon to enter any other plea and the arraignment shall be continued until the Omnibus Hearing when pursuant to Rule 11.10 he shall plead to the complaint or the complaint as amended or be given additional time within which to plead.

Subd. 5. Omnibus Hearing Date and Procedure. If upon arraignment, the defendant does not plead guilty, a date shall be fixed, not more than seven (7) days from the date of the arraignment, unless the court for good cause shown extends the time, when an Omnibus Hearing shall be held in accordance with Rule 11.

Subd. 6. Notice by Prosecuting Attorney.

(1) Notice of Evidence and Identification Procedures. When the prosecution has (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping, (2) any confessions, admissions or statements in the nature of confessions made by the defendant, (3) any evidence against the defendant discovered as the result of confessions, admissions or statements in the nature of confessions made by the defendant, or (4) when in the investigation of the case against the defendant, any identification procedures were followed, including but not limited to lineups or other observations of the defendant and the exhibition of photographs of the defendant or of any other persons, the prosecuting attorney, on or before the date set for defendant's arraignment, shall notify the defendant or his counsel in writing of such evidence and identification procedures.

(2) Notice of Additional Offenses. The prosecuting attorneys shall notify the defendant or his counsel in writing of any additional offenses the evidence of which may be offered at the trial under any exceptions to the general exclusionary rule. The notice shall be given at the Omnibus Hearing under Rule 11 or as soon thereafter as the offense becomes known to the prosecuting attorney. Such additional offenses shall be described with sufficient particularity to enable the defendant to prepare for trial. The notice need not include offenses for which the defendant has been previously prosecuted, or those that may be offered in rebuttal of the defendant's character witnesses or as a part of the occurrence or episode out of which the offense charged in the indictment arose.

Subd. 7. Discovery. Before the date set for the Omnibus Hearing the prosecution and defendant shall complete the discovery that is required by Rules 9.01, subd. 1 and 9.02, subd. 1 to be made without the necessity of an order of court.

Rule 19.05. Bail or Conditions of Release

Upon the defendant's initial appearance before the district court following an indictment, the court may, in accordance with Rule 6 set bail or other conditions of release or may continue or modify bail or conditions of release previously ordered.

Rule 19.06. Record

A verbatim record shall be made of the proceedings before the court upon defendant's initial appearance and arraignment and of the Omnibus Hearing.

Comment

Rule 19 relating to the warrant or summons on an indictment and the subsequent procedures parallels for the most part Rules 3, 4, 5, 7, 8, 11 governing the warrant or summons on a complaint and the procedures thereafter followed, all of which lead up to the Omnibus Hearing under Rule 11. The necessary differences between the two procedures under an indictment and a complaint are reflected in Rule 19.

Rule 19.01 provides for the issuance of a warrant of arrest or summons upon an indictment when requested by the prosecuting attorney, and a summons shall be issued when directed by the court. (See F.R.Crim.P. 9(a).) (Rule 19.01 takes the place of Minn. Stat. §§ 630.02, 630.03 (1971) providing for bench warrants.) (See also Rule 18.08 providing for notice to the defendant or his attorney at the discretion of the prosecuting attorney.)

That part of Rule 19.01 providing for the issuance of a summons for a corporation takes the place of Minn. Stat. § 630.15 (1971).

The provision of Rule 19.01 that a defendant in custody may be ordered by the court to be brought before the court at a specified time and place is taken from Minn. Stat. § 630.01 (1971).

Rule 19.01 permits more than one warrant or summons to be issued upon the same indictment as for example, for codefendants. (See F.R.Crim.P. 9(a).)

If a defendant other than a corporation does not respond to a summons a warrant shall issue. (See F.R.Crim.P. 9(a).) If a corporation does not respond to a summons, the court may proceed as provided in Rule 14.02, subd. 4.

Rule 19.02, subd. 1 provides that the warrant shall be signed by a judge of the district court. The form of the warrant follows substantially that prescribed for a warrant upon a complaint by Rule 3.02, subd. 1 except that the indictment warrant directs the defendant to be brought before the district court, and Rule 19.04, subd. 1 requires that this be done promptly.

The amount of bail and other conditions of release may be set by the district court (See Rule 6.02) and endorsed on the warrant. (See F.R.Crim.P. 9(b)(1) and Minn. Stat. § 630.05 (1971). (See also Rule 19.05).

The form of summons prescribed by Rule 19.02, subd. 2 is substantially the same as that prescribed by Rule 3.02, subd. 3 for a summons on a complaint.

Rule 19.03 governing execution or service of a warrant or summons upon an indictment and proof of execution or service follows substantially Rule 3.03 governing the similar procedures relating to a warrant or summons on a complaint.

Upon the defendant's first appearance before the district court under Rule 19.04, he shall be advised of the charges against him; provided with a copy of the indictment; given the advice required by Rule 5.01 (provided for upon initial appearance before a county or municipal court following a complaint); counsel shall be appointed for him if he is unrepresented and unable to afford counsel (Rule 19.04, subd. 3); the bail or conditions of his release set, continued, or modified in accordance with the provisions of Rule 6.02 (Rule 19.05); and a date shall be fixed for arraignment (Rule 13), which shall be held not more than 7 days after his first appearance in district court, unless the time is extended for good cause. (Rule 19.04, subd. 5). Instead of having a separate arraignment, Rule 19.04, subd. 4, permits the arraignment and initial appearance to be consolidated. This is possible only if requested by the defendant and agreed to by the court. Ordinarily, the Omnibus Hearing would then be held within seven (7) days after the consolidated initial appearance and arraignment under Rule 19.04, subd. 5, but that rule also permits the court to extend that time for good cause.

On or before the date of the arraignment the prosecuting attorney shall give the Rasmussen notice required by Rule 19.04, subd. 6(1). (See Rule 7.01 and Comments to Rule 7.01).

Upon the date fixed for arraignment, the defendant shall be arraigned as provided by Rule 13. If he does not plead guilty, a date shall be fixed for the Omnibus Hearing under Rule 11, which shall be held not more than 7 days from the date of the arraignment unless extended for good cause. (Rule 19.04, subd. 4 and subd. 5).

Between defendant's first appearance in the district court and the Omnibus Hearing, the prosecution and defendant shall complete the discovery procedures required by Rules 9.01, subd. 1; 9.02, subd. 1 (Rule 19.04, subd. 7).

The parties shall serve their motions under Rule 10 at least 3 days before the Omnibus Hearing (Rule 10.04) (including motions to suppress based on the Rasmussen notice given under Rule 19.04, subd. 6(1)). (See also comment to Rule 11.03.)

At or before the Omnibus Hearing the prosecution shall give the Spreigl notice required by Rule 19.04, subd. 6(4). (See Rule 7.02 and Comments to Rule 7.02.)

The Omnibus Hearing shall be held in district court, or by reference in a municipal or county court, in accordance with the provisions of Rule 11. (See comments to Rule 11.) If at the Omnibus Hearing the defendant wishes to challenge the sufficiency of the evidence heard by the grand jury to support the indictment that challenge is governed by Rule 17.06, subd. 2(1)(a) and Rule 18.06, subds. 1 and 2. The provision in Rule 11.03 concerning a motion that there is an insufficient showing of probable cause applies only to complaints and not to indictments.

By rule 19.06 a verbatim record shall be made of the defendant's first appearance before the district court, the arraignment, and the Omnibus Hearing.

RULE 20. PROCEEDINGS FOR MENTALLY ILL OR MENTALLY DEFICIENT

Rule 20.01. Competency to Proceed

Subd. 1. Competency to Proceed Defined. No person shall be tried or sentenced for any offense while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or participating in his defense.

Subd. 2. Proceedings. If during the pending proceedings, the court in which a criminal case is pending determines upon motion of the prosecuting attorney, defense counsel, or on its own motion that there is reason to doubt the defendant's competency as defined by this rule, the court shall suspend the criminal proceedings and shall proceed as follows:

(1) Court. If the case is pending before a municipal or county court and the charge is a felony or gross misdemeanor, the case shall be transferred to the district court of the county where the offense occurred for further proceedings in conformity with this rule. If the charge is a misdemeanor, the court having trial jurisdiction shall either proceed according to this rule, or cause civil commitment proceedings to be instituted against the defendant, or unless contrary to the public interest, dismiss the case.

(2) Probable Cause--Felony or Gross Misdemeanor. In the case of a felony or gross misdemeanor, unless the issue of probable cause has previously been determined, the district court, upon motion, before proceeding further shall determine whether there is sufficient probable cause stated on the face of the complaint. If the court determines that the complaint does not state sufficient probable cause to believe the defendant committed the offense charged, the charges against the defendant shall be dismissed.

(3) Medical Examination. The court shall appoint at least one qualified psychiatrist or clinical psychologist or physician experienced in the field of mental illness to examine the defendant and to report to the court on his mental condition. The court may order the defendant confined in a state mental hospital or other suitable hospital or facility for the purpose of such examination for a specified period not to exceed 60 days. If the defendant or prosecution has retained a qualified psychiatrist or clinical psychologist or physician experienced in the field of mental illness, the court on request of the defendant or prosecuting attorney shall direct that such psychiatrist or psychologist or physician be permitted to observe the examination and to conduct his own examination of the defendant.

(4) Report of Examination. At the conclusion of the examination, a written report of the examination shall be forwarded to the judge who ordered the examination, and he shall cause copies of the report to be delivered forthwith to the prosecuting attorney and to defense counsel. The contents of the report shall not be otherwise disclosed until the hearing on the defendant's competency. The report of the examination shall contain:

(1) A diagnosis of the mental condition of the defendant.

(2) If the defendant is mentally ill or mentally deficient, an opinion as to: (a) his capacity to understand the proceedings against him and to participate in his defense; (b) the extent of his homicidal tendencies, if any, and the degree of likelihood that he will engage in seriously harmful conduct; (c) the extent to which he can be treated without being committed to an institution; and

(d) whether there is a substantial probability that with treatment or otherwise he will ever attain the competency to proceed, and if so, in approximately what period of time.

(3) A statement of the factual basis upon which the diagnosis and opinion are based.

(4) If the examination could not be conducted by reason of the defendant's unwillingness to participate therein, a statement to that effect with an opinion, if possible, as to whether the defendant's unwillingness was the result of mental illness or deficiency.

Subd. 3. Determination of Competency. If either party files written objections to the report within ten (10) days after the receipt of a copy thereof, the court, upon notice to the parties, shall hold a hearing on the issue of the defendant's competency to proceed. At the hearing, evidence as to the defendant's mental condition may be admitted, including the report of the person who examined the defendant at the direction of the court. If neither the prosecution nor the defense files written objections to the report within the ten-day period, the court without a hearing may determine the defendant's competency to proceed upon the basis of the report.

Subd. 4. Effect of Finding on Issue of Competency to Proceed.

(1) Finding of Competency. If the court determines that the defendant is competent to proceed, the criminal proceedings against him shall be resumed.

(2) Finding of Incompetency. If the charge against the defendant is a misdemeanor and the court determines that he is incompetent to proceed, the charge shall be dismissed. If the charge against the defendant is a gross misdemeanor or felony and the court determines that the defendant is incompetent to proceed, the criminal proceedings against him shall be further suspended except as provided by Rule 20.01, subd. 6.

(a) Finding of Mental Illness. If the court determines that the defendant is mentally ill so as to be incapable of understanding the proceedings against him or participating in his defense, and the defendant is under civil commitment as mentally ill, the court shall order that the commitment be continued, and if not under commitment, the court shall cause civil commitment proceedings to be instituted against

him. The commitment or continuing commitment shall be subject to the supervision of the trial court as provided by Rule 20.01, subd. 5.

(b) Finding of Mental Deficiency. If the court finds the defendant to be mentally deficient so as to be incapable of understanding the proceedings against him or participating in his defense, and the defendant is under commitment as mentally deficient to the guardianship of the commissioner of public welfare, the court shall order him remanded to the care and custody of the commissioner, and if not under commitment, the court shall cause civil commitment proceedings to be instituted against him. The commitment or continuing commitment shall be subject to the supervision of the trial court as provided by Rule 20.01, subd. 5.

(c) Appeal. Either party shall have the right of appeal to the Court of Appeals from a determination of the county or probate court upon the civil commitment proceedings. The appeal shall be on the record only pursuant to Rule 28. In all civil commitment proceedings instituted under this rule, a verbatim record of the proceedings shall be made.

Subd. 5. Continuing Supervision by the Court in Felony and Gross Misdemeanor Cases. The head of the institution to which the defendant is committed under civil commitment proceedings, or if the defendant is not committed to an institution, the officer or other person charged with his supervision or to whom he has been committed, shall report periodically to the trial court, at such times as the court shall provide, on the defendant's mental condition with an opinion as to his competency to proceed. The reports shall be made not less than once every six months unless otherwise ordered. Copies of the reports shall be furnished to the prosecuting attorney and to defense counsel.

When the court on application of the prosecuting attorney, defense counsel, the defendant, or the person having supervision over the defendant, or on the court's own motion, determines, after a hearing with notice to the parties, that the defendant is competent to proceed, the criminal proceedings against the defendant shall be resumed. Unless the criminal charges against the defendant have been dismissed as provided

by Rule 20.01, subd. 6, the trial court and the prosecuting attorney shall be notified of any proposed institutional transfer, partial institutionalization status, and any proposed termination, discharge, or provisional discharge of the civil commitment. The prosecuting attorney shall have the right to participate as a party in any proceedings concerning such proposed changes in the defendant's civil commitment or status.

Subd. 6. Dismissal of Criminal Proceedings. Except when the defendant is charged with murder, the criminal proceedings against him shall be dismissed upon the expiration of three years from the date of the finding of his incompetency to proceed unless the prosecuting attorney, before the expiration of the three-year period, files a written notice of his intention to prosecute the defendant when he has been restored to competency.

Subd. 7. Determination of Legal Issues Not Requiring Defendant's Participation. The fact that the defendant is incompetent to proceed shall not preclude his counsel from making any legal objection or defense which is susceptible of fair determination before trial without the personal participation of the defendant.

Subd. 8. Admissibility of Defendant's Statements. When a defendant is examined under this rule, any statement made by him for the purpose of the examination and any evidence derived from the examination shall be admissible in evidence at the proceedings to determine whether he is competent to proceed.

Subd. 9. Credit for Time Spent in Confinement. If the court orders criminal proceedings resumed on a finding that defendant is competent to proceed, and the defendant is convicted of the charge, the time he has spent confined to a hospital or other facility under this rule shall be credited upon any jail or prison sentence imposed upon him.

Rule 20.02. Medical Examination of Defendant Upon Defense of Mental Deficiency or Mental Illness

Subd. 1. Authority of Court to Order Examination. The court having trial jurisdiction over the offense charged may order a mental examination of the defendant when the defense has notified the prosecuting attorney pursuant to Rule 9.02, subd. 1(3)(a) of an intention to assert a defense of mental illness or deficiency, when the defendant in a misdemeanor case pleads not guilty by reason of mental illness or mental deficiency, or when at the trial of the case, the defendant offers evidence of such mental condition.

Subd. 2. Examination of the Defendant. If the court orders a mental examination of the defendant, it shall appoint at least one qualified psychiatrist, or clinical psychologist, or physician experienced in the field of mental illness to examine the defendant and report upon his mental condition. For the purpose of the examination, the court, upon a special showing of need therefor, may order the defendant to be confined to a hospital or other suitable facility for a specified period not to exceed 60 days. If the defendant or prosecution has retained a qualified psychiatrist or clinical psychologist or physician experienced in the field of mental illness, the court on request of the defendant or prosecuting attorney shall direct that such psychiatrist or psychologist or physician be permitted to observe the mental examination and to conduct his own mental examination of the defendant.

Subd. 3. Refusal of Defendant to be Examined. If the defendant does not participate in the examination so that the examiner is unable to make an adequate report to the court, the court may prohibit the defendant from introducing evidence of his mental condition, may strike any such evidence previously introduced, may permit any other party to introduce evidence of defendant's refusal to cooperate and to comment thereon to the trier of the facts, and may make any such other ruling as it deems just.

Subd. 4. Report of Examination. At the conclusion of the examination, a written report of the examination shall be forwarded to the judge who ordered the examination, and he shall cause copies of the report to be delivered forthwith to the prosecuting attorney, and to defense counsel. The contents of the report shall not otherwise be disclosed except as hereafter provided by this rule. The report of the examination shall contain:

(1) A diagnosis of the defendant's mental condition as requested by the court;

(2) If so directed by the court an opinion as to whether, because of mental illness or deficiency, the defendant at the time of the commission of the offense charged was laboring under such a defect of reason as not to know the nature of the act constituting the offense with which defendant is charged or that it was wrong;

(3) Any opinion requested by the court that is based on the examiner's diagnosis;

(4) A statement of the factual basis upon which the diagnosis and any opinion are based.

If the examination cannot be conducted by reason of the defendant's unwillingness to participate, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental illness or deficiency.

Subd. 5. Admissibility of Evidence at Trial. No evidence derived from the examination shall be received against the defendant unless the defendant has previously made his mental condition an issue in the case. If his mental condition is an issue, any party may call the person who examined the defendant at the direction of the court to testify as a witness at the trial and he shall be subject to cross-examination by any other party. The report or portions thereof may be received in evidence to impeach the testimony of the person making it.

Subd. 6. Admissibility of Defendant's Statements. When a defendant is examined under Rule 20.01 or Rule 20.02, or both, the admissibility at trial of any statements made by him for the purposes of the examination and any evidence obtained as a result of such statements shall be determined by the following rules:

(1) Notice by Defendant of Sole Defense of Mental Condition. If a defendant notifies the prosecuting attorney under Rule 9.02, subd. 1(3)(a) of his intention to rely solely on the defense of mental illness or deficiency or if the defendant in a misdemeanor case relies solely on the plea of not guilty by reason of mental illness or mental deficiency pursuant to Rule 14.01(c), statements made by the defendant for the purpose of the mental examination and evidence obtained as a result of the statements shall be admissible at the trial upon that issue.

(2) Separate Trial of Defenses. If a defendant notifies the prosecuting attorney under Rule 9.02, subd. 1(3)(a) of his intention to rely on the defense of mental illness or mental deficiency together with a defense of not guilty, or if the defendant in a misdemeanor case pleads both not guilty and not guilty by reason of mental illness or mental deficiency, there shall be a separation of the two defenses with a sequential order of proof before the court or jury in a continuous trial in which the defense of not guilty shall be heard and determined first, and then the defense of the defendant's mental illness or deficiency.

(3) Effect of Separate Trial. If the defendant relies on the two defenses, the statements made by him for the purpose of the mental examination and any evidence obtained as a result of such statements shall be admissible against him only at that stage of the trial relating to the defense of mental illness or mental deficiency.

(4) Procedure Upon Separated Trial of Defenses.

(a) Instructions to Jury. When the two defenses are separated for trial under this rule, the jury shall be informed at the commencement of the trial that the two defenses have been interposed; that the defense of not guilty will be tried first and then the defense of mental illness or mental deficiency; that if the jury finds that the elements of the offense charged have not been proved, the defendant will be acquitted; that if the jury finds the elements of the offense have been proved, the defense of mental illness or deficiency will then be tried and determined by the jury.

(b) Proof of Elements of Offense--Effect. Upon the trial of the defense of not guilty the jury, or the court, if a jury is waived, shall determine whether the elements of the offense charged have been proved beyond a reasonable doubt.

If the court or jury determines that the elements of the offense have not been proved beyond a reasonable doubt, a judgment or acquittal shall be entered.

If the court or jury determines that the elements of the offense have been proved beyond a reasonable doubt, the defense of mental illness or mental deficiency shall then be tried and determined by the jury, or by the court, if a jury is waived, and based upon that determination the jury or court shall render a verdict or make a finding: (1) of not guilty by reason of mental illness; or (2) of not guilty by reason of mental deficiency; or (3) of guilty. The court shall enter judgment accordingly. The defendant shall have the burden of proving the defense of mental illness or mental deficiency by a preponderance of the evidence.

Subd. 7. Simultaneous Examinations. The court may order that the examination for competency to proceed under Rule 20.01 and the examination authorized by Rule 20.02 be conducted simultaneously.

Subd. 8. Legal Effect of Finding of Not Guilty by Reason of Mental Illness or Deficiency.

(1) Mental Illness. When a defendant is found not guilty by reason of mental illness, and the defendant is under civil commitment as mentally ill, the court

shall order that the commitment be continued, and if not under commitment, the court shall cause civil commitment proceedings to be instituted against him and that the defendant be detained in a state hospital or other facility pending completion of the proceedings. The commitment or continuing commitment in felony and gross misdemeanor cases shall be subject to the supervision of the trial court as provided by Rule 20.02, subd. 8(4).

(2) Mental Deficiency. When a defendant is found not guilty by reason of mental deficiency and the defendant is under commitment to the guardianship of the commissioner of public welfare, the court shall order him remanded to the care and custody of the commissioner, and if not under such commitment, the court shall cause civil commitment proceedings to be instituted against him. The commitment or continuing commitment in felony and gross misdemeanor cases shall be subject to the supervision of the trial court as provided by Rule 20.02, subd. 8(4).

(3) Appeal. Either party shall have the right to appeal to the Court of Appeals from a determination of the county or probate court upon the civil commitment proceedings. The appeal shall be taken on the record only pursuant to Rule 28. In all commitment proceedings instituted under this rule, a verbatim record of the proceedings shall be made.

(4) Continuing Supervision. In felony and gross misdemeanor cases only, the trial court and the prosecuting attorney shall be notified of any proposed institutional transfer, partial hospitalization status, and any proposed termination, discharge, or provisional discharge of the civil commitment. The prosecuting attorney shall have the right to participate as a party in any proceedings concerning such proposed changes in the defendant's civil commitment or status.

Rule 20.03. Disclosure of Reports and Records of Defendant's Mental Examinations

Subd. 1. Order for Disclosure. If a defendant notifies the prosecuting attorney under Rule 9.02, subd. 1(3)(a) of his intention to rely on the defense of mental illness or mental deficiency, the trial court, on motion of the prosecuting attorney and notice to defense counsel may order the defendant to furnish either to the court or to the prosecuting attorney copies of all medical reports and hospital and medical records previously or thereafter made

concerning the mental condition of the defendant and relevant to the issue of the defense of his mental illness or mental deficiency. If the copies of the reports and records are furnished to the court, the court shall inspect them to determine their relevancy. If the court determines they are relevant, they shall be delivered to the prosecuting attorney. Otherwise, they shall be returned to the defendant.

If the defendant is unable to comply with the court order, a subpoena duces tecum may be issued under Rule 22.

Subd. 2. Use of Reports and Records. If an order for disclosure of reports and records under Rule 20.03, subd. 1 is entered and copies thereof are furnished to the prosecuting attorney, the reports and records and any evidence obtained therefrom may be admitted in evidence only upon the issue of the defense of mental illness or mental deficiency when that issue is the sole defense or when it is tried as provided by Rule 20.02, subd. 6(5).

Comment

Rule 20 prescribes the detailed procedures to be followed when it appears that a defendant may be mentally incompetent to stand trial or when he interposes a defense of mental irresponsibility. The rule fills in the omissions in existing procedures (Minn. Stat. §§ 611.026, 631.18, 631.19 (1971)) and attempts to meet the constitutional equal protection and due process requirements established by Jackson v. Indiana, 406 U.S. 715 (1972), McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972), Humphrey v. Cady, 405 U.S. 504 (1972), and Pate v. Robinson, 383 U.S. 375 (1966), which are not fully met by the present statutes. To the extent the statutes are inconsistent with Rule 20, they are superseded by the rule.

Rule 20 in authorizing a compulsory medical examination of the defendant (Rules 20.01, subd. 2(3) and 20.02, subd. 1) also provides procedures for avoiding infringement of the defendant's privilege against self-incrimination (Rule 20.02, subd. 6).

Rule 20.01 details the procedures relating to comptency to proceed.

Rule 20.01, subd. 1 with some changes of language adopts the provisions of Minn. Stat. § 611.026 (1971) defining competency to proceed.

If the court before which the case is pending determines there is reason to doubt the defendant's competency and the charge is a felony or gross misdemeanor, the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9 shall be taken in the district court (Rule 20.01, subd. 2(1)).

If the charge is a misdemeanor, the county or municipal court has the options of (1) following the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9; (2) causing civil commitment proceedings to be instituted immediately under Minn. Stat. § 253B.07 (1982) or; (3) dismissing the case, unless dismissal would be contrary to the public interest (Rule 20.01, subd. 2(1).)

Rule 20.01, subd. 2(2) provides that upon motion, before proceeding further, the district court shall determine whether the complaint sufficiently states probable cause on its face. If the court determines that probable cause is not sufficiently stated, the case shall be dismissed. If it determines that probable cause is sufficiently stated, the criminal proceedings are suspended and the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9 shall be followed.

The first steps in that procedure under Rule 20.01, subds. 2(3) and (4) are the medical examination of the defendant and a determination of his competency upon the medical report, or after hearing if objection is made to the report (Rule 20.01, subd. 3). (These rules are derived from ALI Model Penal Code §§ 4.04-4.06 and Wis. Stat. § 971.14).

If the defendant is found to be competent, the criminal proceedings shall be resumed (Rule 20.01, subd. 4(1)).

If he is found to be incompetent and the charge is a misdemeanor, the case shall be dismissed (Rule 20.01, subd. 4(2)).

If the charge is a felony or gross misdemeanor and the defendant is found to be incompetent, the criminal proceedings shall continue to be suspended (Rule 20.01, subd. 4(2)), and the court shall follow the procedure established by Rules 20.01, subd. 4(2) to 20.01, subd. 6.

If the defendant is under civil commitment under Minn. Stat. Ch. 253B (1982), the civil commitment shall be continued (Rule 20.01, subd. 4(2)(a) and (b).) If he is not under civil commitment, commitment proceedings under Minn. Stat. § 253B.07 (1982) in the county or probate court shall be instituted against him.

At any time, on motion of the interested parties or on the court's own motion, a hearing shall be held to determine the defendant's competency, and if he is found to be competent, the criminal proceedings shall be resumed. (There is no limitation on the time or number of these hearings.) (Rule 20.01, subd. 5).

The provisions for institution of civil commitment proceedings, for notice and for hearing before the trial court upon the termination of civil commitment and upon the issue of defendant's competency (Rules 20.01, subd. 4(2)(a); 20.01, subd. 4(2)(b); 20.01, subd. 5), and the provision for automatic dismissal of the criminal charges after 3 years (Rule 20.01, subd. 6) are intended to meet the constitutional equal protection and due process requirements established by Jackson v. Indiana, 406 U.S. 715 (1972).

Rule 20.01, subd. 4(2)(c) gives either party the right to appeal to the Court of Appeals from the determination of the county or probate court upon the civil commitment proceedings instituted under Rules 20.01, subd. 4(2)(a) and (b). The appeal shall be determined only upon the record made in the county or probate court, which shall be a verbatim record.

During the period of the defendant's incompetency, Rule 20.01, subd. 7 permits the defense attorney to make any legal objection or defense to the prosecution which can be determined without the presence of the defendant. (This could include motions to dismiss the indictment or complaint under Rules 18.02, subd. 2; 17.06) (See Wis. Stat. § 971.14(6)).

By Rule 20.01, subd. 8 statements made by the defendant to the court-appointed examiner for the purpose of the examination under Rule 20.01, subd. 2(3) and evidence derived therefrom are admissible at the proceedings to determine his competency (Rule 20.01, subd. 3). (See ALI Penal Code, § 4.09 Wis. Stat. § 971.18) (For the admissibility of these statements at trial, see Rule 20.02, subd. 6)

Rule 20.01, subd. 9 provides for credit for any confinement to a hospital or other facility under Rule 20.01, subd. 2(3).

Rule 20.02 details the procedures to be followed when the defense is not guilty by reason of mental illness or mental deficiency (Rules 14.01; 9.02, subd. 1(3)(a)).

The definition of mental illness and mental deficiency contained in Minn. Stat. § 611.026 (1971) with its judicial interpretations is not affected by these rules. (See State v. Rawland, 294 Minn. 17, 199 N.W.2d 774 (1972)).

Rule 20.02 is intended, first, to provide a procedure for compulsory mental examination of the defendant without infringing upon the defendant's constitutional privilege against self-incrimination as to statements made by him for the purpose of the examination, (Rules 20.02, subd. 1 to subd. 7) and,

second, to provide procedures following an acquittal by reason of mental illness or mental deficiency that will meet constitutional requirements of equal protection and due process (Rule 20.02, subd. 8). (See Jackson v. Indiana, 406 U.S. 715 (1972), McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972).)

By Rule 20.02, subd. 1 an order for compulsory mental examination is triggered by a defense notice under Rule 9.02, subd. 1(3)(a) of an intention to rely on the defense of mental illness or mental deficiency, by the defendant in a misdemeanor case pleading not guilty by reason of mental illness or mental deficiency, or when the defendant offers evidence of mental illness or mental deficiency at trial. Under Rule 9.02, subd. 1(3)(a), in felony and gross misdemeanor cases, if he also intends to rely on the defense of not guilty of the elements of the offense charged he must at the same time so notify the prosecution. (See Rule 20.02, subd. 6(2) providing for the trial procedure in the event the defendant gives notice of his intention to rely on both the defenses of mental illness or mental deficiency and not guilty.)

Rule 20.02, subd. 1 authorizing compulsory mental examination of the defendant changes existing Minnesota law. (State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966)) (For similar provisions and cases upholding their constitutionality, see Wis. Stat. § 971.16; Roberts v. State, 41 Wis.2d 537, 164 N.W.2d 525 (1969); State ex rel. LaFollette v. Raskin, 35 Wis.2d 607, 150 N.W.2d 318 (1967).

Rule 20.02, subd. 2 providing for the examination is the same as Rule 20.01, subd. 2(3) governing the examination for competency to proceed. Under Rule 20.02, subd. 7 the two examinations may by court order be conducted simultaneously. In the order for the examination under Rule 20.02, subd. 2, the court shall direct what the examination and report shall cover. (See Rule 20.02, subd. 4(1), (2), (3).

Rule 20.02, subd. 3 leaves the imposition of sanctions for failure of the defendant to participate in the examination to the discretion of the trial court to be determined under all of the circumstances. See Rule 20.02, subd. 4 providing that the examiner's report shall if possible contain an opinion as to whether the defendant's failure to participate was the result of his mental condition.

Rule 20.02, subd. 4 provides what the report of the examination shall contain. Rule 20.02, subd. 4(2) is worded in the language of Minn. Stat. § 611.026, but is intended to include the judicial interpretations given to that statute. (See State v. Rawland, 294 Minn. 17, 199 N.W.2d 774 (1972).)

Rule 20.02, subd. 5 provides that evidence derived from the examination is inadmissible except when the defendant has raised the issue of his mental condition.

Rule 20.02, subd. 6 is intended to provide a procedure for obviating objections on the grounds of self-incrimination to the admissibility at trial of statements made by the defendant for the purpose of the compulsory mental examination under Rules 20.02, subd. 2 and 20.01, subd. 2(3).

If the defendant intends to rely solely on the defense of mental irresponsibility (Rules 9.02, subd. 1(3)(a); 14.01) statements made by the defendant for the purpose of the mental examination and evidence drived from the statements shall be admissible on the trial of that issue, if otherwise admissible under the rules of evidence. (Compare Wis. Stat. § 971.18).

If, however, the defendant intends to rely on the defense of mental illness or mental deficiency and the defense that he is not guilty of the elements of the offense charged (Rules 9.02, subd. 1(3)(a); 14.01), there must be a separation of the two defenses for trial (Rules 20.02, subd. 6(2); 20.02, subd. 6(4)). (See also Wis. Stat. § 971.175; State ex rel. LaFollette v. Raskin, 35 Wis.2d 607, 150 N.W.2d 318 (1967). The mandatory separation of the two defenses for trial under this rule makes it unnecessary to use the procedures outlined in State v. Hoffman, 328 N.W.2d 709 (Minn. 1982).

If the two defenses are separated for trial, the statements and evidence derived therefrom will be admissible only upon the trial of the defense of mental illness or mental deficiency, if otherwise admissible under the rules of evidence. (Rule 20.02, subd. 6(3).)

The trial procedure when there is a separation of the two defenses under Rule 20.02, subd. 6(2) is set forth in Rule 20.02, subd. 6(4). (See also Wis. Stat. § 971.175.) The trial shall be continuous before the same jury or judge, with the defense of not guilty of the elements of the offense tried first, and then if necessary, the defense of not guilty by reason of mental illness or mental deficiency.

The jury shall be informed before commencement of the trial that the two defenses have been interposed and of the trial procedures that will be following in trying them. (Rule 20.02, subd. 6(4)(a).

Upon the trial of the defense of not guilty, the jury or court shall determine whether the elements of the offense have been proved beyond a reasonable doubt (Rule 20.02, subd. 6(4)(b).)

The form of the determination shall be as follows: (1) "We, the jury, find that the elements of the offense of (name of offense) have been proved beyond a reasonable doubt.", or (2) "We, the jury, find that the elements of the offense of (name of offense) have not been proved beyond a reasonable doubt."

If it is determined that the elements of the offense have been proved, the trial of the defense of mental illness or mental deficiency shall follow immediately before the same jury or court.

Upon the trial of the defense of mental irresponsibility, the jury or court shall render a verdict or make a finding of (1) not guilty by reason of mental illness (See Rule 20.02, subd. 8(1) and (4) for the effect and consequences.) or (2) not guilty by reason of mental deficiency (See Rule 20.02, subd. 8(2) and (4) for the effect and consequences.); or (3) a verdict or finding of guilty (resulting in a judgment of conviction and sentence).

The provisions of Minn. Stat. § 611.026 (1971) placing the burden on the defendant of proving his lack of mental responsibility by a preponderance of the evidence are continued by Rule 20.02, subd. 6(4)(b).

The provisions of Rule 20.02, subd. 8 for civil commitment (Rule 20.02, subd. 8(1)(2)) following an acquittal by reason of mental illness or mental deficiency, for appeal from the determination in the civil commitment proceedings (Rule 20.02, subd. 8(3)), and for continuing supervision by the trial court while the defendant is under commitment (Rule 20.02, subd. 8(4) are similar to those contained in Rules 20.01, subd. 4 and subd. 5 governing civil commitment of a defendant found incompetent to stand trial. Like those rules, Rule 20.02, subd. 8 is intended to meet constitutional requirements of equal protection and due process. There is no continuing supervision by the criminal trial court in misdemeanor cases.

Rules 20.02, subd. 8(4) and 20.01, subd. 5 both require that the trial court and the prosecuting attorney be notified of any proposed institutional transfer or partial hospitalization status (see Minn. Stat. § 253B.15, subd. 11) or any porposed discharge, provisional discharge, or other termination of a defendant's civil commitment when that defendant has been found not guilty by reason of mental illness or deficiency or incompetent to proceed. The prosecuting attorney then has the right to participate as a party in any civil proceedings being conducted under the Minnesota Commitment Act of 1982, Minn. Stat. Ch. 253B, concerning those matters. As such, the prosecuting attorney could question and present witnesses and

argue for the continued commitment of the defendant in the civil proceedings. A person committed as mentally ill and dangerous can be discharged from that commitment only under the provisions of Minn. Stat. § 253B.18. Unlike patients committed as mentally ill only, patients committed as mentally ill and dangerous may not seek a discharge or provisional discharge of their commitment under Minn. Stat. § 253B.17 in the probate court which committed them or from the head of the institution under Minn. Stat. § 253B.16. Rather, Minn. Stat. § 253B.18 permits their discharge or provisional discharge only if ordered by the commissioner of public welfare after receiving a recommendation to that effect from an administrative special review board following a hearing. The commissioner's decision may be appealed to a three judge probate appeal panel appointed by the Supreme Court. The probate appeal panel then conducts a de novo hearing before deciding on the discharge or provisional discharge of the defendant. Minn. Stat. § 253B.19. Beyond that, any party may appeal an adverse decision to the Court of Appeals and an appeal of a release order stays the effect of that order until the appeal is decided by the Court of Appeals. Minn. Stat. § 253B.19, subd. 5. This is basically the same procedure as provided by the previous law under Minn. Stat. § 253A.15 as interpreted by the court in In the Matter of the Mental Illness of K.B.C., 308 N.W.2d 495 (Minn. 1981).

Rule 20.03 (which is comparable to Minn.R.Civ.P. 35.03 and 35.04) permits the disclosure to use and by the prosecution of medical reports and hospital and medical records that are relevant to the defense of mental illness or mental deficiency. It includes reports and records that are made both before and after the defense of mental illness or mental deficiency is asserted. These rules allow the prosecution to call a defense-retained psychiatrist to testify at the mental illness portion of a bifurcated trial and such a practice does not violate the defendant's attorney-client privilege or his constitutional right to the effective assistance of counsel. State v. Dodis, 314 N.W.2d 233 (Minn. 1982).

The defendant may turn over the copies of the reports and records to the court instead of to the prosecuting attorney. If he does so, the court shall examine them to determine their relevancy. If the court determines they are relevant, they shall be given to the prosecuting attorney. Otherwise they shall be returned to the defendant.

If the defendant is unable to comply with the order of court for disclosure, either because he does not have access to the reports or records, or for any other reason, a subpoena duces tecum may be issued under Rule 22 for their production. (See Rule 22.02).

By Rule 20.03, subd. 2 the reports and records disclosed to the prosecution under Rule 20.03, subd. 1 and evidence obtained therefrom are admissible only when the defense of mental illness or mental deficiency is the sole defense or when that defense is separated for trial under Rule 20.02, subd. 6(4).

RULE 21. DEPOSITIONS

Rule 21.01. When Taken

Whenever there is a reasonable probability that the testimony of a prospective witness will be used at hearing or at trial under any of the conditions specified in Rule 21.06, subd. 1, the court before whom the proceedings are pending may, at any time after the filing of a complaint or indictment, upon motion and notice to the parties, order that the testimony of such witness be taken by oral deposition before any designated person authorized to administer oaths and that any designated book, paper, document, record, recording or other material, not privileged, be produced at the same time and place. The order shall also direct the defendant to be present at the taking of the deposition.

Rule 21.02. Notice of Taking

The party or person at whose instance a deposition is to be taken shall give to every other party reasonable notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. Unless otherwise ordered by the court the notice to the defendant shall be served personally on all the defendants. The notice shall inform them that they are required by order of court to personally attend the taking of the deposition, and a copy of the court order shall be attached to the notice. An officer having custody of any of the defendants shall be notified of the time and place set for the deposition and shall produce them at the examination and keep them in the presence of the witness during the examination.

On motion of a party upon whom notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.

Rule 21.03. Expenses of Defendant and Counsel; Failure to Appear

Subd. 1. Expenses, Defendant and Counsel. If a defendant is unable to bear the expenses of travel and subsistence of himself and his attorney for attendance at the examination, the court shall direct that such expenses be paid at public expense.

Subd. 2. Failure to Appear. If a defendant who is not confined fails to appear at the examination without reasonable excuse after having received notice thereof, the deposition may be taken and used to the same extent as though he had been present.

Rule 21.04. How Taken

Subd. 1. Oral Deposition. Depositions shall be taken upon oral examination.

Subd. 2. Oath and Record of Examination. The witness shall be put on oath and a verbatim record of his testimony shall be made.

The testimony shall be taken stenographically and transcribed unless the court orders otherwise.

In the event the court orders that the testimony at a deposition be recorded by other than stenographic means, the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

Subd. 3. Scope and Manner of Examination--Objections--Motion to Terminate.

(a) In no event shall the deposition of a party defendant be taken without his consent.

(b) The scope and manner of examination and cross-examination shall be the same as that allowed at trial. Each party having possession of a statement of the witness being deposed shall make the statement available to the other party for examination and use at the taking of a deposition if such other party would be entitled to the statement at the trial.

(c) All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be recorded by the person before whom the deposition is taken. Evidence objected to shall be taken subject to the objections.

(d) At any time during the taking of the deposition, on motion of a party or of the deponent, and upon a showing that the examination is being conducted in bad faith, or in such manner as to annoy, embarrass, or oppress the deponent or party or to elicit privileged testimony, the court which ordered the deposition taken may order the person conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of taking the deposition by ordering as follows: (1) that certain matters not be inquired into, or that the scope of the examination be limited to certain matters; (2) that the examination be conducted with no one present except persons designated by the court.

Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to move for the order.

Rule 21.05. Transcription, Certification and Filing

When the testimony is fully transcribed, the person before whom the deposition was taken shall certify on the deposition that the witness was duly sworn and that the deposition is a verbatim record of the testimony given by the witness. He shall then securely seal the deposition in an evenlope endorsed with the title of the case and marked "Deposition of (hereinsert name of witness)" and shall promptly file it with the court in which the case is pending or send it by registered or certified mail to the clerk thereof for filing.

Upon the request of a party, documents and other things produced during the examination of a witness, or copies thereof, shall be marked for identification and annexed as exhibits to the deposition, and may be inspected and copied by any party. If the person producing the exhibits requests their return, the person taking the deposition shall mark them, and, after giving each party an opportunity to inspect and copy them, return the exhibits to the parties producing them. The exhibits may then be used in the same manner as if annexed to the deposition.

Rule 21.06. Use of Deposition

Subd. 1. Unavailability of Witness. At the trial, or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if it appears: (a) that the witness is dead or unable to be present or to testify at the trial or hearing because of then existing physical or

mental illness or infirmity; or (b) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, order of court, or other reasonable means.

Subd. 2. Inconsistent Testimony. A deposition may be used as substantive evidence, so far as otherwise admissible under the rules of evidence, if the witness gives testimony at the trial or hearing inconsistent with his deposition or if he persists at the hearing or trial in refusing to testify despite an order of the court to do so.

Subd. 3. Impeachment. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

A deposition may not be used if it appears that the absence of the witness was procured or caused by the party offering the deposition, unless part of the deposition has previously been offered by another party.

Rule 21.07. Effect of Errors and Irregularities in Depositions

Subd. 1. As to Notice. All errors and irregularities in the order or notice for taking a deposition are waived unless written objection is served promptly upon the party giving the notice.

Subd. 2. As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the grounds for disqualification become known or could be discovered with reasonable diligence.

Subd. 3. As to Taking of Deposition. Objections to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

Subd. 4. As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony

is transcribed or the deposition is prepared, recorded, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the person taking the deposition under these rules are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Rule 21.08. Deposition by Stipulation

The parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions. These rules to the extent not inconsistent with the stipulation shall otherwise govern the taking of the deposition.

Comment

Rule 21 is adapted from F.R.Crim.P. 15; Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15 (1971), 52 F.R.D. 409, 438; Minn.R.Civ.P. 28-30; and F.R.Civ.P. 30. Existing Minnesota law contains no provision for depositions to be taken on behalf of the prosecution in criminal cases. Minn. Stat. § 611.08 (1971) for taking depositions on behalf of the defendant is superseded by Rule 21. Minn. Stat. Ch. 597 (1971) where applicable to criminal cases is superseded to the extent it is inconsistent with Rule 21.

Under Rule 21.01, an order may be made for taking the oral deposition of a prospective hearing or trial witness of either party only upon a showing of reasonable probability that the witness will be unavailable at the hearing or trial because of the conditions specified in Rule 21.06, subd. 1. (Rule 21.01 is adapted from F.R.Crim.P 15(a) and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(a) (1971), 52 F.R.D. 409, 438-439.)

The deposition may be taken before any person authorized to administer oaths designated by the order. If the deposition is taken outside the State of Minnesota, this would include any person authorized to administer oaths by the laws of Minnesota or of the state where the deposition is taken. (See Moore v. Kelsey, 26 Wash.2d 31, 173 P.2d 130 (1946).)

Rule 21.02 providing for notice to the defendants and for the production of those in custody at the taking of the deposition is adapted from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(b) (1971), 52 F.R.D. 409, 439. Notice shall normally be personally served on the defendant. However, in cases where the defendant is unavailable and time is of the essence, the court may order that notice be served on the defendant's attorney instead of the defendant. These rules do not deal with the constitutionality of the use of a deposition at trial when the defendant has not been

personally notified.

The provisions of Rule 21.03, subd. 1 for the payment of the expenses of an indigent defendant comes from F.R.Crim. P. 15(c) and Preliminary Draft of Proposed Amendments to F.R. Crim.P. 15(c) (1971), 52 F.R.D. 409, 440.

Rule 21.03, subd. 2 providing for the consequences of a defendant's failure to appear at the deposition is adapted from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(b) (1971), 52 F.R.D. 409, 440.

Rule 21.04, subd. 2 providing for recording a deposition by other than stenographic means if the court so orders follows F.R.Civ.P. 30(b)(4).

Rule 21.04, subd. 3 relating to the deposition of a party defendant and the scope of examination and cross-examination is adapted from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(d) (1971), 52 F.R.D. 409, 440-441.

Rule 21.04, subd. 3(c) providing for objections follows substantially the language of Minn.R.Civ.P. 30.03. The time and manner of making objections and the conditions under which objections are waived are treated in Rule 21.07.

Rule 21.04, subd. 3(d) for termination or limitation of the deposition is adapted from the language of Minn.R.Civ.P. 30.04 and F.R.Civ.P. 30(d).

Rule 21.05 governing the certification and filing of the deposition comes from Minn.R.Civ.P. 30.06 and F.R.Civ.P. 30(f). Rule 21.05 does not, however, require that the deposition be submitted to and signed by the witness. It requires only that the person before whom the deposition is taken certify that the deposition is a true record of the testimony given by the witness. Any dispute over the accuracy of the record shall be dealt with under Rule 21.07, subd. 4 (completion and return of deposition).

The last paragraph of Rule 21.05 governing exhibits is adapted from F.R.Civ.P. 30(f).

Rule 21.06 establishes the circumstances under which a deposition can be used during a trial or hearing if a deposition exists. The right to obtain a deposition from a prospective witness, however, is governed by Rule 21.01 and under that rule a deposition can be ordered by the court only if there is a reasonable probability that the prospective witness will be unavailable for the trial or hearing for any of the reasons specified in subdivision 1 of Rule 21.06.

Under Rule 21.06 a deposition may be used as substantive evidence when the witness is unavailable within the meaning of Rule 21.06, subd. 1. (Compare Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(e) (1971), 52 F.R.D. 409, 441.)

The deposition may also be used (1) as substantive evidence if the witness gives inconsistent testimony at the trial (Rule 21.06, subd. 2) (See Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(e) (1971), 52 F.R.D. 409, 441; California v. Green, 399 U.S. 149 (1970); Rules of Evidence for United States District Courts 801(c)(2) (Effective Date, July 1, 1973).); (2) as substantive evidence if the witness refuses to testify at trial (Rule 21.06, subd. 2) See Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(g)(2) (1971), 52 F.R.D. 409, 442 or (3) for impeachment. (See F.R.Crim.P. 15(e).)

The last sentence of Rule 21.06, subd. 3, relating to the use of a deposition when the absence of the witness was caused by the party offering the deposition, is adapted from F.R.Crim.P. 15(e).

Rule 21.07, subd. 1 for objections to the order of notice is taken from Minn.R.Civ.P. 32.01.

Rule 21.07, subd. 2 for objections to the qualifications of the person taking the deposition follows the language of Minn.R.Civ.P. 32.02.

Rule 21.07, subd. 3 covering objections to evidence is the same as Minn.R.Civ.P. 32.03(1), (2).

Rule 21.07, subd. 4 for objections to errors in the completion and return of the deposition adopts the language of Minn.R.Civ.P. 32.04.

Rule 21.08 providing for depositions by stipulation is adapted from Minn.R.Civ.P. 29.

RULE 22. SUBPOENA

Rule 22.01. For Attendance of Witnesses; Form; Issuance

Subd. 1. When Issued. A subpoena may be issued in a criminal proceeding only for the attendance of a witness before a grand jury, or at a hearing or trial before the court in which the proceeding is pending, or for attendance at the taking of a deposition.

Subd. 2. By Whom Issued. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title of the proceeding if the subpoena be for a hearing or trial before the court; but if the subpoena be for a grand jury, it shall be headed "In the matter of the investigation of the grand jury of the (particular) county conducting the proceeding." The subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. 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 the party requesting it, who shall fill in the blanks before it is served.

Subd. 3. Unrepresented Defendant. A subpoena shall not be issued at the request of a defendant not represented by counsel without an order of court authorizing its issuance. The defendant's request to the court may be oral and the court's order may be either oral, if noted in the court's record, or written.

Rule 22.02. For Production of Documentary Evidence and of Objects

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena, including medical reports and medical and hospital records ordered to be disclosed under Rule 20.03, subd. 1, be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them to be inspected by the parties or their attorneys.

Rule 22.03. Service

A subpoena may be served by the sheriff, by his deputy, or any other person at least 18 years of age who is not a party. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at his usual place of abode with some person of suitable age and discretion then residing therein. Fees and mileage need not be tendered in advance.

Rule 22.04. Place of Service

A subpoena requiring the attendance of a witness may be served at any place within the state.

Rule 22.05. Contempt

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

Rule 22.06. Witness Outside the State

The attendance of a witness who is outside the state may be secured as provided by law.

Comment

Rule 22 is patterned upon F.R.Crim.P. 177 and Minn. R. Civ.P. 45 and supersedes Minn. Stat. Ch. 596 (1971) to the extent Ch. 596 is inconsistent with Rule 22.

Rule 22.01, subd. 1 prescribes the only purposes for which a subpoena may be issued in a criminal proceeding, that is, for appearance (1) before a grand jury, (2) at a hearing or trial, and (3) at the taking of a deposition.

Subpoenas for attendance at a deposition may be issued only if the court under Rule 21.01 has ordered the deposition or the parties have stipulated for a deposition by Rule 21.08.

Under Rule 22.01, subd. 2 a subpoena shall be issued by the clerk. (This changes Minn. Stat. §§ 357.32, 388.05 for the issuance of subpoenas by the county attorney for grand jury and criminal cases.)

The provisions of Rule 22.01, subd. 2 for the form and issuance of a subpoena follow F.R.Cr.P. 17(a) and Minn.R.Civ. P. 45.01, except that a subpoena duces tecum for production of evidence at a deposition may not be issued without an order of court authorizing the subpoena and under Rule 21.01 or a stipulation under Rule 21.08.

Rule 22.01, subd. 3 restricting the issuance of a subpoena at the request of an unrepresented defendant except on order of court is intended to prevent the indiscriminate use of subpoenas. This rule supersedes Minn. Stat. § 611.06 (1971) to the extent the statute is inconsistent with the rule.

The provisions of Rule 22.02 for subpoenas duces tecum are taken from F.R.Crim.P. 17(c) and Minn.R.Civ.P. 45.02. A subpoena duces tecum for production of evidence at a deposition may not be issued without an order of court authorizing the subpoena duces tecum under 21.01 or stipulation under Rule 21.08.

Rule 22.03 providing for service of a subpoena follows Minn.R.Civ.P. 45.03 except that the person serving it must be at least 18 years of age and no fees or mileage need be tendered.

Under Rule 22.04 a subpoena may be served any place in the state. There are no limitations on the distance to the place in the state where he may be required to attend under a subpoena. (This is different from Minn.R.Civ.P. 45.04(2), 45.05.) (This rule changes Minn. Stat. § 597.11 (1971).)

Rule 22 is intended to apply only to criminal proceedings pending in the State of Minnesota. It does not affect Minn. Stat. § 634.06 (1971) providing a method for compelling Minnesota residents to testify in criminal cases in other states.

Rule 22.05 for contempt follows Minn.R.Civ.P. 45.06.

Rule 22.06 continues the provisions of Minn. Stat. § 634.07 (1971) for compelling the attendance of non-residents to testify in criminal cases in Minnesota.

RULE 23. PETTY MISDEMEANORS AND VIOLATIONS BUREAUS

Rule 23.01. Definition of Petty Misdemeanor

As used in these rules, petty misdemeanor means a misdemeanor offense punishable only by fine of not more than $100.

Rule 23.02. Designation as Petty Misdemeanor by Sentence Imposed

A conviction is deemed to be for a petty misdemeanor as defined by Rule 23.01 if the sentence imposed is within the limits provided by that rule for a petty misdemeanor.

Rule 23.03. Violations Bureaus

Subd. 1. Establishment. The County Court may establish misdemeanor violations bureaus at the places it determines.

Subd. 2. Fine Schedules.

(1) Uniform Fine Schedule. The County Court Judges of the state shall adopt and as necessary revise a uniform fine schedule setting forth fines to be paid to violations bureaus for all statutory petty misdemeanors and for such other statutory misdemeanors as the judges may select.

(2) County Fine Schedules. Upon establishment of a violations bureau, the County Court shall establish by court rule a fine for any misdemeanor which may be paid to the violations bureau in lieu of a court appearance by the defendant. When an offense is the same or substantially the same as an offense included on the uniform fine schedule, the fine established by the County Court shall be the same as the fine prescribed in the uniform fine schedule.

Subd. 3. Fine Payment. A defendant shall be advised in writing before paying a fine to a violations bureau that such a payment constitutes a plea of guilty to the misdemeanor designated and an admission that he understands that he has the rights which he voluntarily waives:

a. to a trial to the court or to a jury;

b. to be represented by counsel;

c. to be presumed innocent until proven guilty beyond a reasonable doubt;

d. to confront and cross-examine all witnesses against him; and

e. to either remain silent or to testify in his own behalf.

Subd. 4. Functions of Violations Bureau. The violations bureau shall process all citations for misdemeanors included on the county fine schedule, accept all fines payable on such citations at the bureau, set dates for arraignment on such citation charges to be heard in court, accept bail, keep proper records and accounts and perform such other duties as the court prescribes.

Subd. 5. Procedures of the Violations Bureau. The County Court shall supervise and the clerk shall operate the misdemeanor violations bureaus. The County Court shall, consistent with these rules, issue rules governing the duties and operation of the bureaus. The clerk shall assign one or more deputy clerks to discharge and perform the duties of the bureaus.

Rule 23.04. Designation as a Petty Misdemeanor in a Particular Case

If at or before the time of arraignment or trial on an alleged misdemeanor violation, the prosecuting attorney certifies to the court that in his opinion it is in the interests of justice that the defendant not be incarcerated if

convicted, the alleged offense shall be treated as a petty misdemeanor if the defendant consents and the court approves.

Rule 23.05. Procedure in Petty Misdemeanor Cases

Subd. 1. No Right to Jury Trial. There shall be no right to a jury trial upon a misdemeanor charge which by operation of Rule 23.04 is to be treated as a petty misdemeanor.

Subd. 2. Right to Appointed Counsel. If a defendant is financially unable to afford counsel, the Court shall, unless waived, appoint counsel to represent him if he is charged with a misdemeanor which by operation of Rule 23.04 is to be treated as a petty misdemeanor and which also involves moral turpitude.

Subd. 3. General Procedure. A defendant charged with a petty misdemeanor violation is presumed innocent until proven guilty beyond a reasonable doubt and except as otherwise provided in Rule 23 the procedure in petty misdemeanor cases shall be the same as for misdemeanors punishable by incarceration.

Rule 23.06. Effect of Conviction

A petty misdemeanor shall not be considered a crime.

Comment

Procedure is established to dispose of certain designated minor offenses without the necessity of a court appearance, and also to reduce a misdemeanor punishable by incarceration to one punishable by fine only, before trial of the alleged offense.

The definition of petty misdemeanor as used in Rule 23 is, under Rule 23.01, broader than the definition provided by Minn. Stat. § 609.02, subd. 4a. By that statute a petty misdemeanor refers solely to a statutory violation punishable only by a fine of not more than $100. Under Rule 23.01, read in conjunction with the definition of "misdemeanor" in Rule 1.01, the term petty misdemeanor as used in Rule 23 refers also to violations of local ordinances, charter provisions, rules, or regulations.

These rules do not specify any procedures or sanctions for enforcing payment of fines in petty misdemeanor cases. Existing law, however, does permit some enforcement methods. The court may delay acceptance of a plea agreement until the defendant has the money to pay the agreed fine. If a defendant is unable to pay a fine when imposed, the court may set a date by which the defendant must either pay the fine or reappear in court. If the fine is not paid by the date set

and the defendant does not reappear as ordered to explain why it has not been paid, the court may issue a bench warrant for the defendant's arrest and set bail in the amount of the fine. Any bail collected could then be used under Minn. Stat. § 629.53 to pay the fine. Contempt procedures under Minn. Stat. Ch. 588 can also be used to enforce payment of a fine when the defendant has willfully refused payment. The prosecuting attorney may refuse to reduce an offense to a petty misdemeanor if the defendant has failed to pay any past fines. The possibility of an administrative sanction exists if the defendant has failed to pay a fine imposed upon conviction of violating a law regulating the operation or parking of motor vehicles. In such cases, the commissioner of public safety is required under Minn. Stat. § 171.16, subd. 3, to suspend the defendant's license for 30 days or until the fine is paid if the court determines that the defendant has the ability to pay the unpaid fine. Similar sanctions for non-traffic offenses might prove effective, but would require legislative action.

Rule 23.02 providing that a conviction is deemed to be for a petty misdemeanor if the sentence imposed is not more than $100 is similar to Minn. Stat. § 609.13 which provides for the reduction of a felony to a gross misdemeanor or misdemeanor and for the reduction of a gross misdemeanor to a misdemeanor. Rule 23.06 provides that a petty misdemeanor shall not be considered a crime.

Rule 23.03 gives the court authority to establish violations bureaus and establishes certain procedures for such bureaus. Rule 23.03, subd. 1 is similar to Minn. Stat. § 487.28, subd. 1 except that the violations bureau under the rule may handle any misdemeanor designated by the court and not just traffic and ordinance violations. Since "County Court" under Rule 1.01 also includes municipal courts, violations bureaus may be established by the Hennepin and Ramsey County Municipal Courts as well as by the county courts governed by Minn. Stat. Ch. 487. See Minn. Stat. §§ 488A.08, 488A.25, and 487.28 (1981) as to the establishment of violations bureaus in Hennepin County, Ramsey County, and all other counties, respectively.

For the purpose of providing uniformity in the fines imposed for certain common misdemeanors throughout the state, Rule 23.03, subd. 2(1) provides that the county and municipal court judges of the state shall adopt a uniform fine schedule setting forth the fines to be paid to violations bureaus for all statutory petty misdemeanors and for such other statutory misdemeanors as the judges select. As necessary, the judges should revise the schedule to assure

that the fines thereon are appropriate and to add new offenses. For the purpose of adopting a uniform schedule, the President of the Minnesota County Judges' Association shall call such meetings as are necessary of all county and municipal court judges of the state.

Rule 23.03, subd. 2(2) provides for the establishment of a county fine schedule. This schedule will include all misdemeanors and petty misdemeanors for which a fine may be paid at a violations bureau in lieu of a court appearance. The county fine schedule should be established by each individual county court and may specify a fine for any misdemeanor, including ordinance violations, whether or not included on the uniform fine schedule. When the offense, however designated, is the same or substantially the same as a statutory offense included on the uniform fine schedule, then the fine in the county schedule must be the same as that prescribed in the uniform schedule. Therefore, the fine for an illegal turn under an ordinance, if included on a county fine schedule, must be the same as provided in the uniform schedule for an illegal turn under the statute.

Rule 23.03, subd. 3 provides that a defendant must be advised in writing that payment of a fine through a violations bureau constitutes a plea of guilty to the designated offense and an admission that the defendant understands and waives those rights specified in the rule.

The written advice required by Rule 23.03, subd. 3 could be included upon the citation issued for the offense. This citation could be set forth in the form of an envelope for mailing the fine to the bureau. In such suitable form, the fine schedule should be included to advise the defendant of the fine for the particular offense with which he is charged. This rule does not require a defendant to sign a written plea of guilty.

Rule 23.03, subds. 4 and 5 concerning the functions and procedures of the violations bureaus are substantially the same as Minn. Stat. § 487.28, subd. 2. To the extent there are any inconsistencies that statute is superseded.

Rule 23.04 provides that, with the consent of the defendant and approval of the court, a misdemeanor otherwise punishable by incarceration shall be treated as a petty misdemeanor on the certification of the prosecutor. This certification should allege that in the prosecutor's opinion it is in the interests of justice, irrespective of the outcome, that the defendant not be incarcerated. If this procedure is

followed, the defendant upon conviction may be fined no more than $100. The defendant, however, then has no right to the jury trial to which he would otherwise be entitled under Rule 26.01, subd. 1(1)(a) (see Rule 23.05, subd. 1). Also, under Rule 23.05, subd. 2, the defendant financially unable to afford counsel will not automatically have counsel appointed on request as he would otherwise be entitled to under Rule 5.02 unless the certified petty misdemeanor involves moral turpitude. See also Rule 5.02 as to the appointment of counsel upon request of the defendant or interested counsel or upon the court's own motion when the prosecution is for a misdemeanor not punishable by incarceration and moral turpitude is not involved.

See also Rule 5.02 as to the appointment of counsel upon request of the defendant or interested counsel when the prosecution is for a misdemeanor not punishable by incarceration.

Rule 23.05, subd. 3 provides that the procedure in cases where an offense has been designated as a petty misdemeanor under Rule 23.04 shall be the same as for misdemeanors punishable by incarceration, except for the right to a jury trial and to counsel which are governed by Rule 23.05, subds. 1 and 2.

By Rule 23.06 a petty misdemeanor shall not be considered a crime. This rule covers offenses designated as petty misdemeanors by the applicable statute or ordinance. The rule also covers misdemeanor offenses designated to be treated as petty misdemeanors under Rule 23.04 and misdemeanor offenses deemed to be petty misdemeanors under Rule 23.02 by reason of the sentence imposed by the court.

RULE 24. VENUE

Rule 24.01. Place of Trial

The case shall be tried in the county where the offense was committed except as otherwise provided by these rules.

Rule 24.02. Venue in Special Cases

Subd. 1. Offense Committed on Public or Private Conveyance. When any offense is committed within the state on a public or private conveyance, and it is doubtful in which county the offense occurred, the case may be prosecuted and tried in any county through which the conveyance traveled in the course of the trip during which the offense was committed, or in the county where such trip began or terminated.

Subd. 2. Offenses Committed on County Lines. Offenses committed on or within 1,500 feet (457.2M) of the boundary line between two counties may be alleged in the complaint or indictment to have been committed in either of them and may be prosecuted and tried in either county.

Subd. 3. Injury or Death in One County from an Act Committed in Another County. If an act is committed in one county resulting in injury or death in another county, the offense may be prosecuted and tried in either county. If it is doubtful in which one of two or more counties the act was committed or injury or death occurred, the offense may be prosecuted and tried in any one of such counties.

Subd. 4. Prosecution in County Where Injury or Death Occurs. If an act is committed either within or without the limits of the state and injury or death results, the offense may be prosecuted and tried in the county of this state where the injury or death occurs, or the body of the deceased is found.

Subd. 5. Prosecution When Death Occurs Outside State. If an assault is committed in this state resulting in death outside the state, the homicide may be prosecuted and tried in the county where the assault was committed.

Subd. 6. Kidnapping. The offense of kidnapping may be prosecuted and tried either in the county where the offense was committed or in any county through or in which the person kidnapped was taken or kept while under confinement or restraint.

Subd. 7. Libel. The offense of publication of a libel contained in a newspaper published in the state may be prosecuted and tried in any county where the paper was published or circulated; but a person shall not be prosecuted for publication of the same libel against the same person in more than one county.

Subd. 8. Bringing Stolen Goods Into State. Whoever brings stolen property into the state in violation of Minn. Stat. § 609.525 (1971) may be prosecuted and tried in any county, but not more than one county, into or through which the property was brought.

Subd. 9. Obscene or Harassing Telephone Calls. Violations of Minn. Stat. § 609.79 (1971) may be prosecuted and tried either at the place where the telephone call is made or where it is received.

Subd. 10. Fair Campaign Practices. Violations of Minn. Stat. § 210A.34 (1975) prohibiting corporate contributions to

political campaigns may be prosecuted and tried in the county where such payment or contribution is made or services rendered or in any county wherein such money has been paid or distributed.

Subd. 11. Series of Offenses Aggregated. When a series of offenses are aggregated pursuant to Minn. Stat. § 609.52, subd. 3(5) (1971) and the offenses have been committed in more than one county, the case may be presented and tried in any one of the counties in which one or more of the offenses was committed.

Subd. 12. Non-Support of Wife or Child. Violations of Minn. Stat. § 609.375 (1971) for non-support of wife or child may be prosecuted and tried in the county where the wife or child or both reside.

Rule 24.03. Change of Venue

Subd. 1. Grounds. The case may be transferred to another county:

a. If the court is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending;

b. For the convenience of parties and witnesses;

c. In the interests of justice;

d. As provided by Rule 25.02 governing prejudicial publicity.

Subd. 2. County to which Transferred. For the purposes of change of venue under this rule the district referred to in Minn. Const. Art. I, § 6 shall be all that area within the geographical boundaries of the State of Minnesota.

Subd. 3. Time for Motion for Change of Venue. A motion for change of venue, except as permitted by Rule 25.02, shall be made at the time prescribed by Rule 10 for making pretrial motions.

Subd. 4. Proceedings on Transfer. If the case is transferred under these rules, all records in the case or certified copies thereof shall be transmitted to the court to which the case is transferred. If the defendant is in custody, the court may order that he be transported to the sheriff of the county to which the case is transferred. Unless the Supreme Court orders otherwise, the case shall be tried before the judge who ordered the change of venue. If the defendant has been released upon conditions of release under these rules

those conditions shall be continued upon the further condition that the defendant shall appear as ordered by the court for trial and other proceedings in the county to which the case has been transferred.

Comment

Rule 24.01. Place of Trial.

Except as provided in Rule 24.02 governing special cases, and Rule 24.03 governing change of venue, criminal cases shall be tried in the county where the offense was committed. This adopts the general rule provided by Minn. Stat. § 627.01 (1971). By Rule 11.01 Omnibus Hearings may be held in any county in the district court's judicial district in which the offense was committed. The place of filing a complaint is provided for by Rule 2.01; the defendant's first appearance in county or municipal court (a) following an arrest upon a complaint by Rules 3.02, subd. 2 and 4.01 or (b) following an arrest without a warrant by Rule 4.02, subd. 5; the defendant's initial appearance in the district court following a complaint (Rule 8) by Rule 5.03. Objections to the place of trial are waived unless asserted before commencement of the trial.

Rule 24.02. Venue in Special Cases.

This rule is adopted from the provisions of existing law as follows:

Rule 24.02, subd. 1 (Offense Committed on Public or Private Conveyances) from Minn. Stat. §§ 627.05, 627.06 (1971) (This would include offenses committed on water-craft, aircraft, or vehicles.);

Rule 24.02, subd. 2 (Offenses Committed on County Lines) from Minn. Stat. § 627.07 (1971);

Rule 24.02, subd. 3 (Injury or Death in One County from an Act Committed in Another County) from Minn. Stat. § 627.08 (1971);

Rule 24.02, subd. 4 (Prosecution in County Where Injury or Death Occurs) from Minn. Stat. § 627.09 (1971);

Rule 24.02, subd. 5 (Prosecution When Death Occurs Outside State) from Minn. Stat. § 627.10 (1971);

Rule 24.02, subd. 6 (Kidnapping) from Minn. Stat. §627.13 (1971);

Rule 24.02, subd. 7 (Libel) from Minn. Stat. § 627.14 (1971);

Rule 24.02, subd. 8 (Bringing Stolen Goods Into State) from Minn. Stat. § 609.525;

Rule 24.02, subd. 9 (Obscene or Harassing Telephone Calls) from Minn. Stat. § 609.79 (1971);

Rule 24.02, subd. 10 (Fair Campaign Practices) from Minn. Stat. §§ 210A.34, 210A.36 (1975);

Rule 24.02, subd. 11 (Series of Offenses Aggregated) from Minn. Stat. § 609.52, subd. 3(5) (1971), as amended;

Rule 24.02, subd. 12 (Non-Support of Wife or Child) from Minn. Stat. § 609.375 (1971).

Rule 24.03. Change of Venue.

Rule 24.03, subd. 1 (Grounds for Change of Venue) permits a change of venue upon motion of the defendant or prosecution or on the court's own motion upon any of the grounds specified in the rule. Change of venue (a) for a fair and impartial trial Rule 24.03, subd. 1a is taken from Minn. Stat. § 627.01 (1971) (b) for the convenience of parties and witnesses (Rule 24.03, subd. 1b from F.R.Crim.P. 21b); (c) in the interests of justice (Rule 24.03, subd. 1c) from F.R.Crim.P. 21(b) and Minn. Stat. § 627.04 (1971); and (d) to avoid prejudicial publicity (Rule 25.02) from ABA Standards, Fair Trial and Free Press, 3.2(c) (Approved Draft, 1968).

Rule 24.03, subd. 2 (County to Which Transferred). Under this rule change of venue may be ordered upon any of the specified grounds to any county of the state. Minn. Const. Art. I, § 6 provides that the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. Rule 24.01 provides that a criminal case shall be tried in the county where the offense was committed thus establishing the district referred to in the constitution. For the purpose of change of venue under Rule 24.03, subd. 2, however, the district of trial may be any county in the state.

Rule 24.03, subd. 3 (Time for Motion for Change of Venue). Except as provided by Rule 25.02 (Special Rules Governing Prejudicial Publicity) a motion for change of venue shall be made at the time prescribed by Rule 10.04, subd. 1 for making pretrial motions (3 days before the Omnibus Hearing (Rule 11)) and shall be heard at that hearing unless the court for good cause orders otherwise. As to when jeopardy attaches, see Comment to Rule 25.02.

Rule 24.03, subd. 4 (Proceedings on Transfer) is taken from F.R.Crim.P. 21(c) and Minn. Stat. § 627.03 (1971). It further

provides that unless the supreme court orders otherwise it shall be tried before the judge who ordered the change of venue. The rule does not change Minn. Stat. § 627.02 (1971) governing the payment of costs. If the defendant has been released upon conditions of release, those conditions shall be continued, conditioned upon his appearance for trial in the county to which venue has been transferred as ordered by the court. This provision takes the place of Minn. Stat. § 627.03 (1971).

RULE 25. SPECIAL RULES GOVERNING PREJUDICIAL PUBLICITY

The following rules shall govern when any question of potentially prejudicial publicity is raised:

Rule 25.01. Pretrial Hearings--Motion to Exclude Public

All pretrial hearings shall be open to the public. However, the defendant may move that all or part of such hearing be held in chambers or otherwise closed to the public on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that may be inadmissible in evidence at the trial and likely to interfere with his right to a fair trial by an impartial jury. The motion shall not be granted unless the court determines that there is a substantial likelihood of such interference. With the consent of the defendant, the court may make such an exclusion order on its own motion or at the suggestion of the prosecution. No exclusion order shall issue without the court setting forth the reasons therefor. Any person aggrieved may petition the Court of Appeals for immediate review of the order granting or denying exclusion. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be made and upon request shall be transcribed and filed and shall be available to the public following the completion of the trial or disposition of the case without trial. For the protection of innocent persons, the court may order that names be deleted or substitutions made therefor in the record.

Rule 25.02. Continuance or Change of Venue

A motion for continuance or change of venue because of prejudicial publicity shall be governed by the following rules:

Subd. 1. At Whose Instance. A continuance or change of venue may be granted on motion of either the prosecution or the defense or on the court's own motion.

Subd. 2. Methods of Proof. In addition to the testimony or affidavits of individuals in the community, which shall not be required as a condition of the granting of a motion for continuance or change of venue, qualified public opinion surveys shall be admissible as well as other materials having probative

value.

Subd. 3. Standards for Granting the Motion. A motion for continuance or change of venue shall be granted whenever it is determined that the dissemination of potentially prejudicial material creates a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. A showing of actual prejudice shall not be required.

Subd. 4. Time of Disposition. If a motion for continuance or change of venue is made before the jury is sworn, the motion shall be determined before the jury is sworn. If a motion is made or if reconsideration of a prior denial is sought, it may be granted notwithstanding the fact that a jury has been sworn to try the case.

Subd. 5. Limitations; Waiver. It shall not be ground for denial of a change of venue that one such change has already been granted. The waiver of the right to trial by jury or the failure to exercise all available peremptory challenges shall not constitute a waiver of the right to a continuance or change of venue if a motion has been timely made.

Rule 25.03. Restrictive Orders

Except as provided in Rule 33.04 the following rule shall govern the issuance of any court order restricting public access to public records relating to a criminal proceeding:

Subd. 1. Motion and Notice.

(a) A restrictive order may be issued only upon motion and after notice and hearing.

(b) Notice of the hearing shall be given in the time and manner and to such interested persons, including the news media, as the court may direct.

Subd. 2. Hearing.

(a) At the hearing, the moving party shall have the burden of establishing a factual basis for the issuance of the order under the conditions specified in subd. 3.

(b) The public and news media shall have a right to be represented at the hearing and to present evidence and arguments in support of or in opposition to the motion.

(c) A verbatim record shall be made of the hearing.

Subd. 3. Grounds for Restrictive Order.

The court may issue a restrictive order under this rule only if the court concludes on the basis of the evidence presented at the hearing that:

(a) Access to such public records will present a clear and present danger of substantially interfering with the fair and impartial administration of justice.

(b) All alternatives to the restrictive order are inadequate.

Subd. 4. Findings of Fact.

The court shall make written findings of the facts and statement of the reasons supporting the conclusions upon which an order granting or denying the motion is based.

Subd. 5. Appellate Review.

(a) Anyone represented at the hearing or aggrieved by an order granting or denying a restrictive order may petition the Court of Appeals for review, which shall be the exclusive method for obtaining review.

(b) The Court of Appeals shall determine upon the hearing record whether the moving party sustained the burden of justifying the restrictive order under the conditions specified in subd. 3 of this rule, and the Court of Appeals may reverse, affirm, or modify the order issued.

Comment

This rule prescribes special rules to be applied in the case of potentially prejudicial publicity. Other applicable rules when this question arises are Rules 26.01, subd. 1(2)(b) (Waiver of Jury Trial); 26.02, subd. 4(2)(b) (Sequestration of Jurors on Voir Dire); 26.03, subd. 3 (Use of Courtroom); 26.03. subd. 5(1) (Sequestration of Jury); 26.03, subd. 6 (Exclusion of Public from Hearings or Arguments Outside Presence of the Jury); 26.03, subd. 7 (Cautioning Parties, Witnesses, Jurors, and Judicial Employees; Sequestration of Witnesses); 26.03, subd. 8 (Admonitions to Jurors); and 26.03, subd. 9 (Questioning Jurors about Exposure to Prejudicial Material). See also Comment to Rule 26.04 (Post-Verdict Motions).

Rule 25.01 (Pretrial Hearings--Motion to Exclude Public) comes from ABA Standards, Fair Trial and Free Press, 3.1 (Approved Draft, 1968). The motion to exclude the public from pretrial hearings under this rule shall not be granted unless the court determines that there is a substantial

likelihood of interference with defendant's right to a fair trial by reason of the dissemination of evidence or argument adduced at the hearing. This determination would include the situation in which the news media agreed not to disseminate these matters until completion of the trial. The provision for appellate review is intended to give the defendant, as well as any person aggrieved, standing to seek immediate review of the court's ruling on exclusion.

Whenever the public is excluded, a record of the proceedings shall be kept and made available to the public, unless the court orders otherwise, following the completion of the trial. For the protection of innocent persons, the court may order that names be deleted or substitutions therefor be made.

This rule does not interfere with the power of the court in any pretrial hearing to caution those present that dissemination of certain information by means of public communication may jeopardize the right to a fair trial by an impartial jury.

Rule 25.02. Motion for Continuance or Change of Venue.

Rule 25.02, subd. 1 and subd. 2 (At Whose Instance; Methods of Proof) are taken from ABA Standards, Fair Trial and Free Press, 3.2(a)(b) (Approved Draft, 1968). Rule 25.02, subd. 3 (Standards for Granting the Motion) is based upon ABA Standards, Fair Trial and Free Press 3.2(c) (Approved Draft, 1968). The determination that there is a reasonable likelihood a fair trial cannot be had may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the prejudicial material involved. Rule 25.02, subd. 4 (Time of Disposition of Motion) is based on ABA Standards, Fair Trial and Free Press, 3.2(d) (Approved Draft, 1968). A motion for continuance or change of venue should, if possible, be made at the time prescribed by Rule 10 for pretrial motions and heard at the Omnibus Hearing under Rule 11. Under Rule 25.02, subd. 4, the motion may be made before the jury is sworn and in that event should be determined before the jury is sworn. If a motion is made or reconsideration of a prior denial is sought, however, it may be granted after the jury is sworn. Since the Fifth Amendment's double jeopardy provisions are applicable to the states [Benton v. Maryland, 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707 (1969)], jeopardy attaches in a jury case when the jury is sworn and in a court trial when the first evidence is presented to the court.

Rule 25.02, subd. 5 (Limitations; Waiver) is taken from ABA Standards, Fair Trial and Free Press, 3.2(e) (Approved Draft, 1968) and expressly permits more than one change of venue. (This changes Minn. Stat. § 627.01 which allows the defendant only one change of venue.)

It is anticipated that Rule 25.03 will be utilized only "in exceptional cases" involving serious crimes. See Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254, 257, and note 7 (Minn. 1977).

Possible alternatives to a restrictive order indicated in Rule 25.03, subd. 3(b) are the following:

A continuance or change of venue under Rule 25.02; sequestration of jurors on voir dire under Rule 26.02, subd. 4(2)(b); regulation of use of the courtroom under Rule 26.03, subd. 3; sequestration of jury under Rule 26.03, subd. 5(1); exclusion of the public from hearings or arguments outside the presence of the jury under Rule 26.03, subd. 6; cautioning or ordering parties, witnesses, jurors, and judicial employees and sequestration of witnesses under Rule 26.03, subd. 7; admonitions to jurors about exposure to prejudicial material under Rule 26.03, subd. 9.

RULE 26. TRIAL

Rule 26.01. Trial by Jury or by the Court

Subd. 1. Trial by Jury.

(1) Right to Jury Trial.

(a) Offenses Punishable by Incarceration. A defendant shall be entitled to a jury trial in any prosecution for an offense punishable by incarceration. Except as otherwise provided by these rules, trials for misdemeanors shall be in the county court. Trials for felonies and gross misdemeanors shall be in the district court.

(b) Misdemeanors Not Punishable by Incarceration. In any prosecution for the violation of a misdemeanor not punishable by incarceration, trial shall be to the court.

(2) Waiver of Trial by Jury.

(a) Waiver Generally. The defendant, with the approval of the court may waive jury trial provided he does so personally in writing or orally upon the record in open court, after being advised by the court of his right to

trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver When Prejudicial Publicity. The defendant shall be permitted to waive jury trial whenever it is determined that (a) the waiver has been knowingly and voluntarily made, and (b) there is reason to believe that, as the result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial.

(3) Withdrawal of Waiver of Jury Trial. Waiver of jury trial may be withdrawn by the defendant at any time before the commencement of trial.

(4) Waiver of Number of Jurors Required by Law. At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of a lesser number than that provided by law. The court shall not approve such a stipulation unless the defendant, after being advised by the court of his right to trial by a jury consisting of the number of jurors provided by law, personally in writing or orally on the record in open court agrees to trial by such reduced jury.

(5) Number Required for Verdict. A unanimous verdict shall be required in all cases.

(6) Waiver of Unanimous Verdict. At any time before verdict, the parties, with the approval of the court, may stipulate that the jury may render a verdict on the concurrence of a specified number of jurors less than that required by law or these rules. The court shall not approve such a stipulation unless the defendant, after being advised by the court of his right to a verdict on the concurrence of the number of jurors specified by law, personally in writing or orally on the record waives his right to such a verdict.

Subd. 2. Trial Without a Jury. In a case tried without a jury, the court, within 7 days after the completion of the trial, shall make a general finding of guilty, not guilty, or if such pleas have been made, a general finding of not guilty by reason of mental illness or mental deficiency, double jeopardy, or that prosecution is barred by Minn. Stat. § 609.035 (1971), if appropriate. The court, within 7 days after the general finding in felony and gross misdemeanor cases, shall in addition specifically find the essential facts in writing on the record. In misdemeanor and petty misdemeanor cases, such findings shall be made within 7 days after the filing of the notice of appeal. If an opinion or memorandum of decision is filed, it is sufficient if the findings of fact

appear therein. If the court omits a finding on any issue of fact essential to sustain the general finding, it shall be deemed to have made a finding consistent with the general finding.

Rule 26.02. Selection of Jury.

Subd. 1. Selection and Qualifications. The jury list shall be composed of the names of persons selected at random from a fair cross-section of the residents of the county who are qualified by law to serve as jurors and shall otherwise be selected as provided by law. The jury shall be drawn from the jury list and summoned, as prescribed by law.

The same jury list and panel may be used for both the district and county court.

Subd. 2. List of Prospective Jurors. Upon request the clerk of court shall furnish the parties with a list of the names and addresses of the persons on the jury panel. The parties shall also have access to such other information as the clerk has obtained from prospective jurors.

Subd. 3. Challenge to Panel. Either party may challenge the jury panel on the ground that there has been a material departure from the requirements of law governing the selection, drawing or summoning of the jurors. The challenge shall be in writing, specifying the facts constituting the grounds of the challenge and shall be made before a jury is sworn. If the opposing party objects to either the sufficiency of the challenge or the facts on which it is based, the court shall hear and determine the challenge.

Subd. 4. Voir Dire Examination.

(1) Purpose--By Whom Made. A voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an informed exercise of peremptory challenges, and shall be open to the public. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then put to the prospective juror or jurors any questions which he thinks necessary touching their qualifications to serve as jurors in the case on trial and may give such preliminary instructions as are set forth in Rule 26.03, subd. 4. Before exercising challenges, either party may make a reasonable inquiry of a prospective juror or jurors in reference to their qualifications to sit as jurors in the case. A verbatim record of the voir dire examination shall be made at the request of either party.

(2) Sequestration of Jurors.

(a) Courts' Discretion. In the discretion of the court the examination of each juror may take place outside of the presence of other chosen and prospective jurors.

(b) Prejudicial Publicity. Whenever there is a significant possibility that individual jurors will be ineligible to serve because of exposure to prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors.

(3) Order of Drawing, Examination and Challenge.

(a) Uniform Rule. Except as provided by Rule 26.02, subd. 4(3)(c) 8 with respect to cases of first degree murder, unless the court orders that the jurors shall be drawn, examined and challenged as provided either by Rule 26.02, subd. 4(3)(b) or (c), they shall be drawn, examined and challenged as follows:

1. The court shall first direct that such a number of the members of the jury panel be drawn and called as will equal the number of which the jury shall be composed for trial of the case plus the number of peremptory challenges available to all the parties and the number of any alternate jurors.

2. The prospective jurors so drawn and called shall take their place in the jury box and be sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the case.

3. The prospective jurors shall be examined as to their qualifications, first by the court, then by the parties, commencing with the defendant.

4. A challenge for cause may be made at any time during voir dire by any party. At the close of voir dire any additional challenges for cause shall be made, first by the defense and then by the prosecution.

5. If any prospective juror is challenged and excused for cause another shall be drawn from the

jury panel so that the number in the jury box will remain equal to the number initially called.

6. After both parties have had an opportunity to challenge for cause, each, commencing with the defendant, may exercise alternately the peremptory challenges permitted by these rules.

7. When the peremptory challenges have been exercised, the jury shall be selected from the remaining prospective jurors in the order in which they were called until the number selected equals the number of which the jury shall be composed for trial of the case plus the alternate jurors, if any.

(b) By Order of Court. The court may order that the jurors be drawn, examined and challenged as provided by Rule 26.02, subd. 4(3)(b) or (c) as follows:

1. The court shall first direct that such a number of the members of the jury panel be drawn and called as will equal the number of which the jury shall be composed for trial of the case plus the number of any alternate jurors.

2. The prospective jurors so drawn and called shall take their place in the jury box and be sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the case.

3. The prospective jurors shall be examined as to their qualifications, first by the court, then by the parties, commencing with the defendant.

4. Upon completion of defendant's examination of a prospective juror, the defendant shall be permitted to exercise a challenge for cause or a peremptory challenge as permitted by these rules as to that juror. If the juror is excused, he shall be replaced by another member of the panel. The replacement juror shall be examined and challenged after all previously drawn jurors have been examined and challenged.

5. Upon completion of the examination and any challenge of each prospective juror by the defendant, the state may examine such prospective juror and may challenge the juror for cause or peremptorily. If the juror is excused, he shall be replaced by another member of the panel who shall be subject to examination and challenge in accordance with this rule.

6. This process of jury selection shall continue until the number of persons of which the jury shall be composed for trial of the case plus any alternate jurors is selected and sworn as the trial jury.

(c) By Order of Court.

1. The court shall direct that one prospective juror at a time be drawn from the jury panel for examination.

2. The prospective juror so drawn shall be sworn to answer truthfully questions asked him relative to his qualifications to serve as a juror in the case.

3. The prospective juror shall be examined by the court and then by the parties, commencing with the defendant.

4. Upon completion of defendant's examination, the defendant may challenge the juror for cause or peremptorily as permitted by these rules.

5. If the juror is excused, another prospective juror shall be drawn from the panel and shall be examined and subject to challenge in the same manner.

6. If a prospective juror is not excused after examination by the defendant, he may be examined by the state and may be challenged for cause or peremptorily by the state.

7. This process of selection shall continue until the number of persons of which the jury shall be composed for trial of the case is selected and sworn as the trial jury plus the number of any alternate jurors.

8. In cases of first degree murder, the method provided by Rule 26.02, subd. 4(3)(c)

shall be preferred unless otherwise ordered by the court.

Subd. 5. Challenge for Cause.

(1) Grounds. A juror may be challenged for cause by either party upon the following grounds:

1. The existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging.

2. A felony conviction unless his civil rights have been restored.

3. The lack of any of the qualifications prescribed by law to render a person a competent juror.

4. A physical or mental defect which renders him incapable of performing the duties of a juror.

5. The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any of the attorneys in the case.

6. Standing in relation of guardian and ward, attorney and client, employer and employee, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense, or on whose complaint the prosecution was instituted.

7. Being a party adverse to the defendant in a civil action, or having complained against, or been accused by him, in a criminal prosecution.

8. Having served on the grand jury which found the indictment, or an indictment on a related offense.

9. Having served on a trial jury which has tried another person for the same or a related offense to that charged in the indictment, complaint, tab charge or a related indictment, complaint or tab charge.

10. Having been a member of a jury formerly sworn to try the same indictment, complaint, tab charge or a related indictment, complaint or tab charge.

11. Having served as a juror in any case involving the defendant.

(2) How and When Exercised. A challenge for cause may be oral and shall state the grounds on which it is based. The challenge shall be made before the juror is sworn to try the case, but the court for good cause shown may permit it to be made after he is sworn but before all the jurors constituting the jury are sworn. If a challenge for cause is made and the court sustains the challenge, the juror shall be excused.

(3) By Whom Tried. If the opposing party objects to the sufficiency of a challenge for cause or the facts on which it is based, all issues of law or fact arising upon the challenge shall be tried and determined by the court.

Subd. 6. Peremptory Challenges. If the offense charged is punishable by life imprisonment the defendant shall be entitled to 15 and the state to 9 peremptory challenges. For any other offense, the defendant shall be entitled to 5 and the state to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants' additional peremptory challenges and permit them to be exercised separately or jointly, and in that event the state's peremptory challenges shall be correspondingly increased.

Subd. 7. Order of Challenges to the Panel and to Individual Jurors. Challenges to the panel and to individual jurors shall be made in the following order:

a. To the panel.

b. To an individual juror for cause.

c. Peremptory challenge to an individual juror.

Subd. 8. Alternate Jurors. A trial judge may impanel alternate or additional jurors whenever in his discretion, he believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall be discharged after the jury retires

consider its verdict. Alternate jurors, in the order in which they are called, shall replace jurors who prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, and be subject to the same examination and challenges for cause as the regular jurors. No additional peremptory challenges shall be allowed for alternate jurors except that unused peremptory challenges for the regular jury may be exercised against alternate jurors. If a juror becomes unable or disqualified to perform his duties after the jury has retired to consider its verdict, a mistrial shall be declared unless the parties agree pursuant to Rule 26.01, subd. 1(4) that the jury shall consist of a lesser number than that selected for the trial.

Rule 26.03. Procedures During Trial

Subd. 1. Presence of Defendant.

(1) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

(2) Continued Presence Not Required. The further progress of a trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to waive his right to be present whenever:

1. a defendant voluntarily and without justification absents himself after trial has commenced; or

2. a defendant after warning engages in conduct which is such as to justify his being excluded from the courtroom because it tends to interrupt the orderly procedure of the court and the due course of the trial. As an alternative to exclusion, the court may use all such methods of restraint as will ensure the orderly procedure of the court and the due course of the trial.

(3) Presence Not Required. A defendant need not be present in the following situations:

1. a corporation may appear by counsel for all purposes;

2. in the case of felonies and gross misdemeanors, on defendant's motion, the court may

excuse the defendant from attendance at any proceeding except arraignment, plea, trial, and imposition of sentence; and

3. in prosecutions for misdemeanors, the court shall permit arraignment and plea in the defendant's absence if the court is satisfied that the defendant has knowingly and voluntarily waived his right to be present. The court with the written consent of the defendant, or his oral consent in open court, may permit trial, and imposition of sentence in the defendant's absence.

Subd. 2. Custody and Restraint of Defendants and Witnesses.

a. During the trial the defendant shall be seated where he can effectively consult with his counsel and can see and hear the proceedings.

b. An incarcerated defendant or witness shall not appear in court in the distinctive attire of a prisoner.

c. Defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order or security. If the trial judge orders such restraint, he shall state his reasons on the record outside the presence of the jury. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall on request of the defendant instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt.

Subd. 3. Use of Courtroom. Whenever appropriate in view of the notoriety of the case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignment of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding.

Subd. 4. Preliminary Instructions. After the jury has been impaneled and sworn, and before the opening statements of counsel, the court may instruct the jury as to the respective claims of the parties and as to such other matters as will aid the jury in comprehending the trial procedure and

sequence to be followed. Preliminary instructions may also include such matters as burden of proof, presumption of innocence, the necessity of proof of guilt beyond a reasonable doubt, the elements which the jury may consider in weighing testimony or determining credibility of witnesses, rules applicable to opinion evidence, and such other rules of law, including the essential elements of the offense, as the court may deem essential to the proper understanding of the evidence. Such preliminary instructions shall be disclosed to the parties before they are given and either party may object to any specific instruction or propose instructions of his own to be given prior to trial.

Subd. 5. Sequestration of the Jury.

(1) In the Discretion of the Court. During the period from the time the jurors are sworn until they retire for deliberation upon their verdict, the court, in its discretion, may either permit them and any alternate jurors to separate during recesses and adjournments or direct that they be continuously kept together during such period under the supervision of proper officers. With the consent of the defendant the court, in its discretion, may allow the jurors to separate over night during deliberation. The officers shall not speak to or communicate with any juror concerning any subject connected with the trial nor permit any other person to do so, and shall return the jury to the courtroom at the next designated trial session.

(2) On Motion. Either party may move for sequestraion of the jury at the beginning of trial or at any time during the course of the trial. Sequestration shall be ordered if it is determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors. Whenever sequestration is ordered, the court in advising the jury of the decision shall not disclose which party requested sequestration.

Subd. 6. Exclusion of the Public From Hearings or Arguments Outside the Presence of the Jury. If the jury is not sequestered, the defendant may move that the public be excluded from any portion of the trial that takes place outside the presence of the jury on the ground that dissemination of evidence or argument adduced at the hearing is likely to interfere with the defendant's right to a fair trial by an impartial jury. The motion shall not be granted unless it is

determined that there is a substantial likelihood of such interference. With the consent of the defendant, the court may take such action on its own motion or at the suggestion of the prosecution. No exclusion order shall issue without the court setting forth the reasons therefor. Any person aggrieved may petition the Court of Appeals for immediate review of the order granting or denying exclusion. Whenever under this rule part of the proceedings are held in chambers or otherwise closed to the public, a complete record of the proceedings shall be made and shall be available to the public following the completion of the trial. For the protection of innocent persons, the court may order that names be deleted or substitutions therefor be made in the record.

Subd. 7. Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses. Whenever appropriate, the court shall order attorneys, parties, witnesses, jurors, and employees and officers of the court not to make extra-judicial statements relating to the case or the issues in the case for dissemination by any means of public communication during the course of the trial.

Witnesses may be sequestered or excluded from the courtroom, prior to their appearance, in the discretion of the court.

Subd. 8. Admonitions to Jurors. Appropriate admonitions shall be given to the jury during the trial not to read, listen,to, or watch reports about the case appearing in the news media.

Subd. 9. Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial. If it is determined that material disseminated outside the trial proceedings raises serious questions of possible prejudice, the court may on its own motion and shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and a verbatim record of the examination shall be kept.

Subd. 10. View by Jury.

a. When the court is of the opinion that a viewing by the jury of the place where the offense being tried was committed, or any other place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the closing arguments, order that the jury be conducted to such place.

b. The jury must be kept together during the viewing under the supervision of a proper officer appointed by the court. The judge and a court reporter must be present, and with the judge's permission any other person may be present. The prosecuting attorney, the defendant and defense counsel may as a matter of right be present, but the right may be waived.

c. The purpose of the viewing shall be solely to permit visual observation by the jury of the place in question, and neither the parties, counsel, nor the jurors while viewing the place may engage in discussion concerning the significance or implications of anything under observation or concerning any issue in the case.

Subd. 11. Order of Jury Trial. The order of a jury trial shall be substantially as follows:

a. The jury shall be selected and sworn.

b. The court may deliver preliminary instructions to the jury.

c. The prosecuting attorney may make an opening statement to the jury, confining the statement to the facts he expects to prove.

d. The defendant may make an opening statement to the jury, or he may make it immediately before he offers evidence in his defense. The statement shall be confined to a statement of the defense and the facts he expects to prove in support thereof.

e. The prosecution shall offer evidence in support of the indictment, complaint or tab charge.

f. The defendant may offer evidence in his defense.

g. The prosecution may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the prosecution's rebuttal evidence. In the interests of justice, the court may permit either party to offer evidence upon his original case.

h. At the conclusion of the evidence, the prosecution may make a closing argument to the jury.

i. The defendant may then make a closing argument to the jury.

j. The court shall charge the jury.

k. The jury shall retire for deliberation and, if possible, render a verdict.

Subd. 12. Note Taking. Jurors may take notes of the evidence presented at the trial and may keep these notes with them when they retire for deliberation.

Subd. 13. Substitution of Judge.

(1) Before or During Trial. If by reason of death, sickness or other disability of the judge before whom pretrial proceedings or a jury trial has commenced is unable to proceed, any other judge sitting in or assigned to the court, upon certification that he has familiarized himself with the record of the proceedings or trial, may proceed with and finish the proceedings or trial.

(2) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability, the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial, he may in his discretion grant a new trial.

Subd. 14. Exceptions.

(1) Exceptions Abolished. Exceptions to rulings or orders of the court or to the actions of a party are abolished. It is sufficient that a party, at the time the ruling or order of court is made or sought or the action of a party taken, makes known to the court the action which he desires the court to take or his objections to the action of the court or of a party and his grounds therefor; and, if a party has no opportunity to object to a ruling or order or action at the time it is made or taken the absence of an objection does not thereafter prejudice him.

(2) Bills of Exception and Settled Cases Abolished. The bill of exceptions and settled case shall not be required. The record of the case for the purposes for which a bill of exceptions or settled case was

heretofore required shall consist of the papers filed in the trial court, the offered exhibits, and the minutes of the court, and the transcript of the proceedings, if any.

Subd. 15. Evidence. In all trials the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules.

Subd. 16. Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law.

Subd. 17. Motion for Judgment of Acquittal.

(1) Motions Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. After the evidence on either side is closed, the court on motion of a defendant or on its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the tab charge, indictment or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses.

(2) Reservation of Decision on Motion. If the defendant's motion is made at the close of the evidence offered by the prosecution, the court may not reserve decision on the motion. If the defendant's motion is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict or is discharged without having returned a verdict.

(3) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 15 days after the jury is discharged or within such further time as the court may fix during the 15-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. Such a motion is not barred by defendant's failure to make a similar motion prior to the submission of the case to the jury.

Subd. 18. Instructions.

(1) Requests for Instructions. 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. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to the arguments to the jury, and such action shall be made a part of the record.

(2) Proposed Instructions. The court may, and upon request of any party shall, before the arguments to the jury, inform counsel what instructions will be given and all such instructions may be stated to the jury by either party as a part of his argument.

(3) Objections to Instructions. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. The matter to which objection is made and the grounds of the objection shall be specifically stated. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. All objections to instructions and the rulings thereon shall be included in the record. All instructions, whether given or refused, shall be made a part of the record. 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.

(4) Giving of Instructions. The court in its discretion shall instruct the jury either before or after the arguments are completed 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 a copy may be taken to the jury room when the jury retires for deliberation.

(5) Contents of Instructions. In charging the jury the court shall state all matters of law which are necessary for the jury's information in rendering a verdict and shall inform the jury that it is the exclusive judge of all questions of fact. The court shall not comment on the evidence or the credibility of the witnesses, but may state the respective claims

of the parties.

Subd. 19. Jury Deliberations and Verdict.

(1) Materials to Jury Room. The court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room.

(2) Jury Requests to Review Evidence.

1. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence.

2. The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(3) Additional Instructions After Jury Retires.

1. If the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors, after notice to the prosecutor and defense counsel, shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless: (a) the jury may be adequately informed by directing their attention to some portion of the original instructions; (b) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or (c) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.

2. The court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions.

3. The court after notice to the prosecutor and defense counsel may recall the jury after it has retired and give any additional instructions as the

court deems appropriate.

(4) Deadlocked Jury. The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

(5) Polling the Jury. When a verdict is rendered and before the jury has been discharged, the jury shall be polled at the request of any party or upon the court's own motion. The poll shall be conducted by the court or clerk of court who shall ask each juror individually whether the verdict announced is his verdict. If the poll does not conform to the verdict, the jury may be directed to retire for further deliberation or may be discharged.

(6) Impeachment of Verdict. Affidavits of jurors shall not be received in evidence to impeach their verdict. If the defendant has reason to believe that the verdict is subject to impeachment, he shall move the court for a summary hearing. If the motion is granted the jurors shall be interrogated under oath and their testimony recorded. The admissibility of evidence at the hearing shall be governed by Rule 606(b) of the Minnesota Rules of Evidence.

(7) Partial Verdict. The court may accept a partial verdict when the jury has agreed on a verdict of conviction on less than all of the charges submitted, but is unable to agree on the remainder.

Rule 26.04. Post-Verdict Motions

Subd. 1. New Trial.

(1) Grounds. The court on written motion of the defendant may grant a new trial on any of the following grounds:

1. If required in the interests of justice;

2. Irregularity in the proceedings of the court, jury, or on the part of the prosecution, or any order or abuse of discretion, whereby the defendant was deprived of a fair trial;

3. Misconduct of the jury or prosecution;

4. Accident or surprise which could not have been prevented by ordinary prudence;

5. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;

6. Errors of law occurring at the trial, and objected to at the time or, if no objection is required by these rules, assigned in the motion;

7. The verdict or finding of guilty is not justified by the evidence, or is contrary to law.

(2) Basis of Motion. A motion for new trial shall be made and heard on the files, exhibits and minutes of the court. Pertinent facts that would not be a part of the minutes may be shown by affidavit except as otherwise provided by these rules. A full or partial transcript of the court reporter's notes of the testimony taken at the trial or other verbatim recording thereof may be used on the hearing of the motion.

(3) Time for Motion. Notice of a motion for a new trial shall be served within 15 days after verdict or finding of guilty. The motion shall be heard within 30 days after the verdict or finding of guilty, unless the time for hearing be extended by the court within the 30-day period for good cause shown.

(4) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be served with the notice of motion. The opposing party shall have 10 days after such service in which to serve opposing affidavits, which period may be extended by the court upon an order extending the time for hearing under this rule. The court may permit reply affidavits.

Subd. 2. Motion to Vacate Judgment. The court on motion of a defendant shall vacate judgment, if entered, and dismiss the case if the indictment, complaint or tab charge does not charge an offense or if the court was without jurisdiction of the offense charged. The motion shall be made within 15 days after verdict or finding of guilty or after plea of guilty, or within such time as the court may fix during the 15-day period.

Subd. 3. Joinder of Motions. Any motions for judgment of acquittal or to vacate judgment shall be joined with a motion for a new trial.

Subd. 4. New Trial on Court's Own Motion. The court, within 15 days after verdict or finding of guilty, with the consent of the defendant, may order a new trial upon any of the grounds specified in Rule 26.04, subd. 1(1).

Comment

Rule 26.01, subd. 1(1). Right to Jury Trial.

In cases of felonies (Minn. Stat. § 609.02, subd. 2 (1971)) and gross misdemeanors, (Minn. Stat. §§ 609.02, subd. 4, 609.03 (2) (1971)) the defendant is entitled to jury trial under Minn. Const. art. 1, § 6 which guarantees the right to jury trial in "all criminal prosecutions." The term "criminal prosecution" includes prosecutions for all crimes defined by Minn. Stat. § 609.02(1971). (Peterson v. Peterson, 278 Minn. 275, 153 N.W.2d 825 (1967); State v. Ketterer, 248 Minn. 173, 79 N.W.2d 136 (1956).) The defendant's right to jury trial for offenses punishable by more than six months imprisonment is also guaranteed by the Fourteenth and Sixth Amendments to the United States Constitution. (Duncan v. Louisiana, 391 U.S. 145 (1968); Baldwin v. New York, 399 U.S. 66 (1970).)

Since misdemeanors in Minnesota are punishable by no more than 90 days of incarceration or a $500 fine or both (Minn. Stat. § 609.03, subd. 3) there would usually be no federal constitutional right to a jury trial on a misdemeanor.

There is, however, a state constitutional right to a jury trial in any prosecution for the violation of a misdemeanor statute punishable by incarceration. See Minn. Const. art. 1, § 6 as interpreted in State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959); State v. Ketterer, 248 Minn. 173, 79 N.W.2d 136 (1956); State ex rel. Erickson v. West, 42 Minn. 147, 43 N.W. 845 (1889); and City of Mankato v. Arnold, 36 Minn. 62, 30 N.W. 305 (1886).

Beyond these constitutional requirements, present statutory law provides for the right to a jury trial at some stage in the proceedings in all prosecutions for the violation of misdemeanors punishable by incarceration. The defendant, however, might not be able to exercise this right to a jury trial until he appeals to district court for a trial de novo. As to the right to a jury trial in Hennepin or Ramsey County, either initially or upon a trial de novo in district court, see Minn. Stat. §§ 484.63 (appeals to district court); 488A.10, subd. 6 (appeals from Hennepin County Municipal Court); and 488A.27, subd. 6 (appeals from Ramsey County Municipal Court after January 1, 1975); and State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959) (jury trial in municipal court for traffic ordinance violations).

In county courts governed by Minn. Stat. Ch. 487 (which includes all but Hennepin and Ramsey County) a defendant has a right to a jury trial in any prosecution for the violation of a statutory misdemeanor punishable by incarceration (see Minn. Const. art. 1, § 6), or of any non-statutory misdemeanor

whether or not punishable by incarceration (see Minn. Stat. § 487.25, subd. 6). There is no right to a jury trial in a prosecution for the violation of a statutory misdemeanor not punishable by incarceration (see Minn. Stat. §§ 169.89, subd. 2 and 633.02).

Under Rule 26.01, subd. 1(1)(a) defendants prosecuted in the municipal courts of Hennepin and Ramsey County as well as those prosecuted in the county courts governed by Minn. Stat., Ch. 487 will have the right to a jury trial if and only if the misdemeanor charged is punishable by incarceration. This will be so whether the misdemeanor is proscribed by statute, ordinance or otherwise, and whether it is a traffic or non-traffic offense. Minn. Stat. §§ 488A.10, subd. 6 (Hennepin County) and 488A.27, subd. 6 (Ramsey County after January 1, 1975) to the extent they provide otherwise are superseded. Also, Minn. Stat. § 487.24, subd. 6, to the extent it might be interpreted to permit a jury trial in a prosecution for the violation of a misdemeanor not punishable by incarceration is superseded. It is the opinion of the Advisory Committee that there should be no difference in the right to a jury trial in the different areas of the state. The committee anticipated that the power of the prosecutor under Rule 23.04 to treat many minor misdemeanors now punishable by incarceration as petty misdemeanors with the consent of the defendant should prevent any large backlog of jury cases from developing. Under Rule 23.05, subd. 1 a defendant is not entitled to a jury trial if the offense is to be treated (see Minn. Stat. Ch. 487) as a petty misdemeanor under Rule 23.04. Also, the broadened use of violations bureaus permitted under Rule 23.03 if implemented by the courts should result in fewer jury and court trial demands.

Rule 26.01, subd. 1(1)(b) providing that there shall be no jury trial at any stage in the prosecution of a misdemeanor not punishable by incarceration is largely consistent with present statutory law. See Minn. Stat. §§ 484.63 and 488.20 (appeals to district court); Minn. Stat. §§ 169.89, subd. 2 and 633.02 (statutory petty misdemeanors); Minn. Stat. § 488A.10, subd. 6 (Ramsey County Municipal Court after January 1, 1975). To the extent Minn. Stat. § 487.25, subd. 6 is inconsistent with Rule 26.01, subd. 1(1)(b) it is superseded.

Rule 26.01, subd. 1(2)(a) (Waiver of Trial by Jury Generally) is based upon F.R.Crim.P. 23 (a), ABA Standards, Trial by Jury, 1.2(b) (Approved Draft, 1968) and continues substantially present Minnesota law (Minn. Stat. § 631.01 (1971)) except that waiver of jury trial by the defendant requires the approval of the court.

Rule 26.01, subd. 1(2)(b) (Waiver When Prejudicial Publicity.)

Under Rule 26.01, subd. 1(2)(b) the defendant shall be permitted to waive jury trial if required to assure the likelihood of a fair trial when there has been a dissemination of potentially prejudicial material. (See ABA Standards, Fair Trial and Free Press, 3.3 (Approved Draft, 1968).)

Rule 26.01, subd. 1(3) (Withdrawal of Waiver of Jury Trial) continues present Minnesota law (Minn. Stat. § 631.01 (1971)) and provides that waiver of jury trial may be withdrawn before commencement of trial. Trial is commenced when jeopardy attaches. See comment to Rule 25.02.

Rule 26.01, subd. 1(4) (Waiver of Number of Jurors Required by Law) is drawn from F.R.Crim.P. 23(b) and ABA Standards, Trial by Jury, 1.3 (Approved Draft, 1968). (See also State v. Sackett, 39 Minn. 69, 38 N.W. 773 (1888).) The number of jurors required by law for felonies and gross misdemeanors is 12. (Minn. Stat. § 593.01 (1971).) (A jury of 6 would not contravene the United States Constitution. Williams v. Florida, 399 U.S. 78 (1970).)

Rule 26.01, subd. 1(5) (Number Required for Verdict) requires a unanimous verdict for felonies, gross misdemeanors, and misdemeanors and so continues existing law in those cases. (Minn. Stat. § 593.01 (1971).) (See also State v. Everett, 14 Minn. 439 (1869) (Gil 330).)

Rule 26.01, subd. 1(6) (Waiver of Unanimous Verdict) continues present Minnesota law. (State v. Zubrocki, 194 Minn. 346, 260 N.W. 507 (1935).) It is based on ABA Standards, Trial by Jury, 1.1(3) (Approved Draft, 1968) except that the defendant's consent is necessary for a less than unanimous verdict.

Rule 26.01, subd. 2 (Trial Without a Jury) requiring special findings in a case tried to the court is taken from F.R.Crim.P. 23(c), and in addition prescribes time limits for general findings and for special findings. Rule 14.01 prescribes the pleas referred to in the rule. The consequences of an omission of a finding on an essential fact comes from Minn. R. Civ. P. 49(a).

Rule 26.02 (Selection of Jury.)

Rule 26.02, subd. 1 (Selection and Qualifications (of Jury)) continues present statutory law for the selection, drawing, and summoning of the trial jury (See Minn. Stat. §§ 593.02, 593.04, 593.13, 593.14, 593.17, 628.43, 628.44, 628.54 (1971) for the qualifications of jurors. See §§ 593.03, 593.05-593.07, 593.09-593.13, 593.135, 593.14 for the selection, drawing, and summoning of jurors.) except that to satisfy constitutional requirements, it provides that the

persons on the jury list from which the jury panel is drawn shall be selected at random from a fair cross-section of the residents of the county who are qualified to serve as jurors. (See a similar provision in Rule 18.01, subd. 2 governing the selection of the grand jury list.) (See also ABA Standards, Trial by Jury, 2.1(a) (Approved Draft, 1968).)

Rule 26.02, subd. 2 (List of Prospective Jurors) is taken from ABA Standards, Trial by Jury, 2.2 (Approved Draft, 1968) and also provides that in addition to the jury list, the parties shall have access to such other information concerning the jurors as may be available at the clerk's office.

Rule 26.02, subd. 3 (Challenge to Panel) is based on ABA Standards, Trial by Jury, 2.3 (Approved Draft, 1968) and Minn. Stat. §§ 631.23, 631.24, 631.25 (1971) except that it substitutes an "objection" for the "exception" to the sufficiency of the challenge (Minn, Stat. § 631.24) and for the "denial" of the facts on which the challenge is based. (Minn. Stat. § 631.25 (1971).) If such an objection is made, the challenge is tried by the court.

Rule 26.02, subd. 4(1) (Purpose of Voir Dire Examination--By Whom Made). The provision of this rule governing the purpose for which voir dire examination shall be conducted and the provision for initiation of the examination by the judge is taken from ABA Standards, Trial by Jury, 2.4 (Approved Draft, 1968). The last sentence of the rule permitting the parties to interrogate the jurors before exercising challenges continues the similar provision of Minn. Stat. § 631.26 (1971) with the limitation that the inquiry shall be "reasonable". The court has the right and the duty to assure that the inquiries by the parties during the voir dire examination are "reasonable". The court may therefore restrict or prohibit questions that are repetitious, irrelevant, or otherwise improper.

Rule 26.02, subd. 4(2)(a) (Sequestration of Jurors at Court's Discretion) gives the court the discretion to sequester jurors during the voir dire.

Rule 26.02, subd. 4(2)(b) (Prejudicial Publicity), following ABA Standards, Fair Trial and Free Press, 3.4(a) (Approved Draft, 1968), directs sequestration of the jurors during voir dire when there is a significant possibility that exposure to prejudicial publicity may result in disqualification of individual jurors. The standard (3.4(a)) recommends that the questioning should be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude toward the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

Rule 26.02, subd. 4(3) (Order of Drawing, Examination and Challenge of Jurors.) The purpose of this rule is to achieve uniformity in the order of drawing, examination, and challenge of jurors, but also to provide a limited number of alternatives that may be followed, in the discretion of the trial court. Hence, a uniform rule (26.02, subd. 4(3)(a)) is prescribed which is to be followed unless the court orders that one of the two alternatives, 26.02, subd. 4(3)(b) or (c), shall be adopted in a particular case. An exception is that in cases of first degree murder, Rule 26.02, subd. 4(3)(c) is to be preferred unless otherwise ordered by the court. (See Rule 26.02, subd. 4(3)(c) 8.)

Rule 26.02, subd. 4(3)(a) (Uniform Rule) is the uniform rule which is to be followed unless the court orders otherwise and substantially adopts the method used in civil cases, so that in a criminal case 20 members of the jury panel are first drawn for a 12-person jury. (See Minn. Stat. §§ 546.09, 546.10 (1971); Rule 27, PT. I, Code of Rules for the District Courts.) After each party has exercised his challenges for cause, commencing with the defendant, they exercise their peremptory challenges alternately commencing with the defendant. If all peremptory challenges are not exercised, the jury shall be selected from the remaining prospective jurors in the order in which they were called.

Rule 26.02, subd. 4(3)(b) (By Order of Court) is the first alternative to Rule 26.02, subd. 4(3)(a). With a 12-person jury to be selected, 12 members of the jury panel are first drawn, and as a juror is excused for cause or peremptorily, a replacement is drawn so that there are always 12 persons in the jury box. The order of examination and challenge prescribed by the rule, first by defendant and then by the state, retains existing law. (Minn. Stat. § 631.39 (1971).)

Rule 26.02, subd. 4(3)(c) (By Order of Court) is the second alternative to Rule 26.02, subd. 4(3)(a) and provides that the prospective jurors shall be drawn one at a time. Otherwise this rule is substantially the same as Rule 26.02, subd. 4(3)(b). In cases of first degree murder this alternative shall be preferred unless the court in its discretion orders otherwise.

Rule 26.02, subd. 5(1) (Grounds of Challenge for Cause) with some changes of language, substantially adopts the grounds for challenge for cause under existing law (See Minn. Stat. §§ 631.28-631.31 (1971)), but abolishes the classifications of the grounds into general causes (§§ 631.28, 631.29), particular causes (§ 631.30), implied bias (§§ 631.30, 631.31), and actual bias (§§ 631.30, 631.32). For the definition of a felony conviction which would disqualify a person from service on the jury, see Minn. Stat. § 609.13 (1971). The term "related offense" in the rule is intended to be more comprehensive than the conduct or behavioral incident covered by Minn. Stat. § 609.035 (1971).

Rule 26.02, subd. 5(2) (How and When Challenge for Cause is Exercised) providing that a challenge for cause may be oral, stating the grounds upon which it is based, continues substantially the similar provisions of Minn. Stat. § 631.34 (1971). The requirement that a challenge for cause to an individual juror shall be made before he is sworn but for good cause may be made before all the jurors are sworn adopts substantially the provisions of Minn. Stat. § 631.26 (1971). As to when jeopardy attaches, see comment to Rule 25.02.

Rule 26.02, subd. 5(3) (By Whom Challenges for Cause are Tried) provides that if a party objects to a challenge for cause, it shall be tried by the court. The rule abolishes exceptions to and denials of the challenge (Minn. Stat. § 631.34 (1971)) by the triers of fact (Minn. Stat. § 631.34 (1971)) (Minn. Stat. § 631.35 (1971)).

Rule 26.02, subd. 6 (Peremptory Challenges) changes the number of peremptory challenges allowed by Minn. Stat. § 631.27 (1971) when the offense is punishable by life imprisonment from 20 for the defendant and 10 for the state to 15 and 9. The provision of § 631.27 giving the defendant 5 and the prosecution 3 peremptory challenges in the trial of other offenses is continued. The provision for additional peremptory challenges when there is more than one defendant comes from F.R.Crim.P. 24.

Rule 26.02, subd. 7 (Order of Challenges) prescribes the order in which challenges shall be made: first, to the panel; second, to an individual juror for cause; and third, peremptorily to an individual juror. It supersedes the requirement of Minn. Stat. § 631.39 (1971) that challenges for cause be made for (1) general disqualification, (2) implied bias, and (3) actual bias, in that order.

Rule 26.02, subd. 8 (Alternate Jurors) is based on F.R.Crim.P. 24(c) and ABA Standards, Trial by Jury, 2.7 (Approved Draft, 1968) and displaces Minn. Stat. § 546.095 (1971). It places no limitations on the number of alternate jurors and permits no additional peremptory challenges and differs in those respects from the federal rule and § 546.095.

Rule 26.03, subd. 1(1) (Presence Required) is taken from F.R.Crim.P. 43. See also Rules 14.02 and 27.03, subd. 2.

Rule 26.03, subd. 1(2) (Continued Presence Not Required) is based upon Proposed F.R.Crim.P. 43(b) (1971), 52 F.R.D. 472, Allen v. Illinois, 397 U.S. 337, 90 Sup.Ct. 1057 (1970) and

Minn. Stat. § 631.015 (1971). If a defendant fails to be present at the trial, the court may proceed with the trial unless it appears that the defendant's absence was involuntary. The defendant may move for a new trial on the ground his absence was involuntary.

Rule 26.03, subd. 1(3) (Presence Not Required), permitting the defendant's absence from proceedings in the case of misdemeanors, is drawn from proposed F.R.Crim.P. 43(c) (1971), 52 F.R.D. 472 (See also Rules 14.02 and 27.03, subd. 2.) In addition, in the case of felonies and gross misdemeanors, it permits the court to excuse defendant's presence from any proceeding except arraignment, plea, trial, and imposition of sentence.

Rule 26.03, subd. 2 (Custody and Restraint of Defendants and Witnesses) is taken from ABA Standards, Trial by Jury, 4.1(a), (b), (c) (Approved Draft, 1968).

Rule 26.03, subd. 3 (Use of Courtroom) comes from ABA Standards, Fair Trial and Free Press 3.5(a) (Approved Draft, 1968).

Rule 26.03, subd. 4 (Preliminary Instructions) is adapted from ABA Standards, Trial by Jury 4.6(a) (Approved Draft, 1968) and Minn. R. Civ. P.

Rule 26.03, subd. 5(1) (Sequestration of Jury in Discretion of Court) permits sequestration of the jury in the discretion of the court.

Rule 26.03, subd. 5(2) (Sequestration on Motion) directing sequestration on motion of either party when prejudicial publicity may come to the attention of the jurors, comes from ABA Standards, Fair Trial and Free Press 3.5(b) (Approved Draft, 1968).

Rule 26.03, subd. 6 (Exclusion of Public From Hearing or Arguments Outside the Presence of the Jury) is adapted from ABA Standards, Fair Trial and Free Press 3.5(d) (Approved Draft, 1968). When the record of proceeding from which the public is excluded is made available, the court may order that names be deleted or substitutions therefor made for the protection of innocent persons. This rule for exclusion of the public is not intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize right to a fair trial by an impartial jury. (See ABA Standards, Fair Trial and Free Press 3.5(d) (Approved draft, 1968).) An agreement by the news media not to publicize

matters heard until after completion of the trial could afford the basis for a determination by the court that there is no substantial likelihood of interfering with defendant's right to a fair trial by permitting the news media or the public to be present. Re provision for appellate review, see comment to Rule 25.01.

Rule 26.03, subd. 7 (Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses) comes from ABA Standards, Fair Trial and Free Press, 3.5(c) (Approved Draft, 1968).

Rule 26.03, subd. 8 (Admonitions to Jurors) adopts the substance of ABA Standards, Fair Trial and Free Press 3.5(a) (Approved Draft, 1968). In any case that appears likely to be of significant public interest, an admonition in substantially the following form, suggested by ABA Standards, 3.5(e), Fair Trial and Free Press (Approved Draft, 1968), may be given before the end of the first day if the jury is not sequestered:

"During the time you serve on this jury, there may appear in the newspapers or on the radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain standards--for example, a witness may testify about events he himself has seen or heard but not about matters of which he was told by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination. News reports about the case are not subject to these standards, and if you read, listen to, or watch these reports, you may be exposed to misleading or inaccurate information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction."

If the process of selecting a jury is a lengthy one, such an admonition may also be given to each juror as he is selected. At the end of each subsequent day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form suggested by Standard 3.5(e) may be given:

"For the reasons stated earlier in the trial, I must remind you not to read, listen to, or watch any news reports concerning this case while you are serving on this jury."

Rule 26.03, subd. 9 (Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial) adopts ABA Standards, Fair Trial and Free Press, 3.5(f) (Approved Draft, 1968).

Rule 26.03, subd. 10 (View by Jury) adapted from N.Y.C.P.L. 270.50, replaces Minn. Stat. § 546.12 (1971).

Rule 26.03, subd. 11 (Order of Jury Trial) substantially continues the order of trial under existing practice. (See Minn. Stat. § 546.11 (1971).) The order of closing argument, under sections "h" and "i" of this rule continues to be the same as under existing Minn. Stat. § 631.07 (1971) with the prosecution proceeding first and then the defendant.

Rule 26.03, subd. 12 (Note Taking) is adapted from Minn. Stat. § 631.10 (1971) and ABA Standards, Trial by Jury 4.2 (Approved Draft, 1968).

Rule 26.03, subd. 13 (Substitution of Judge) is taken from F.R.Crim.P. 25(a)(b) and ABA Standards, Trial by Jury 4.3 (Approved Draft, 1968) and takes the place of Minn. Stat. § 484.29 (1971).

Rule 26.03, subd. 14(1) (Exceptions Abolished) is taken from Minn. R. Civ. P. 46 and supersedes Minn. Stat. § 547.03 (1971).

Rule 26.03, subd. 14(2) (Bills of Exception and Settled Cases Abolished) abolishes the bill of exceptions and settled case provided by Minn. Stat. §§ 547.02-06, 632.05 (1971) and adopts Minn. R. Civ. P. 59.02 and Minn. R. Civ. App. P. 110.01 providing for the record on a hearing upon a motion for new trial and on appeal. See also F.R.Crim.P. 26.

Rule 26.03, subd. 15 (Evidence) leaves to the Minnesota Rules of Evidence the issues of the admissibility of evidence and the competency of witnesses except as otherwise provided in these rules. As to the use of a deposition at a criminal trial, Rule 21.06 controls rather than the Minnesota Rules of Evidence if there is any conflict between them. See Rule 802 and the comments to Rule 804 in the Minnesota Rules of Evidence.

Rule 26.03, subd. 16 (Interpreters) comes from F.R.Crim.P. 28(b).

Rule 26.03, subd. 17 (Motion for Judgment of Acquittal) abolishing motions for directed verdict, and providing for motions for judgment of acquittal is taken from F.R.Crim.P. 29(a)(b)(c) and ABA Standards, Trial by Jury, 4.5(a)(b)(c) (Approved Draft, 1968). Such a motion by the defendant, if not granted, should not be deemed to withdraw the case from the jury or to bar the defendant from offering evidence.

(See F.R.Crim.P. 29(a), ABA Standards, Trial by Jury, 4.5(a) (Approved Draft, 1968).

Rule 26.03, subd. 18(1) (Requests for Instructions) follows Minn. R. Civ. P. 51. See also F.R.Crim.P. 30 and ABA Standards, Trial by Jury 4.6(b) (Approved Draft, 1968).

Rule 26.03, subd. 18(2) (Proposed Instructions) substantially adopts similar provisions in Minn. Stat. § 546.14 (1971).

Rule 26.03, subd. 18(3) (Objections to Instructions) is adapted from F.R.Crim.P. 30 and ABA Standards, Trial by Jury 4.6(c)(e) (Approved Draft, 1968). The last sentence relating to errors in fundamental law comes from Minn. R. Civ. P. 51.

Rule 26.03, subd. 18(4) (Giving of Instructions) comes from Minn. R. Civ. P. 51 except that the provisions permitting the giving of instructions before closing arguments and the jury to take written instructions to the jury room are new.

Rule 26.03, subd. 18(5) (Contents of Instructions) provides that the court shall instruct the jury on the law and may summarize the claims of the parties, but does not permit comment on the evidence or on the credibility of the witnesses. Compare Minn. Stat. § 631.08 (1971) which provides that the judge may "present the facts of the case."

Rule 26.03, subd. 19 (Jury Deliberations and Verdict.)

Rule 26.03, subd. 19(1) (Materials to Jury Room) adopts the substance of Minn. Stat. § 631.10. [See also ABA Standards, Trial by Jury, 5.1(a) (Approved Draft, 1968).] It also permits the jury to take to the jury room a copy of the instructions, in the discretion of the court. For the notes of the jury see Rule 26.03, subd. 12.

Rule 26.03, subd. 19(2) (Jury Requests to Review Evidence) comes from ABA Standards, Trial by Jury, 5.2(a)(b) (Approved Draft, 1968) and takes the place of a similar provision of Minn. Stat. § 631.11 (1971).

Rule 26.03, subd. 19(3) (Additional Instructions After Jury Retires) is based on ABA Standards, Trial by Jury, 5.3(a)(b)(c) and takes the place of a similar provision of Minn. Stat. § 631.11 (1971).

Rule 26.03, subd. 19(4) (Deadlocked Jury.)

The kind of instructions that may be given to a deadlocked jury is left to judicial decision or to formulation of a pattern instruction. In State v. Martin, 297 Minn. 359, 211 N.W.2d 765 (1973), the Minnesota Supreme Court disapproved an

an Allen instruction (Allen v. United States, 164 U.S. 492 (1896)) and adopted ABA Standards, Trial by Jury, 5.4 (Approved Draft, 1968).

Rule 26.03, subd. 19(5) (Polling the Jury) is drawn from ABA Standards, Trial by Jury, 5.5 (Approved Draft, 1968) and Minn. Stat. § 631.16 (1971).

Rule 26.03, subd. 19(6) (Impeachment of Verdict) adopts the procedure outlined in Swartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960).

Rule 26.03, subd. 19(7) (Partial Verdict) is taken from State v. Olkon, 299 N.W.2d 89 (Minn. 1980) which authorized the court to accept a partial verdict.

Rule 26.04 (Post-Verdict Motions.)

Rule 26.04, subd. 1(1) (Grounds of New Trial) substantially adopts the grounds for a new trial set forth in Minn. Stat. § 547.01 (1971) and adds the ground that a new trial may be granted in the interests of justice. (See F.R. Crim.P. 33.) ABA Standards, Fair Trial and Free Press, 3.6 (Approved Draft, 1968) recommends that a verdict of guilty should be set aside and a new trial granted whenever, on the basis of competent evidence, the court finds a substantial likelihood that the vote of one or more of the jurors was influenced by exposure to an extra-judicial communication of any matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Under existing Minnesota law, a motion for a new trial should not be granted on that ground if the defendant, having knowledge during the trial that one or more jurors has been exposed to an extra-judicial communication, fails promptly to move for a mistrial. (See State v. O'Donnell, 280 Minn. 213, 158 N.W.2d 699 (1968) outlining the steps to be taken by defense counsel in the event of prejudicial publicity during trial.)

Rule 26.04, subd. 1(2) (Basis of Motion for New Trial) is taken from Minn. R. Civ. P. 59.02 and supersedes Minn. Stat. §§ 547.02, 547.023 (1971).

Rule 26.04, subd. 1(3) (Time for Motion) is based upon Minn. R. Civ. P. 59.03 and F.R.Crim.P. 35 and supersedes Minn. Stat. §§ 547.02, 547.023 (1971). The post-conviction remedy, Minn. Stat. §§ 590.01-590.06 (1971) provides a means for relief on the ground of newly discovered evidence after the time for making a motion for new trial.

Rule 26.04, subd. 1(4) (Time for Serving Affidavits) is taken from Minn. R. Civ. P. 59.04.

Rule 26.04, subd. 2 (Motion to Vacate Judgment) is based on F.R.Crim.P. 34 except that it is treated as a motion to vacate judgment instead of a motion in arrest of judgment and permits the court to vacate a judgment of acquittal and to dismiss the case on the grounds stated or to dismiss the case if a judgment has not been entered.

Rule 26.04, subd. 3 (Joinder of Motions) provides for joinder of motions for new trial (Rule 26.04, subd. 1) and motions to vacate judgment (Rule 26.04, subd. 2).

Rule 26.04, subd. 4 (New Trial on Court's Own Motion) permits the court to grant a new trial on its own motion with the consent of the defendant.

RULE 27. SENTENCE AND JUDGMENT

Rule 27.01. Conditions of Release

When a defendant has been convicted and is awaiting sentence, the court may continue or alter the conditions for defendant's release, or may order confinement of the defendant, taking into account the conditions of release and the factors determining the conditions of release as provided by Rule 6.02, subd. 1 and subd. 2 and whether there is reason to believe that the defendant will flee or pose a danger to any person or to the community. The burden of establishing that the defendant will not flee or will not be a danger to any other person or to the community rests with the defendant.

Rule 27.02. Presentence Investigation in Misdemeanor Cases

In misdemeanor cases, the report of the presentence investigation may be oral if so directed by the court. If the presentence report is given orally, the defendant or his attorney shall be permitted to hear the report.

Rule 27.03. Sentencing Proceedings

Subd. 1. Hearings. Hearings upon the presentence report and upon the sentence to be imposed upon the defendant shall be held as provided by law. Before the sentencing proceeding, in a misdemeanor or gross misdemeanor case, each party shall notify the opposing party and the court of any part of a written presentence report which he intends to controvert by the production of evidence. Both the prosecutor and the defendant or his attorney shall have an opportunity to controvert any part of an oral presentence report and for such purpose the court may continue the sentencing.

The procedure for such hearings in felony cases shall be as follows:

(A) At the time of, or within three days after a plea, finding or verdict of guilt of a felony, the court may order a presentence investigation and shall order that a sentencing worksheet be completed. As part of any presentence investigation and report, the court may order a mental or physical examination of the defendant. The court shall also then:

(1) Set a date for the return of the report of the presentence investigation.

(2) Set a date, time and place for the sentencing.

(3) Order the defendant to return at such date, time and place.

(4) If the facts ascertained at the time of a plea or through trial cause the judge to consider departure from the sentencing guidelines appropriate, the court shall advise counsel of such consideration.

(B) The presentence investigation report, if ordered, shall include the information required by Minn. Stat. § 609.115, subd. 1, a completed sentencing guidelines worksheet and any supplemental worksheets and such other information as the court may direct. The report shall be submitted to the court in triplicate.

(C) The court shall cause a copy of the sentencing worksheet and the nonconfidential portion of the presentence investigation report, if any, to be forwarded to the prosecutor and to the defendant or his attorney subject to the limitations of Minn. Stat. § 609.115, subd. 4. If the presentence investigation report contains a confidential information section that portion need not be forwarded to counsel or to defendant but counsel should be advised that such information is available for inspection at some designated place.

If departure from the sentencing guidelines appears appropriate, and the court has not previously notified the parties or counsel for the parties that the court is considering departure, the court shall forward notification of such consideration at the time the sentencing worksheet and any presentence investigation report is forwarded.

(D) Upon receipt of the sentencing worksheet and any presentence investigation report, any party desiring a sentencing hearing shall, not later than eight days before the date for the sentencing, file with the court and serve on opposing counsel a motion for such hearing, except that when the sentencing worksheet and any presentence investigation report is received within eight days prior to the sentencing date, the motion for a sentencing hearing shall be made within a reasonable time after receipt of the worksheet and any report. If necessary, the court shall continue the sentencing.

The motion for a sentencing hearing shall specifically set forth the reasons for the motion, including a designation of any portion of the presentence investigation report or sentencing guidelines worksheet challenged, and the grounds for the challenge supported by affidavits or other documentation.

(E) Opposing counsel shall file and serve any reply not later than three days before the sentencing date.

(F) At the sentencing hearing, issues raised in the sentencing hearing motion shall be heard. In addition, any remaining factual or legal issues relating to the sentence shall be succinctly stated on the record by counsel. The court shall also permit the record to be supplemented by such testimony as it deems relevant and material to the issues.

At the conclusion of the sentencing hearing, the court may state into the record findings of fact, conclusions of law and appropriate order on the issues submitted by the parties. Otherwise, the court shall issue written findings of fact, conclusions of law and appropriate order within twenty days of the conclusion of the sentencing hearing.

If it is determined upon hearing that the sentencing worksheet or supplement submitted as a part of any presentence investigation report contains an error or errors, the court shall cause a corrected worksheet to be prepared, filed and submitted to the sentencing guidelines commission.

(G) The court may impose sentence immediately following the conclusion of the sentencing hearing.

Subd. 2. Defendant's Presence at Hearing and Sentencing. Defendant must be personally present at the sentencing hearing and at the time sentence is pronounced except when excused pursuant to Rule 26.03, subd. 1(3). Sentence may be pronounced against a corporation in the absence of counsel if counsel fails to appear on the date of sentence after reasonable notice thereof.

Subd. 3. Statements at Time of Sentencing. Before pronouncing sentence, the court shall give the prosecutor and defense counsel an opportunity to make a statement with respect to any matter relevant to the question of sentence including a recommendation as to sentence. The court shall also address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information before sentence. The court shall not accept any communication relative to sentencing that is not on the record without disclosing the contents to the defense and to the prosecution.

Subd. 4. Imposition of Sentence. When sentence is imposed the court:

(A) Shall state the precise terms of the sentence.

(B) Shall assure that the record accurately reflects all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed. Such time shall be automatically deducted from the sentence and the term of imprisonment including time spent in custody as a condition of probation from a prior stay of imposition or execution of sentence.

(C) For felony cases if the sentence imposed deviates from the sentencing guidelines applicable to the case, the court shall state into the record findings of fact as to the reasons for departure and shall forward, or cause to be forwarded, to the sentencing guidelines commission a copy of the transcript of that portion of the record or a completed departure form as provided by the commission.

(D) Prior to imposition of a sentence in a felony case which deviates from the sentencing guidelines, the court shall allow either party to request a sentencing hearing if no sentencing hearing was held and the court did not give prior notice that the sentence imposed might depart from the sentencing guidelines.

(E) If the court elects to stay imposition or execution of sentence, and:

(1) Requires a period of probation in felony cases, the court shall advise the defendant that non-custodial probation time may not be credited against his sentence in the event that probation is ultimately revoked and sentence executed.

(2) If noncriminal conduct could result in revocation, the trial court should advise the defendant so that he can be reasonably able to tell what lawful acts are prohibited.

(3) A written copy of the conditions of probation should be given to the defendant at the time of sentencing or soon thereafter.

(4) The defendant should be told that in the event of a disagreement between himself and his probation agent as to the terms and conditions of probation, he can return to the court for clarification if necessary.

Subd. 5. Notice of Right to Appeal. After imposition of sentence or granting of probation the court shall inform the defendant of his right to appeal the judgment of conviction or sentence or both and the right of a person who is unable to pay the cost of appeal to apply for leave to appeal at state expense by contacting the state public defender.

Subd. 6. Record. A verbatim record of the sentencing proceedings shall be made. In felony and gross misdemeanor cases any verbatim record made in accordance with this rule shall be transcribed. In misdemeanor cases any such record need not be transcribed unless requested by the court, the defendant or the prosecuting attorney.

Subd. 7. Judgment. The clerk's record of a judgment of conviction shall contain the plea, the verdict of findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The sentence or stay of imposition of sentence is an adjudication of guilt.

Subd. 8. Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record or errors in the record arising from oversight or omission may be corrected by

the court at any time and after such notice, if any, as the court orders.

Subd. 9. Correction or Reduction of Sentence. The court at any time may correct a sentence not authorized by law. The court may at any time modify a sentence during either a stay of imposition or stay of execution of sentence except that the court may not increase the period of confinement.

Rule 27.04. Probation Revocation

Subd. 1. Commencement of Proceedings.

(1) Issuance of Revocation Warrant or Summons. Proceedings for the revocation of probation shall be commenced by the issuance of a warrant or a summons by the court based upon a written report showing probable cause to believe that the probationer has violated any conditions of probation. The written report shall include a description of the surrounding facts and circumstances upon which the request for revocation is based. In any case the court may issue a summons instead of a warrant whenever it is satisfied that a warrant is unnecessary to secure the appearance of the probationer. If the probationer fails to appear in response to a summons, a warrant may be issued.

(2) Contents of Warrant and Summons. Both the warrant and summons shall contain the name of the probationer, a description of the probationary sentence sought to be revoked, the signature of the issuing judge or judicial officer of the county or district court, and shall be accompanied by the written report upon which it was based. The amount of any bail or other conditions of release may be set by the issuing judge or judicial officer and endorsed on the warrant. The warrant shall direct that the probationer be brought promptly before the court that issued the warrant if it is in session. If that court is not in session the warrant shall direct that the probationer be brought before a judge or judicial officer of that court, without unnecessary delay, and in any event not later than 36 hours after the arrest exclusive of the day of arrest, or as soon thereafter as such judge or judicial officer is available. The summons shall summon the probationer to appear at a stated time and place to respond to the revocation charges.

(3) Execution or Service of Warrant or Summons; Certification. Execution, service, and certification of the warrant or summons shall be as provided in Rule 3.03.

Subd. 2. First Appearance.

(1) Advice to Probationer. When a probationer initially appears before the court pursuant to a warrant or summons concerning an alleged probation violation, he shall be advised of the nature of the charge against him. He shall also be given a copy of the written report upon which the warrant or summons was based if he has not previously received such report. The judge, judicial officer, or other duly authorized personnel shall further advise the probationer substantially as follows:

a. That he is entitled to counsel at all stages of the proceedings, and if he is financially unable to afford counsel, one will be appointed for him at his request;

b. That unless waived, a revocation hearing will be held to determine whether there is clear and convincing evidence that he has violated any conditions of probation and that probation should therefore be revoked;

c. That before the revocation hearing all evidence to be used against the probationer shall be disclosed to him and he shall be provided access to all official records pertinent to the proceedings;

d. That at the hearing both the prosecution and the probationer shall have the right to offer evidence, present arguments, subpoena witnesses, and call and cross-examine witnesses, provided, however, that the probationer may be denied confrontation by the court when good cause is shown that a substantial risk of serious harm to others would exist if it were allowed. Additionally, the probationer shall have the right at the revocation hearing to present mitigating circumstances or other reasons why the violation, if proved, should not result in revocation;

e. That the probationer has the right of appeal from the determination of the court following the revocation hearing.

(2) Appointment of Counsel. The appointment of counsel for a probationer financially unable to afford counsel shall be governed by the standards and procedures set forth in Rule 5.02.

(3) Conditions of Release. The probationer may be released pending appearance at the revocation hearing. In deciding upon the conditions of release and whether to release the probationer, the court shall take into account the conditions of release and the factors determining the conditions of release as provided by Rule 6.02, subd. 1 and subd. 2 and whether there is a reason to believe that the probationer will flee or pose a danger to any person in the community. The burden of establishing that the probationer will not flee or will not be a danger to any other person or the community rests with the probationer.

(4) Time of Revocation Hearing. The court shall set a date for the revocation hearing to be held within a reasonable time before the court which granted probation. If the probationer is in custody as a result of the revocation proceedings, the revocation hearing shall be held within seven days. If the probationer has allegedly violated a condition of probation by commission of a crime, the court may postpone the revocation hearing pending disposition of the criminal case whether or not the probationer is in custody.

(5) Record. A verbatim record shall be made of the proceedings at the probationer's initial appearance before the court under this rule.

Subd. 3. Revocation Hearing.

(1) Hearing Procedures. The hearing shall be held in accordance with the provisions of subd. 2(1) (a), (b), (c), and (d) of this rule.

(2) Finding of No Violation of Conditions of Probation. If the court finds that a violation of the conditions of probation has not been established by clear and convincing evidence, the revocation proceedings shall be dismissed, and the probationer's probation continued under the conditions theretofore ordered by the court.

(3) Finding of Violation of Conditions of Probation. If the court finds upon clear and convincing evidence that any conditions of probation have been violated, or if the probationer admits the violation, the court may proceed as follows:

a. Imposition of Sentence Stayed. If imposition of sentence was initially stayed, and probationer placed on probation, the court may again stay imposition of sentence or impose sentence and stay execution thereof, and in either event place the probationer on probation pursuant to Minn. Stat. § 609.135, or impose sentence and order the execution thereof.

b. Execution of Sentence. If execution of sentence initially imposed was stayed and probationer placed on probation, the court may continue the stay and place the probationer on probation in accordance with the provisions of Minn. Stat. § 609.135, or order execution of the sentence previously imposed.

(4) Record of Findings. A verbatim record shall be made of the proceedings at the revocation hearing and in any contested hearing the court shall make written findings of fact on all disputed issues including a summary of the evidence relied upon and a statement of the court's reasons for its determination.

(5) The probationer or the prosecution may appeal from the court's decision according to the procedure provided for appeal from a sentence by Rule 28.05.

Comment

Rule 27.01 (Conditions of Release) is based on F.R.Crim.P. 32, 46(c) and 28 U.S.C. § 3148. Pending sentence the conditions for defendant's release or whether he should be confined are to be determined under Rules 6.02, subd. 1 and subd. 2, governing pre-trial release, but the defendant has the burden of establishing he will not flee or pose a danger to any other person or to the community.

Minn. Const. art. I, § 7, provides that all persons shall before conviction be bailable by sufficient sureties. The defendant is not entitled to bail as a matter of right after conviction.

Rule 27.02 (Presentence Investigation in Misdemeanor Cases.) In misdemeanor cases the presentence investigation report may be oral rather than written and this will often be the case. Where the report is oral, the defendant or his attorney must be allowed to hear the report when given.

Rule 27.03 (Sentencing Proceedings.)

Rule 27.03, subd. 1 (Hearings) adopts for misdemeanors and gross misdemeanors the provisions for summary hearings upon the presentence report and sentence contained in Minn. Stat. §§ 609.115, subd. 4, and 631.20 (1982). The provision for notice of any part of the presentence report that a party intends to controvert comes from ABA Standards, Sentencing Alternatives and Procedures, 18-5.5 (Approved Draft, 1979). Of course, where the report is oral there would be no opportunity to give such notice and possibly no chance to controvert objectionable information contained in the report. Both parties are entitled to an opportunity to controvert even parts of an oral report and to do this the court may continue the sentencing so evidence can be obtained.

Sentencing in felony cases for offenses committed on or after May 1, 1980, is governed by Minn. Stat., Ch. 244 and the Minnesota Sentencing Guidelines promulgated pursuant to those statutes. The more complex procedures required by these rules for felony cases are necessary for a proper sentencing decision under the sentencing guidelines. Because of the adoption of the Minnesota Sentencing Guidelines an ad hoc volunteer committee chaired by Chief Justice Douglas Amdahl drafted proposed rules for sentencing under the guidelines. These rules were approved by the District Court Judges Association and the Ramsey County District Court Judges. The proposals of the ad hoc committee have been substantially incorporated into Rules 27.03, subds. 1 through 5 and these comments.

The Sentencing Guidelines Commission recommends that where the felony involved a sexual offense, that the trial court order a physical or mental examination of the offender as a supplement to the presentence investigation permitted by Minn. Stat. § 609.115. Minnesota Sentencing Guidelines and Commentary, Training Material, III. E. (Hereinafter referred to as Training Manual.) Rule 27.03, subd. 1(A) permits the court to order such examinations. This rule is not intended to preclude a post-sentence investigation whenever required by statute (Minn. Stat. § 609.115, subd. 2 (sentence of life imprisonment)) or whenever the court considers one necessary. The presentence investigation may include the information obtained on the pretrial release investigation under Rule 6.02, subd. 3.

The date for the return of the presentence investigation report should be set sufficiently in advance of sentencing to allow counsel sufficient time to make any motion pursuant to Rule 27.03, subd. 1(D).

The date of the sentencing should be determined after consultation with counsel to determine if unusual problems are anticipated in obtaining the information necessary to complete the report of the presentence investigation (e.g., securing necessary documentation of out-of-state convictions needed to compute the criminal history index score).

As to the confidential information section of a presentence investigation report mentioned in Rule 27.03, subd. 1(C), see County of Sherburne v. Schoen, 306 Minn. 171, 236 N.W.2d 592 (1975).

The ad hoc committee suggested that judges rely on the facts of the conviction offense or offenses considered in the light of factors such as are set forth in the guidelines as a ground for departure and not ask for recommendations for departure from the presentence investigator.

Rule 27.03, subd. 1(D) essentially continues existing practice and imposes time requirements. Unlike Minn. Stat. § 244.10, subd. 1, this rule does require that the motion for a sentencing hearing include grounds.

Rule 27.03, subd. 1(F) is in accord with Minn. Stat. § 244.10, subd. 1, which requires that written findings of fact, conclusions of law and appropriate order on the issues raised at the sentencing hearing be issued at the conclusion of the hearing or within twenty days thereafter.

In Rule 27.03, subd. 1(G) the term "sentencing hearing" refers to the hearing required by Minn. Stat. § 244.10, subd. 1 on issues of sentencing. In the usual case, actual sentencing should immediately follow.

Rule 27.03, subd. 2 (Defendant's Presence at Hearing and Sentencing) is adopted from F.R.Crim.P. 43. See also N.Y.C.L. 380.40.

Rule 27.03, subd. 3 (Statements at the Time of Sentencing) is based on ABA Standards, Sentencing Alternatives and Procedures, 18-6.3 and 18-6.4 (Approved Draft, 1979). See also N.Y.C.P.L. 380.50.

Rule 27.03, subd. 4 (Imposition of Sentence) parts (A) and (B) are based on ABA Standards, Sentencing Alternatives and Procedures, 18-6.6iii, iv (Approved Draft, 1979). Existing law relating to probation is continued (Minn. Stat. §§ 609.135, 609.14).

Minn. Stat. § 244.10, subd. 2 requires written findings of fact as to the reasons for departure from the sentencing guidelines. The court's statement into the record under Rule 27.03, subd. 4(C) should satisfy this requirement.

Rule 27.03, subd. 4(D) is designed to eliminate any possible due process notice problems where a defendant does not request a sentencing hearing because of an expectation that he will receive a sentence in conformance with the sentencing guidelines. It is also anticipated that fewer sentencing hearings will be requested by the prosecution and defense so long as there is an opportunity to request such a hearing after notice that the court might depart from the guidelines.

Rule 27.03, subd. 4(E) is designed to avoid any due process notice problems if probation is revoked and sentence executed. A defendant has a right to refuse probation when the conditions of the probation are more onerous than a prison sentence, State v. Randolph, 316 N.W.2d 508 (Minn. 1982).

As to part (E)(2) of Rule 27.03, subd. 4, the sentencing guidelines indicate that revocation of a stayed sentence should not be based on merely technical violations, and a court should instead use expanded and more onerous conditions of probation for such technical violations. Training Manual III. B. The Minnesota Supreme Court has stated that a trial court should refer to the following ABA Standard in determining whether to revoke probation:

> Grounds for and alternatives to probation revocation.
>
> (a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original defense and the intervening conduct of the offender that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked. ABA Standards for Criminal Justice, Probation § 5.1(a) (Approved Draft, 1970) cited in State v. Austin, 295 N.W.2d 246 (Minn. 1980).

Rule 27.03, subd. 5 (Notice of Right to Appeal) is based on F.R.Crim.P. 32. Failure to notify the defendant of his right to appeal does not extend the time for appeal. Minn. Stat. § 244.11 authorizes either the defendant or the state to appeal from a sentence whether imposed or stayed. See Rule 28.05 for the procedure to be followed on such an appeal.

Rule 27.03, subd. 6 (Record), requiring a verbatim record of the sentencing proceedings, is in accord with ABA Standards, Sentencing Alternatives and Procedures, 5.7 (Approved Draft, 1968). It does not affect the provisions of Minn. Stat. § 243.49 (1971) relative to the transcription of trial court proceedings.

Rule 27.03, subd. 7 (Judgment), stating what the record of the judgment shall contain, is adapted from F.R.Crim.P. 32(b). The sentence or stay of imposition of sentence constitutes an adjudication of guilt if the court does not sooner make such an adjudication.

Rule 27.03, subd. 8 (Clerical Mistakes) for correction of clerical mistakes is taken from F.R.Crim.P. 36.

Rule 27.03, subd. 9 (Correction or Reduction of Sentence), adopted from F.R.Crim.P. 35, permits the court to correct an unauthorized sentence at any time. This would include a failure to follow proper procedures in connection with the imposition of sentence. The rule also permits the court at any time to modify a sentence during either a stay of imposition or stay of execution of sentence except to increase the period of confinement. The powers of the court under this rule are not limited by the duration or expiration of a term of court. Other remedies available in connection with the sentence are provided for the post-conviction remedy (Minn. Stat. Ch. 590 (1971).)

Rule 27.04 (Probation Revocation) sets forth the procedure to be followed to assure that a defendant is accorded all of his constitutional rights to due process as set forth in Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Morrissey v. Brewer, 408 U.S. 471 (1972) before his probation is revoked. The rule is based primarily on ABA Standards,

Sentencing Alternatives and Procedures, 18-7.5 (Approved Draft, 1979) except that no preliminary hearing to determine probable cause is required. Such a hearing, however, is not constitutionally required if the defendant is not in custody or if the final revocation hearing is held within the time that the preliminary hearing would otherwise be required. Pearson v. State, 308 Minn. 287, 241 N.W.2d 490 (1976). The requirement of Rule 27.04, subd. 2(4) that the final revocation hearing be held within seven days if the defendant is in custody makes a preliminary hearing constitutionally unnecessary. It is, however, necessary under Rule 27.04, subd. 1(2) that the defendant be brought before the court after his arrest within the same time limits as set forth under Rule 3.02, subd. 2 for arrests upon warrant. At that time the court may order the defendant released under Rule 27.04, subd. 2(3) pending the final revocation hearing. At that initial appearance the defendant shall also be given the written report showing probable cause if he has not already received that, have counsel appointed if necessary, be advised as to his rights under the rule, and have a time set for the final revocation hearing.

The provisions in Rule 27.04, subd. 1(1) as to the contents of the written report and in Rule 27.04, subd. 2(1) as to the defendant's various procedural rights are taken from ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(d) and (e) (Approved Draft, 1979). The provisions in Rule 27.04, subd. 2(3) concerning release of the defendant are similar to those set forth in Rule 27.01 concerning release of a defendant pending sentencing. The standard of proof set forth in Rule 27.04, subd. 3(2) and (3) is taken from ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(e).

RULE 28. APPEALS TO COURT OF APPEALS

Rule 28.01. Scope of Rule

Subd. 1. Appeals from County and District Court. Rule 28 governs the procedure for appeals in misdemeanor, gross misdemeanor, and felony cases from the district courts and county courts to the Court of Appeals except for cases in which the defendant has been convicted of murder in the first degree.

Subd. 2. Applicability of Rules of Civil Appellate Procedure. Except as otherwise provided in these rules, the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern appellate procedures in such cases.

Subd. 3. Suspension of Rules. In the interest of expediting decision, or for other good cause shown, the Court of Appeals may suspend the requirements or provisions

of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction, but the Court of Appeals may not alter the time for filing notice of appeal except as provided by these rules.

Rule 28.02. Appeal by Defendant

Subd. 1. Review by Appeal. Except as provided by law for the issuance of the extraordinary writs and for the Post-Conviction Remedy, a defendant may obtain review of orders and rulings of the county or district courts by the Court of Appeals only by appeal as provided by these rules. Writs of error are abolished.

Subd. 2. Appeal as of Right.

(1) Final Judgment. A defendant may appeal as of right from any final judgment adverse to him. A judgment shall be considered final within the meaning of these rules when there is a judgment of conviction upon the verdict of a jury or the finding of the court, and sentence is imposed or the imposition of sentence is stayed.

(2) Orders. A defendant may not appeal until final judgment adverse to him has been entered by the trial court except that a defendant may appeal from an order refusing or imposing conditions of release or in felony and gross misdemeanor cases from:

1. an order granting a new trial when the defendant claims that the trial court should have entered a final judgment in his favor; or

2. an order, not on his motion, finding him incompetent to stand trial.

(3) Sentences. A defendant may appeal as of right from any sentence imposed or stayed in a felony case. All other sentences may be reviewed only pursuant to Rule 28.02, subd. 3.

Subd. 3. Discretionary Appeal. The Court of Appeals in the interests of justice and upon petition of the defendant may allow an appeal from an order not otherwise appealable, except an order made during trial, in the manner provided by the Minnesota Rules of Civil Appellate Procedure, provided that the petition shall be served and filed within thirty (30) days after entry of the order appealed.

Subd. 4. Procedure for Appeals Other than Sentencing Appeals.

(1) Service and Filing. An appeal shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on the prosecuting attorney, the attorney general for the State of Minnesota, and the clerk of the trial court in which the judgment or order appealed from is entered. A bond shall not be required of a defendant for exercising his right to appeal. Unless otherwise ordered by the appellate court, defendant need not file a certified copy of the judgment or order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure. Failure of the defendant to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) Contents of Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall give the names, addresses, and telephone numbers of all counsel and indicate whom they represent; shall designate the judgment or order from which appeal is taken; and shall state that the appeal is to the Court of Appeals.

(3) Time for Taking an Appeal. An appeal by a defendant shall be taken within 90 days after final judgment or entry of the order appealed from in felony and gross misdemeanor cases and within 10 days after final judgment or entry of the order appealed from in misdemeanor cases. A notice of appeal filed after the announcement of a decision or order, but before sentencing or entry of judgment or order shall be treated as filed after such entry or sentencing and on the day thereof. If a timely motion to vacate the judgment, for judgment of acquittal, or for a new trial has been made, the time for an appeal from a final judgment does not begin to run until the entry of an order denying the motion, and the order denying the motion may be reviewed upon the appeal from the judgment.

A judgment or order is entered within the meaning of these appellate rules when it is entered upon the record of the clerk of the trial court.

For good cause the trial court or a judge of the Court of Appeals may, before or after the time for appeal has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for appeal.

Subd. 5. Proceedings in Forma Pauperis. Proceedings on appeal or postconviction in forma pauperis shall be as follows:

(1) An indigent defendant wishing the service of an attorney in an appeal or postconviction case shall make application therefore to the office of the Public Defender, addressed as follows:

Minnesota State Public Defender
The Law School, University of Minnesota
Minneapolis, MN 55455

(2) The office of the State Public Defender shall promptly send to such applicant a financial inquiry form, preliminary questionnaire form and such other forms as deemed appropriate.

(3) The applicant shall, if he wishes to pursue his application, completely fill out these forms, sign each of these forms, and have his signature notarized on each of these forms if indicated.

(4) The applicant shall then return these completed documents to the office of the State Public Defender for further processing.

(5) The State Public Defender's office shall determine if the applicant is financially and otherwise eligible for representation. If the applicant is so eligible then the State Public Defender shall represent him regarding a judicial review or an evaluation of the merits of a judicial review of his case in a felony case and may so represent him in misdemeanor or gross misdemeanor cases. Upon the administrative determination by the State Public Defender's office that the office will represent an applicant for such a review or evaluation, the State Public Defender is automatically appointed for that purpose without order of the court. The State Public Defender's office shall notify the applicant of its decision on representation and advise him of any problem relative to his qualifications to obtain the services of the State Public Defender's office. Any applicant who contests a decision of the State Public Defender's office that the applicant is ineligible for representation may apply to the Minnesota Supreme Court for relief.

(6) All requests for transcripts necessary for judicial review or efforts to have cases reviewed in which the defendant is not represented by an

attorney shall be referred by the court receiving the same to the office of the State Public Defender for processing as in paragraphs (2) through (5) above.

(7) All clerks of court shall furnish the office of the State Public Defender copies of any documents in their possession, without the prior payment of the fees therefor and shall bill the office of the State Public Defender for these copies after they have been furnished to the State Public Defender's office.

(8) All fees, other than for furnishing copies of documents, including appeal fees, hearing fees or filing fees, ordinarily charged by the clerks of court shall automatically be waived in cases in which the State Public Defender's office, or other public defender's office, represents the defendant in question. Such fees shall also be waived by the court upon a sufficient showing by any other attorney that the defendant is unable to pay the fees required.

(9) Unless otherwise specifically provided by Supreme Court order, the State Public Defender's office shall be appointed to represent all eligible indigent defendants in all appeal or postconviction cases as provided above, regardless of which county in the state is the county in which the defendant was accused.

(10) In postconviction cases, the cost of transcripts and other necessary expenses shall be borne by the State of Minnesota from funds available to the State Public Defender's office, regardless of which county in the state is the county in which the defendant was accused, if approved by the State Public Defender.

(11) The cost of transcripts and other necessary expenses in all indigent appeal cases shall likewise be paid from funds available to the State Public Defender's office when the county in which the defendant was accused is within a judicial district which has a District Public Defender, including Ramsey and Hennepin Counties, if approved by the State Public Defender.

(12) In all indigent appeal cases arising from judicial district which do not have a District Public Defender system, the costs of transcripts and other necessary expenses shall be borne by the county therein in which the defendant was accused.

(13) When a defendant is represented on appeal by the State Public Defender's office, the provisions of Rule 110.02, subd. 2 of the Minnesota Rules of Civil Appellate Procedure concerning the certificate as to transcript shall not apply. Rather, in such cases, the State Public Defender upon ordering the transcript shall mail a copy of the written request for transcript to the clerk of the trial court, the clerk of the appellate courts, and the prosecuting attorney. The reporter shall promptly acknowledge receipt of said order and his acceptance of it, in writing, with copies to the clerk of the trial court, the clerk of the appellate courts, the State Public Defender, and the prosecuting attorney and in so doing shall state the estimated number of pages of the transcript and the estimated completion date not to exceed 60 days. Upon delivery of the transcript, the reporter shall file with the clerk of the appellate courts a certificate evidencing the date of delivery.

Subd. 6. Stay. When an appeal is taken by the defendant, the execution of judgment or sentence shall not be stayed unless a stay is granted by the trial court judge or a judge of the appellate court.

Subd. 7. Release of Defendant.

(1) Conditions of Release. Upon appeal, if the court grants a stay under subd. 6 of this rule, the conditions for defendant's release and the factors determining the conditions of release shall be governed by Rule 6.02, subd. 1 and subd. 2, except as hereinafter provided by this rule. The court shall also take into consideration that the defendant may be compelled to serve the sentence imposed upon him before the appellate court has an opportunity to decide the case.

(2) Burden of Proof. Release pending appeal from a judgment of conviction upon which the defendant was sentenced to incarceration shall not be granted unless the defendant establishes to the satisfaction of the court that there is no substantial risk the defendant will not appear to answer the judgment following the conclusion of the appellate proceedings, that the defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice, and that the appeal is not frivolous or taken for delay.

(3) Application for Release Pending Appeal. Application for release pending appeal shall be made in the first instance to the trial court. If the trial court refuses release pending appeal, or imposes conditions of release, the court shall state on the record the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review, may be made to the appellate court or a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the prosecuting attorney. The appellate court or a judge thereof may order the release of the defendant pending disposition of the motion.

(4) Credit for Time Spent in Custody. All time the defendant is in custody pending an appeal shall be automatically deducted from the sentence imposed by the court.

Subd. 8. Record on Appeal. The record on appeal shall consist of the papers filed in the trial court, the offered exhibits, and the transcript of the proceedings, if any. Bills of exception and settled cases are abolished.

In lieu of the record as defined by this rule, the parties may within 60 days after filing of the notice of appeal prepare, sign, and file with the clerk of trial court a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court, stating only the claims and facts essential to a decision. If the statement is accurate, it, together with such additions as the trial court may consider necessary to present the issues raised by the appeal, shall be approved by the trial court and shall be the record on appeal. Any recitation of the essential facts of the case, conclusions of law, and memorandum relating thereto of the trial court shall be included with the record. If appellant intends to proceed on appeal with a statement of the case under this rule rather than by obtaining a transcript, or without a statement of the case or transcript, he shall serve notice of his intent to do so on respondent and the clerk of the trial court and file the notice with the clerk of the appellate courts all within the time provided for ordering a transcript.

Subd. 9. Transcript of Proceedings and Transmission of the Transcript and Record. The Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the transcript of the proceedings and the transmission of the transcript and record to the Court of Appeals, except that the transcript shall be ordered within 30 days after filing of the notice of appeal and may be extended by the appellate

court for good cause shown. If the entire transcript is not to be included, the appellant, within the 30 days, shall file with the clerk of the appellate courts and serve on the clerk of the trial court and respondent a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary, he shall order, within 10 days of service of the description or notification of no transcript, those other parts from the reporter deemed necessary, or serve and file a motion in the trial court for an order requiring the appellant to do so.

Subd. 10. Briefs. The appellant shall serve and file his brief and appendix within 60 days after delivery of the transcript by the reporter or after the filing of the trial court's approval of the statement pursuant to subd. 8 of this rule or Rule 110.03 of the Minnesota Rules of Civil Appellate Procedure. In all other cases, if the transcript is obtained prior to appeal or if the record on appeal does not include a transcript, then the appellant shall serve and file his brief and appendix with the clerk of the appellate courts within 60 days after the filing of the notice of appeal. The respondent shall serve and file his brief and appendix, if any, within 45 days after service of the brief of appellant. The appellant may serve and file a reply brief within 15 days after service of the respondent's brief. In all other respects the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

Subd. 11. Scope of Review. On appeal from a judgment, the court may review any pretrial or trial order or ruling, whether or not a motion for new trial has been made, and may review the denial of a motion for new trial or to vacate judgment or for judgment of acquittal, whether ruled upon before or after judgment. The court may review any other matter as the interests of justice may require.

Subd. 12. Action on Appeal. On appeal from a judgment, if the court affirms the judgment, it shall direct the sentence as pronounced by the trial court or as modified by the appellate court pursuant to Rule 28.05, subd. 2, be executed. If it reverses the judgment, it shall either direct a new trial, or that the defendant be discharged or that the conviction be reduced to a lesser included offense or to an offense of lesser degree, as the case may require. If the conviction is reduced, the case shall be returned to the court which imposed the sentence for resentencing.

Subd. 13. Oral Argument.

(1) Allowance of Oral Argument. There shall be oral argument in every case if either party serves on adverse counsel and files with the clerk of the appellate courts a request for it at the time of serving and filing his initial brief, unless:

1. oral argument is forfeited by respondent pursuant to Rule 128.02 of the Minnesota Rules of Civil Appellate Procedure for failure to timely file a brief and appellant has either waived oral argument or not requested it;

2. oral argument is waived pursuant to Rule 134.06; or

3. the appellate court determines in the exercise of its discretion that oral argument is unnecessary because:

a. the dispositive issue or set of issues has been authoritatively settled; or

b. the briefs and record adequately present the facts and legal arguments and the decisional process would not be significantly aided by oral argument.

The clerk of the appellate court shall notify the parties when it has been determined that oral argument shall not be allowed under this provision. Any party so notified may request the court to reconsider its decision by serving on all other parties and filing with the clerk of the appellate courts a written request for reconsideration within 5 days of receipt of the notification that no oral argument shall be allowed. If, under this provision, oral argument is not allowed, the case shall be considered as submitted to the court at the time the clerk of the appellate courts notifies the parties that oral argument has been denied.

The Court of Appeals may direct presentation of oral argument in any case.

(2) Procedure Upon Oral Argument. Except in exigent circumstances, the oral argument shall be heard before the full panel to which the case has been assigned, and in any event shall be considered and decided by the full

panel. Except as otherwise provided by this rule, the procedure upon oral argument including waiver and forfeiture of oral argument shall be as set forth in the Minnesota Rules of Civil Appellate Procedure.

Rule 28.03. Certification of Proceedings

If, upon the trial of any person convicted in any court, or if, upon any motion to dismiss a tab charge, complaint or indictments, or upon any motion relating to the tab charge, complaint, or indictment, any question of law shall arise which in the opinion of the judge is so important or doubtful as to require a decision of the Court of Appeals, he shall, if the defendant shall request or consent thereto, report the case, so far as may be necessary to present the question of law, and certify the report to the Court of Appeals, whereupon all proceedings in the case shall be stayed until the decision of the Court of Appeals. The prosecuting attorney shall, upon certification of the report, forthwith furnish a copy to the attorney general at the expense of the county. Other criminal cases in such trial court involving or depending upon the same question, may, if the defendant so requests, or consents thereto, be stayed in like manner until the decision of the case so certified. Unless otherwise provided by order of the appellate court, the filing and serving of briefs upon certification shall be as provided in Rule 28.04, subd. 2(3).

Rule 28.04. Appeal by Prosecuting Attorney

Subd. 1. Right of Appeal. The prosecuting attorney may appeal as of right to the Court of Appeals:

(1) in any case, from any pretrial order of the trial court except an order dismissing a complaint for lack of probable cause to believe the defendant has committed an offense or an order dismissing a complaint pursuant to Minn. Stat. § 631.21; and

(2) in felony cases from any sentence imposed or stayed by the trial court.

Subd. 2. Procedure Upon Appeal of Pretrial Order. The procedure upon appeal of a pretrial order by the prosecuting attorney shall be as follows:

(1) Stay. Upon oral notice that the prosecuting attorney intends to appeal a pretrial order, the

trial court shall order a stay of proceedings of five (5) days to allow time to perfect the appeal.

(2) Notice of Appeal. Within five (5) days after entry of the order staying the proceedings, the prosecuting attorney shall file with the clerk of the appellate courts a notice of appeal and a copy of the written request to the court reporter for such transcript of the proceedings as appellant deems necessary. Both the notice of appeal and request for transcript shall have attached at the time of filing, proof of service on the defendant or his attorney, the attorney general for the State of Minnesota, and the clerk of the trial court in which the pretrial order is entered. Failure to request the transcript, to file a copy of such request, or to file proof of service does not deprive the Court of Appeals of jurisdiction over the prosecuting attorney's appeal, but it is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal. The contents of the notice of appeal shall be as set forth in Rule 28.02, subd. 4(2).

(3) Briefs. Within fifteen (15) days of delivery of the transcripts, appellant shall file his brief with the clerk of the appellate courts together with proof of service upon the respondent. Within 8 days of service of appellant's brief upon him the respondent shall file his brief with said clerk together with proof of service upon the appellant. In all other respects the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

(4) Dismissal by Attorney General. In appeals by the prosecuting attorney, the attorney general may, in his discretion, within 20 days after entry of the order staying proceedings, dismiss the appeal and shall within 3 days thereafter give notice thereof to the judge of the lower court and file with the clerk of the appellate courts notice of such dismissal. The lower court shall then proceed as if no appeal had been taken.

(5) Oral Argument and Consideration. The provisions of Rule 28.02, subd. 13 concerning oral argument shall apply to appeals by the prosecuting attorney provided that the date of oral argument or submission of the

case to the court without oral argument shall not be more than 3 months after all briefs have been filed. The Court of Appeals shall not hear or accept as submitted any such appeals more than 3 months after all briefs have been filed and in such cases the lower court shall then proceed as if no appeal had been taken.

(6) Attorney's Fees. Reasonable attorney's fees and costs incurred shall be allowed to the defendant on such appeal which shall be paid by the county in which the prosecution was commenced.

(7) Joinder. The prosecuting attorney may appeal from one or several of the orders under this rule joined in a single appeal.

(8) Time for Appeal. The prosecuting attorney may not appeal under this rule until after the Omnibus Hearing has been held under Rule 11, or the evidentiary hearing and pretrial conference, if any, have been held under Rule 12, and all issues raised therein have been determined by the trial court. An appeal by the prosecuting attorney under this rule bars any further appeal by the prosecuting attorney from any existing orders not included in the appeal. No appeal of a pretrial order by the prosecuting attorney shall be taken after jeopardy has attached.

An appeal under this rule does not deprive the trial court of jurisdiction over pending matters not included in the appeal.

Subd. 3. Cross-Appeal by Defendant. Upon appeal by the prosecuting attorney, the defendant may obtain review of any pretrial order which will adversely affect him, by filing a notice of cross-appeal with the clerk of the appellate courts, together with proof of service on the prosecuting attorney, within 10 days after service of notice of the appeal by the prosecuting attorney under Rule 28.04, subd. 2(2). Failure to serve the notice does not deprive the Court of Appeals of jurisdiction over defendant's cross-appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the cross-appeal.

Subd. 4. Conditions of Release. Upon appeal by the prosecuting attorney, the conditions for defendant's release pending the appeal shall be governed by Rule 6.02, subd. 1 and subd. 2. The court shall also consider that the defendant, if

not released, may be confined for a longer time pending the appeal than would be possible under the potential sentence for the offense charged.

Subd. 5. Proceedings in Forma Pauperis. An indigent defendant wishing the services of an attorney in an appeal taken by the prosecuting attorney under this rule shall proceed under Rule 28.02, subd. 5.

Rule 28.05. Appeal from Sentence Imposed or Stayed

Subd. 1. Procedure. The following procedures shall apply to the appeal of a sentence imposed or stayed as permitted by these rules:

(1) Notice of Appeal and Briefs. Any party appealing a sentence shall file with the clerk of the appellate courts, within 90 days after judgment and sentencing, (a) a notice of appeal, (b) 9 copies of an informal letter brief setting forth the arguments concerning the illegality or inappropriateness of the sentence, (c) an affidavit of service of the notice upon opposing counsel, the attorney general, and the clerk of the trial court in which the sentence was imposed or stayed, and (d) an affidavit of service of the brief upon opposing counsel and upon the attorney general. A defendant appealing the sentence and the judgment of conviction has the option of combining the two appeals into a single appeal; when this option is selected the procedures established by Rule 28.02 of these rules shall continue to apply. The clerk of the appellate courts shall not accept a notice of appeal from sentence unless accompanied by the requisite briefs and affidavit of service.

(2) Transmission of Record. Upon receiving a copy of the notice of appeal, the clerk of the trial court shall immediately forward to the clerk of the appellate courts, (a) a transcript of the sentencing hearing and any written explanation of sentence by the trial court which is not already included in the transcript, (b) the sentencing guidelines worksheet, and (c) any presentence investigation report.

(3) Respondent's Brief. Within 10 days of service upon respondent of the copy of the notice of appeal and appellant's brief, respondent, if he wishes to respond, shall serve his informal letter brief upon appellant and file with the clerk of the appellate courts 9 copies of his brief.

(4) Other Procedures. The provisions of Rule 28.02, subd. 4(2) concerning the contents of the notice of appeal, Rule 28.02, subd. 5 concerning proceedings in forma pauperis, Rule 28.02, subd. 6 concerning stays, Rule 28.02, subd. 7 concerning the release of the defendant on appeal, and Rule 28.02, subd. 13 concerning oral argument shall apply to sentence appeals under this rule.

Subd. 2. Action on Appeal. On appeal of a sentence, the court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the sentencing court. This review shall be in addition to all other powers of review presently existing. The court may dismiss or affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence or order further proceedings to be had as the court may direct.

Comment

Rule 28 governs the procedure for appeals to the Court of Appeals, Minn. Stat. Ch. 480A (1982), in all petty misdemeanor, misdemeanor, gross misdemeanor, and felony cases except for cases in which the defendant has been convicted of murder in the first degree. Appeals to the Supreme Court in criminal cases are permitted as a matter of right only when a defendant has been convicted of murder in the first degree, Minn. Stat. § 632.14 (1982), and the procedure in such cases is governed by Rule 29. Rule 29 also governs the procedure for seeking further discretionary review in the Supreme Court of any decision by the Court of Appeals.

The provision of Rule 28.01, subd. 3 for suspension of the rules if taken from Fed. R. App. P. 2 and Minn. R. Civ. App. P. 102. The court, however, may not extend the time for filing a notice of appeal except as provided by Rule 28.02, subd. 4(3).

Under Rule 28.02, subd. 1 the defendant may obtain review of lower court orders and rulings only by appeal except as may be provided in the case of the extraordinary writ authorized by Minn. Const. art. VI, § 2, and the postconviction remedy, Minn. Stat. Ch. 590. The statutory authorization for the extraordinary writs is contained in Minn. Stat. § 480A.06, subd. 5 (1982) and Chapter 586 (Mandamus), 589 (Habeas Corpus), and 606 (Certiorari). The procedure for obtaining writs of mandamus or prohibition is contained in Minn. R. Civ. App. P. 120 and 121.

The provisions in Rule 28.02, subd. 2(2) concerning a defendant's right to appeal from an order refusing or imposing conditions of release is taken from Fed. R. App. P. 9(a) and 18 U.S.C. § 3147(b). The remaining provisions of Rule 28.02, subd. 2(1) and (2) are taken substantially from ABA Standards, Criminal Appeals, 21-1.3 (Approved Draft, 1979). Rule 28.02, subd. 2(3) giving a defendant the right to appeal any sentence imposed or stayed in a felony case is based on Minn. Stat. § 244.11 (1982). Under Rule 28.04, subd. 1(2) the prosecuting attorney also has a right to appeal from a sentence imposed or stayed. Under Rule 27.04, subd. 3(5) either the defendant or the prosecuting attorney may also appeal from the court's decision in a probation revocation proceeding.

Rule 28.02, subd. 3 (Discretionary Appeal) is taken from Minn. R. Civ. App. P. 105 which sets forth the procedure to be followed by a defendant in seeking permission to proceed with an appeal from an order not otherwise appealable. A defendant seeking to appeal from a sentence imposed or stayed in a misdemeanor or gross misdemeanor case would have to proceed under this rule.

Under Rule 28.02, subd. 4 (Procedure for Appeals Other Than Sentencing Appeals) the method for perfecting an appeal to the Court of Appeals is similar to that provided in Minn. R. Civ. App. P. 103.01 except that it is not necessary to file a certified copy of the judgment or order appealed from, a statement of the case, or a bond. Timely filing of the notice with the clerk of the appellate courts is the jurisdictional prerequisite for the appeal. However, failure to take the other actions required by the rule could result in dismissal of the appeal or some lesser sanction as the Court of Appeals deems appropriate.

Under Rule 28.02, subd. 4(3) (Time for Taking an Appeal) a timely motion for a new trial (Rule 26.04, subd. 1(3)), a motion for judgment of acquittal (Rule 26.03, subd. 17(3)), or motion to vacate judgment (Rule 26.04, subd. 2) delays the start of the time period for taking an appeal from the judgment until entry of the order denying the motion. The provisions for extension of time for taking an appeal are based on Fed. R. App. P. 4(b).

Rule 28.02, subd. 5 (Proceedings in Forma Pauperis) sets forth the procedures for an indigent defendant to follow to obtain the assistance of the State Public Defender with an appeal or postconviction proceeding. See Minn. Stat. § 611.25 (1982) as to the powers and duties of the State Public Defender.

Rule 28.02, subd. 7(1), (2), and (3) (Release of Defendant, Burden of Proof, and Application for Release Pending Appeal) are adapted from ABA Standards, Criminal Appeals, 21-2.5(a) and (b) (Approved Draft, 1979), Fed. R. App. P. 9(b) and (c), and 18 U.S.C. § 3148.

Rule 28.02, subd. 8 (Record on Appeal) is based on Minn. R. Civ. App. P. 110.01 and 110.04.

Under Rule 28.02, subd. 9 (Transcript of Proceedings and Transmission of the Transcript and Record) the transcript must be ordered within 30 days after filing of the notice of appeal rather than within 10 days as otherwise provided by Minn. R. Civ. App. P. 110.02, subd. 1. The other provisions of Minn. R. Civ. App. P. 110 and 111 concerning the content and transmission of the record and transcripts apply to criminal appeals under Rule 28. It is therefore necessary in a criminal appeal upon ordering the transcript to serve and file a Certificate as to Transcript as required by Minn. R. Civ. App. P. 110.02, subd. 2.

Rule 28.02, subd. 10 (Briefs) establishes time limits for serving and filing briefs in criminal cases different from that provided by Minn. R. Civ. App. P. 131.01 for civil cases. Also, the appellant's initial brief in a criminal case, unlike in a civil case, must contain a statement of the procedural history. Otherwise, the provisions of Minn. R. Civ. App. P. 128, 129, 130, 131, and 132 concerning the form and filing of briefs govern in the appeal of a criminal case.

Rule 28.02, subd. 11 (Scope of Review) is adapted from Minn. R. Civ. App. P. 103.04 except that on appeal from the final judgment it permits review of pretrial and trial orders or rulings whether or not a motion for new trial has been made, and timely post-trial motions may be reviewed whether ruled upon before or after judgment.

A party appealing to the Court of Appeals does not automatically receive oral argument. Rather, Rule 28.02, subd. 13(1) (Right to Oral Argument) requires a party desiring oral argument to serve and file with his initial brief a written request for the argument. If oral argument is requested, it shall be granted unless one of the three grounds set forth in the rule exists. The first two grounds of waiver and forfeiture are taken from Minn. R. Civ. App. P. 134.01. The final ground permitting denial of oral argument is based on Minn. R. Civ. App. P. 134.01 and Rule 10(d) of the Eighth Circuit Rules of Appellate Procedure.

Pursuant to Minn. Stat. § 480A.08, subd. 3, the Court of Appeals shall decide every case within 90 days after oral argument or final submission of briefs, whichever is later. If oral argument is denied under Rule 28.02, subd. 13(1)3 the case shall be considered as submitted to the court at the time the clerk so notifies the parties. If oral argument is not held because it was not requested by the parties or was waived or forfeited by them, then the date upon which the case

is considered submitted to the court is determined under Minn. R. Civ. App. P. 134.06. Under Minn. R. Civ. App. P. 134.06 waiver of oral argument requires the consent of the court as well as the agreement of the parties.

Rule 28.03 (Certification of Proceedings) is based upon former Minn. Stat. § 632.10 which was repealed in 1979.

Rule 28.04 (Appeal by Prosecuting Attorney) sets forth the right and the procedure for the prosecuting attorney to appeal to the Court of Appeals. The right of the prosecuting attorney under Rule 28.04, subd. 1(2) to appeal from a sentence imposed or stayed in a felony is based on Minn. Stat. § 244.11 (1982). The procedure for such sentencing appeal is set forth in Rule 28.05.

To the extent that an order granting a defendant a new trial also suppresses evidence, it will be viewed as a pretrial order concerning the retrial and the prosecuting attorney may appeal the suppression part of the order under Rule 28.04, subd. 1(1). State v. Brown, 317 N.W.2d 714 (Minn. 1982). A good faith timely motion by the prosecuting attorney for clarification or rehearing of an appealable order extends the time to appeal from that order until 5 days after entry of the order deciding the motion for clarification or rehearing. State v. Wollan, 303 N.W.2d 253 (Minn. 1981).

Generally, absent special circumstances, failure of the prosecuting attorney to file his brief within the 15 days as provided by Rule 28.04, subd. 2(3) will result in dismissal of the appeal. State v. Schroeder, 292 N.W.2d 758 (Minn. 1980); State v. Olson, 294 N.W.2d 320 (Minn. 1980); State v. Weber, 313 N.W.2d 387 (Minn. 1981). Although the prosecutor need no longer submit with his notice of appeal the statement formerly required by Minn. Stat. § 632.12, he is required by the court's decisions in State v. Webber, 262 N.W.2d 157 (Minn. 1977), State v. Helenbolt, 280 N.W.2d 631 (Minn. 1979), and State v. Fisher, 304 N.W.2d 33 (Minn. 1981) to show on appeal that the trial court clearly and unequivocally erred and that, unless reversed, the error will have a critical impact on the outcome of the trial.

Rule 28.04, subd. 2(6) (Attorney's Fees), providing for payment of attorney's fees by the county in which the prosecution was commenced assumes that the prosecution was commenced in a proper county.

Rule 28.05 (Appeal from Sentence Imposed or Stayed) is taken from the order of the Minnesota Supreme Court dated February 28, 1980. These appeal procedures are necessary

because Minn. Stat. § 244.11 (1982) now authorizes both the defendant and the prosecution to appeal from any sentence imposed or stayed by the court for felony offenses occurring on or after May 1, 1980. Permitting the state to appeal a sentence does not violate the constitutional protection against double jeopardy. United States v. DiFrancesco, 449 U.S. 117 (1980).

Rule 28.05, subd. 2 (Action on Appeal) is taken from Minn. Stat. § 244.11 (1982).

RULE 29 APPEALS TO SUPREME COURT

Rule 29.01. Scope of Rule

Subd. 1. Appeals from Court of Appeals and in First Degree Murder Cases. Rule 29 governs the procedure in misdemeanor, gross misdemeanor, and felony cases for appeals from the Court of Appeals to the Supreme Court and from the district court to the Supreme Court in cases in which the defendant has been convicted of murder in the first degree.

Subd. 2. Applicability of Rules of Civil Appellate Procedure. Except as otherwise provided in these rules, the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern appellate procedure in such cases.

Subd. 3. Suspension of Rules. In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these rules in a particular case on application of any party or on its own motion and may order proceedings in accordance with its direction, but the Supreme Court may not alter the time for filing notice of appeal or filing a petition for review except as provided by these rules.

Rule 29.02. Right of Appeal

Subd. 1. Appeals in First Degree Murder Cases. A defendant may appeal as of right from the trial court to the Supreme Court only from a final judgment of conviction of murder in the first degree. Upon such an appeal the defendant may include other charges which were joined for prosecution with the first degree murder charge. Except as otherwise provided in Rule 118 of the Rules of Civil Appellate Procedure for accelerated review by the Supreme Court of cases pending in the Court of Appeals, there shall be no other direct appeals from the county court or district court to the Supreme Court.

Subd. 2. Appeals from Court of Appeals. A party may appeal from a final decision of the Court of Appeals to the Supreme Court only with leave of the Supreme Court.

Rule 29.03. Procedure for Appeals in First Degree Murder Cases

Subd. 1. Service and Filing. An appeal shall be taken by filing a notice of appeal to the Supreme Court with the clerk of the appellate courts together with proof of service on the prosecuting attorney, the attorney general for the State of Minnesota, and the clerk of the trial court in which the judgment appealed from is entered. A bond shall not be required of a defendant for exercising his right to appeal. Unless otherwise ordered by the Supreme Court, defendant need not file a certified copy of the judgment appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure. Failure of the defendant to take any other step than timely filing his notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems necessary, including dismissal of the appeal.

Subd. 2. Contents of Notice of Appeal. The notice of appeal shall specify the defendant taking the appeal; shall give the names, addresses, and telephone numbers of all counsel and indicate whom they represent; shall designate the judgment from which appeal is taken; and shall state that the appeal is to the Supreme Court.

Subd. 3. Time for Taking an Appeal. An appeal by a defendant from a final judgment of conviction of murder in the first degree shall be taken within 90 days after the final judgment. A judgment shall be considered final within the meaning of these rules when there is a judgment of conviction upon the verdict of a jury or the finding of the court, and sentence is imposed. A notice of appeal filed after the announcement of a decision, or order, but before sentencing or entry of judgment shall be treated as filed after such sentencing or entry and on the day thereof. If a timely motion to vacate the judgment, for judgment of acquittal, or for a new trial has been made, the time for an appeal from a final judgment does not begin to run until the entry of an order denying the motion, and the order denying the motion may be reviewed upon appeal from the judgment.

A judgment or order is entered within the meaning of these appellate rules when it is entered upon the record of the clerk of the trial court.

For good cause the trial court or a justice of the Supreme Court may, before or after the time for appeal has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for appeal.

Subd. 4. Other Procedures. The provisions of Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 6, concerning stays, Rule 28.02, subd. 7, concerning release of defendant, Rule 28.02, subd. 9, concerning the transcript of proceedings and transmission of the transcript and record, Rule 28.02, subd. 10, concerning briefs, Rule 28.02, subd. 11, concerning the scope of review, and Rule 28.02, subd. 12, concerning action on appeal, and Rule 29.04, subd. 9, concerning oral argument shall apply to appeals in first degree murder cases under this rule.

Rule 29.04. Procedure for Appeals from Court of Appeals

Subd. 1. Service and Filing. A party petitioning for review to the Supreme Court from the Court of Appeals shall file nine copies of a petition for review with the clerk of the appellate courts together with proof of service on adverse counsel and, when the petitioning party is not the attorney general, also proof of service on the attorney general for the State of Minnesota. A bond shall not be required of a defendant as a condition of petitioning for review. Failure of a party to take any other step than timely filing the petition for review does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate including dismissal of the appeal.

Subd. 2. Time for Petitioning. In cases originally appealed to the Court of Appeals by the prosecuting attorney pursuant to Rule 28.04, a party petitioning for review to the Supreme Court from the Court of Appeals shall serve and file the petition for review within 20 days after the filing of the Court of Appeals' decision. For all other cases, a party petitioning for review to the Supreme Court from the Court of Appeals shall serve and file the petition for review within 30 days after the filing of the Court of Appeals' decision.

In all cases except those originally appealed to the Court of Appeals by the prosecuting attorney pursuant to Rule 28.04, a justice of the Court of Appeals or the Supreme Court may for good cause, before or after the time to serve and file a petition for review has expired, with or without motion and notice, extend

the time for serving and filing such a petition for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for that purpose.

Subd. 3. Contents of Petition for Review. The petition for review shall not exceed 10 pages exclusive of the appendix and shall identify the petitioner, state that petitioner is seeking permission to appeal to the Supreme Court from the Court of Appeals and contain in order the following information:

(1) the names, addresses, and telephone numbers of the attorneys for all parties;

(2) the date the decision of the Court of Appeals was filed and a designation of the judgment or order from which petitioner had appealed to the Court of Appeals;

(3) a concise statement of the legal issue or issues presented for review along with an indication of how each issue was decided in the trial court and in the Court of Appeals;

(4) a procedural history of the case from commencement of prosecution through filing of the decision in the Court of Appeals including a designation of the trial court and trial judge and the disposition of the case in the trial court and in the Court of Appeals;

(5) a concise statement of facts indicating briefly the nature of the case and including only those facts relevant to the issue or issues sought to be reviewed;

(6) a concise statement of the reasons why the Supreme Court should exercise its discretion to review the case; and

(7) an appendix containing a copy of the written decision of the Court of Appeals and a copy of any recitation of the essential facts of the case, conclusions of law, and memoranda relating thereto from the trial court.

Subd. 4. Discretionary Review. Review of any decision of the Court of Appeals is discretionary with the Supreme Court. The following criteria may be considered:

(1) the question presented is an important one upon which the Supreme Court should rule;

(2) the Court of Appeals has ruled on the constitutionality of a statute;

(3) the Court of Appeals has decided a question in direct conflict with an applicable precedent of a Minnesota appellate court;

(4) the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers; or

(5) a decision by the Supreme Court will help develop, clarify, or harmonize the law; and

1. the case calls for the application of a new principle or policy;

2. the resolution of the question presented has possible statewide impact; or

3. the question is likely to recur unless resolved by the Supreme Court.

Subd. 5. Response to Petition. When a petition for review has been filed, the opposing party shall file nine copies of any response to the petition, not to exceed 10 pages exclusive of the appendix, with the clerk of the appellate courts together with proof of service on appellant within 20 days after service of the petition upon respondent. Failure to respond to the petition shall not be considered as agreement with the petition.

Subd. 6. Cross-Petition by Respondent. A respondent cross-petitioning for review to the Supreme Court shall file nine copies of a cross-petition for review, not to exceed 10 pages exclusive of the appendix, with the clerk of the appellate courts together with proof of service on appellant within 20 days after service of the petition for review on respondent or within 30 days after filing of the decision of the Court of Appeals, whichever is later. The cross-petition shall conform to the requirements of Rule 29.04, subd. 3, except that the procedural history, statement of facts, and appendix need not be included unless respondent is dissatisfied with them as they appear in the petition for review.

The court may permit a respondent, without filing a cross-appeal, to defend a decision of judgment on any ground that the law and record permit that would not expand the relief he has been granted.

Subd. 7. Action on Petition or Cross-Petition. The Supreme Court shall issue and file its order granting or denying permission to appeal or cross-appeal within 60 days of the date the petition is filed. Upon the filing of the order, the clerk of the appellate courts shall mail a copy of it to the attorneys for the parties.

Subd. 8. Briefs. Except as otherwise provided in subd. 10 of this rule, appellant shall serve and file his brief and appendix within 30 days after entry of the order granting permission to appeal and respondent shall serve and file his brief and appendix, if any, within 30 days after service of the brief of appellant. The appellant may serve and file a reply brief within 10 days after service of the respondent's brief. The Rules of Civil Appellate Procedure to the extent applicable shall otherwise govern the form and filing of briefs except that appellant's brief shall also include a statement of the procedural history.

Subd. 9. Oral Argument. Each party shall serve and file with his initial brief a notice stating whether oral argument is requested. Oral argument shall be granted unless the court determines it is unnecessary because:

(1) neither party has requested oral argument in the notice served and filed with the initial briefs;

(2) oral argument is forfeited pursuant to Rule 128.02 of the Rules of Civil Appellate Procedure; or

(3) oral argument is waived pursuant to Rule 134.06 of the Rules of Civil Appellate Procedure.

The Supreme Court may direct presentation of oral argument in any case.

Subd. 10. Appeals Involving Pretrial Orders.

(1) Briefs. In cases originally appealed to the Court of Appeals by the prosecuting attorney pursuant to Rule 28.04, the appellant shall within fifteen (15) days from the date of entry of the order granting permission to appeal serve his brief upon opposing counsel and file with the clerk of the appellate courts 14 copies thereof. Within eight (8) days of such service on respondent, respondent shall serve his brief upon appellant and file 14 copies thereof with said clerk.

(2) Hearing. Additionally in such cases the date of oral argument or submission of the case to the court without oral argument shall not be more than three months after all briefs have been filed. The Supreme Court shall not hear or accept as submitted any such appeal more than three months after all briefs have been filed and in such cases the lower court shall then proceed pursuant to the judgment of the Court of Appeals as if no further appeal had been taken to the Supreme Court.

(3) Attorney's fees. Reasonable attorney's fees and costs incurred shall be allowed to the defendant on an appeal to the Supreme Court by the prosecuting attorney in a case originally appealed by the prosecuting attorney to the Court of Appeals pursuant to Rule 28.04. Such fees shall be paid by the county in which the prosecution was commenced.

(4) Conditions of Release. Upon an appeal to the Supreme Court in a case originally appealed by the prosecuting attorney pursuant to Rule 28.04, the conditions for defendant's release pending the appeal shall be governed by Rule 6.02, subd. 1 and subd. 2.

Subd. 11. Other Procedures. The provisions of Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 6, concerning stays, Rule 28.02, subd. 7, concerning release of defendant, Rule 28.02, subd. 8, concerning record on appeal, Rule 29.02, subd. 11, concerning the scope of review, and Rules 28.02, subd. 12 and 28.05, subd. 2, concerning action on appeal shall apply to appeals to the Supreme Court from the Court of Appeals.

Comment

Rule 29 governs the procedure for discretionary appeals from the Court of Appeals to the Supreme Court and for appeals as of right from the district court to the Supreme Court in cases in which the defendant has been convicted of murder in the first degree.

Rule 29.01, subd. 3 (Suspension of Rules) is similar to Rule 28.01, subd. 3 governing the Court of Appeals and is taken from Fed. R. App. P. 2 and Minn. R. Civ. App. P. 102. The court, however, may not extend the time for filing a notice of appeal or a petition for review except as provided by Rules 29.03, subd. 3 and 29.04, subd. 2.

Under Rule 29.02, subd. 1 (Appeals in First Degree Murder Cases) and Minn. Stat. § 632.14 (1982) direct appeals from the trial court to the Supreme Court in criminal cases are permitted only from a final judgment of conviction of murder in the first degree. Other charges which were joined for prosecution with the first degree murder charge may be included on the appeal. Rule 29.02, subd. 1 permits an appeal only from final judgment as defined in Rule 29.02, subd. 3. Therefore, appeals of any matters in a first degree murder prosecution arising before final judgment, such as an appeal by the prosecuting attorney of a pretrial order, should go to the Court of Appeals under Rule 28 initially.

Under Rule 29.02, subd. 2 (Appeals from Court of Appeals), the discretionary appeal to the Supreme Court is taken from the decision of the Court of Appeals. The procedure for such an appeal is set forth in Rule 29.04.

The procedure for appeals in first degree murder cases as set forth in Rule 29.03 is basically the same as that set forth in Rule 28.02 for appeals to the Court of Appeals by defendants in all other criminal cases. See the comments on Rule 28.02 for explanations of those provisions that are similar. Oral argument on the appeal of a first degree murder case is governed by Rule 29.04, subd. 3 and the comments to that rule also apply.

The discretionary appeal to the Supreme Court under Rule 29.04 (Procedure for Appeals from Court of Appeals) is taken from the final decision of the Court of Appeals. The time limits specified in Rule 29.04, subd. 2 (Time for Petitioning) for filing a petition for review run from the date of filing of that final decision with the clerk of the appellate courts. The clerk of the appellate Courts is required by Minn. R. Civ. App. P. 136.01, subd. 2 to mail copies of the final decision to the attorneys for the parties and to the trial court when the Court of Appeals files its decision.

Under Minn. R. Civ. App. P. 136.02 the clerk of the appellate courts is to enter judgment pursuant to the decision of the Court of Appeals not less than 30 days after that decision is filed. The filing of a petition for review under Rule 29.04 stays entry of the judgment and transmission of the judgment back to the clerk of the trial court according to Minn. R. Civ. App. P. 136.02 and 136.03. If the petition for review is denied, the judgment is to be entered and transmitted immediately.

Rule 29.04, subd. 2 (Time for Petitioning) provides shorter time limits for petitioning the Supreme Court for review when the appeal concerns a pretrial order originally appealed to the

Court of Appeals by the prosecuting attorney. In such cases either the defendant or the prosecuting attorney can petition for review to the Supreme Court from an adverse decision in the Court of Appeals. If the Supreme Court agrees to permit such an appeal, Rule 29.04, subd. 10 provides additional provisions to expedite the appeal. For all other cases, the time limits for petitioning and responding are the same as those specified for civil cases under Minn. R. Civ. P. 117.

The criteria set forth in Rule 29.04, subd. 4 (Discretionary Review) to be considered by the Supreme Court in deciding whether to grant a petition for review are the same as those set forth in Minn. R. Civ. App. P. 117, subd. 2. The rule is based in part on Minn. Stat. § 480A.10, subd. 1 (1982).

The provision in Rule 29.04, subd. 6 (Cross-Petition by Respondent) permitting a respondent to defend a decision or judgment on any ground that the law and record permit even without filing a cross-petition is taken from Rule 10.5 of the Rules of the Supreme Court of the United States.

The 60-day time limit for granting or denying permission to appeal as provided in Rule 29.04, subd. 7 (Action on Petition or Cross-Petition) is taken from Minn. Stat. § 480A.10, subd. 1 (1982).

Except as provided by Rule 29.04, subd. 10 (Appeals Involving Pretrial Orders), the time limits for serving and filing briefs under Rule 29.04, subd. 8 (Briefs) are the same as provided in Minn. R. Civ. App. P. 131.01 for civil cases. See Minn. R. Civ. App. P. 128, 129, 130, 131, and 132 for other provisions governing the form and filing of briefs in a criminal case.

Rule 29.04, subd. 9 (Oral Argument) is based on Minn. R. Civ. App. P. 134.01. See Minn. R. Civ. App. P. 134.02, 134.03, 134.04, 134.05, 134.06, 134.07, and 134.08 for other provisions governing oral argument in a criminal case.

Rule 29.04, subd. 10 (Appeals Involving Pretrial Orders) provides additional limitations upon appeals to the Supreme Court for cases which were originally appealed to the Court of Appeals by the prosecuting attorney under Rule 28.04.

Rule 29.04, subd. 11 (Other Procedures) provides by reference that certain procedures set forth in Rule 28 shall also apply to discretionary appeals from the Court of Appeals to the Supreme Court under Rule 29.04. See the comments to Rule 28 for an explanation of those procedures referred to by Rule 29.04, subd. 11.

RULE 30. DISMISSAL

Rule 30.01. By Prosecuting Attorney

The prosecuting attorney may in writing or on the record, stating the reasons therefor, including the satisfactory completion of a pretrial diversion program, dismiss a complaint or tab charge without leave of court and an indictment with leave of court. In felony and gross misdemeanor cases, if the dismissal is on the record, it shall be transcribed and filed.

Rule 30.02. By Court

If there is unnecessary delay by the prosecution in bringing a defendant to trial, the court may dismiss the complaint, indictment or tab charge.

Comment

Rule 30.01 (Dismissal by Prosecuting Attorney) is adopted from F.R.Crim.P. 48(a) except that dismissal of a complaint or tab charge does not require leave of court. As to when jeopardy attaches, see comment to Rule 25.02. According to State v. Aubol, 309 Minn. 323, 244 N.W.2d 636 (1976), leave to dismiss must be granted if the prosecutor has provided a factual basis for the insufficiency of the evidence to support a conviction, and the court is satisfied that the prosecutor has not abused his discretion.

Rule 30.02 (Dismissal by Court) is taken from F.R.Crim.P. 48(b) and takes the place of Minn. Stat. § 611.04 (1971). See also comment to Rule 11.11 relative to the constitutional right to a speedy trial and the consequences of a denial.

RULE 31. HARMLESS ERROR AND PLAIN ERROR

Rule 31.01. Harmless Error

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Rule 31.02. Plain Error

Plain errors or defects affecting substantial rights may be considered by the court upon motions for new trial, post-trial motions, and on appeal although they were not brought to the attention of the trial court.

Comment

Rule 31.01 (Harmless Error) comes from F.R.Crim.P. 52(a).

Rule 31.02 (Plain Error) is adapted from F.R.Crim.P. 52(b).

RULE 32. MOTIONS

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court or these rules permit it to be made orally. The motion shall state the grounds upon which it is made and shall set forth the relief or order sought and may be supported by affidavit.

Comment

Rule 32 (Motions) is taken from F.R.Crim.P. 47 and Minn. R. Civ. P. 7.02.

RULE 33. SERVICE AND FILING OF PAPERS

Rule 33.01. Service; Where Required

Written motions other than those which are heard ex parte, written notices, and other similar papers shall be served upon each of the parties.

Rule 33.02. Service; How Made

Whenever under these rules or by an order of court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions or as ordered by the court or as required by these rules.

Rule 33.03. Notice of Orders

Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a copy thereof and shall make a record of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by these rules.

Rule 33.04. Filing

(a) Except as provided in Rule 9.03, subd. 9, search warrants and search warrant applications, affidavits and inventories, including statements of unsuccessful execution, and papers required to be served shall be filed with the court. Papers shall be filed as provided in civil actions.

(b) Except as otherwise provided by this rule, search warrants and related documents need not be filed until after execution of the search or the expiration of ten days.

(c) A complaint, indictment, application, or affidavit requesting a warrant directing the arrest of a person or authorizing a search and seizure may contain or be accompanied by a request by the prosecuting attorney that the complaint, indictment, application or affidavit, any supporting evidence or information, and any order granting the request, not be filed.

(d) An order shall be issued granting the request in whole or in part, if the judge finds from affidavits, sworn testimony or evidence that there are reasonable grounds to believe that: (1) in the case of complaint, indictment, or arrest documents, such filing may lead to any person to be arrested fleeing or secreting himself or otherwise preventing the execution of the warrant or (2) in the case of a search warrant application or affidavit, such filing may cause this search or a related search to be unsuccessful or could create a substantial risk of injuring an innocent person or severely hampering an ongoing investigation.

(e) The order shall further direct that upon the execution of and return of an arrest warrant, the filing required by subd. (a) shall forthwith be complied with; and in the case of a search warrant, the application or affidavit in support thereof shall be filed forthwith following the commencement of any criminal proceeding utilizing evidence obtained in or as a result of the search, or at any other such time as directed by the judge. Until such filing, the documents and materials ordered withheld from filing shall be retained by the judge or the judge's designee.

Comment

Rule 33.01 (Service: Where Required) comes from F.R.Crim.P. 49(a).

Rule 33.02 (Service: How Made) is taken from F.R.Crim.P. 49(b) and provides that service upon the attorney or a party shall be made in the manner provided in civil actions, or as ordered by the court or as provided by these rules. Minn. R. Civ. P. 5.02 provides the method for service in civil actions. Rule 21.02 of these rules provides how the defendant shall be served with notice of the taking of depositions. Rules requiring notice or service are: Rules 7.01 (Rasmussen and Spreigl Notices); 9.02, subd. 1(3) (Notice of Defenses); 9.02, subd. 2(2) (Notice of Time and Place of Discovery on Order of Court); 9.02, subd. 2(4) (Notice of Results of

Discovery Following Order of Court); 10.04, subd. 1 (Service of Motions); 28.02, subd. 3 (Discretionary Appeal); 28.02, subd. 4 (Procedure for Appeals Other than Sentencing Appeals by the Defendant); 28.04, subd. 2 (Procedure Upon Appeal of Pretrial Order by the Prosecuting Attorney); 28.04, subd. 3 (Cross-Appeal by Defendant); 28.05, subd. 1(1) (Notice of Appeal and Briefs in Sentencing Appeals); 29.03, subds. 1 and 3 (Procedure for Appeals in First Degree Murder Cases); 29.04, subds. 1 and 2 (Procedure for Appeals From Court of Appeals); 29.04, subd. 5 (Response to Petition); 29.04, subd. 6 (Cross-Petition by Respondent).

Rule 33.03 (Notice of Orders) comes from F.R.Crim.P. 49(c) and Minn. R. Civ. P. 77.04. Rules 28.02, subd. 4(3), 29.03, subd. 3, and 29.04, subd. 2 provide for extension of time for taking an appeal.

Rule 33.04 (Filing) adopts F.R.Crim.P. 49(d) and Minn. R. Civ. P. 5.04.

The Rule as amended [in 1978] contains several safeguards against unwarranted orders which withhold the filing of documents referred to in the Rule. The prosecuting attorney, a responsible public official, must request the order; the request must be supported by adequate evidence showing the need for the order; the need must be found by a judge to exist; and, finally, when the arrest or search warrant has been executed, the documents must be filed immediately, and thereupon become available to the public. Supporting precedents for this Rule are: Grand jury secrecy about indictment issued; (Rule 18.08), Minn. Stat. § 626A.06, subd. 9, prohibiting disclosures of applications for and granting of warrants for interception of communications.

RULE 34. TIME

Rule 34.01. Computation

Except as provided by Rules 3.02, subd. 2(2), 4.02, subd. 5(1), and 4.02, subd. 5(3), time shall be computed as follows:

The day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is seven days or less, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday (Presidents' Birthday), Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other

day appointed as a holiday by the President or the Congress of the United States or by the State.

Rule 34.02. Enlargement

When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 26.03, subd. 17(3); 26.04, subd. 1(3); or 26.04, subd. 2, or except as provided by Rules 28.02, subd. 4(3), 29.03, subd. 3, and 29.04, subd. 2 the time for taking an appeal.

Rule 34.03. For Motions; Affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing unless a different period is fixed by rule or order of court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served not less than one day before the hearing unless the court permits them to be served at a later time.

Rule 34.04. Additional Time After Service by Mail

Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period.

Rule 34.05. Unaffected by Expiration

The continued existence or the expiration of a term of court does not affect or limit the period of time provided for the doing of any act or the taking of any proceeding, or affect the power of the court to do any act or take any proceeding in any action which has been pending before it.

Comment

Rule 34.01 (Computation) adopts Minn. R. Civ. P. 6.01 except that it specifies the legal holidays provided for by Minn. Stat. § 645.44, subd. 5 (1971) and excludes Saturdays,

Sundays, and legal holidays from computation when the period of time allowed is "seven days or less" rather than "less than seven days."

Rule 34.02 (Enlargement) is taken from F.R.Crim.P. 45(b) and Minn. R. Civ. P. 6.02. It permits an extension of time except for motions for judgment of acquittal (Rule 26.03, subd. 17(3)), for new trial (Rule 26.04, subd. 1(3)), or to vacate judgment (Rule 26.04, subd. 2). Extension of time for taking an appeal may not be enlarged except as provided by Rules 28.02, subd. 4(3), 29.03, subd. 3, and 29.04, subd. 2.

Rule 34.03 (For Motions; Affidavits) is taken from F.R.Crim. P. 46(d) and Minn. R. Civ. P. 6.04. Rule 10.03 requires notice of motions not later than three days before the Omnibus Hearing.

Rule 34.04 (Additional Time After Service by Mail) is taken from Fed.R.Crim.P. 45(c) and Minn. R. Civ. P. 6.05.

Rule 34.05 (Unaffected by Expiration of Term of Court) comes from Minn. R. Civ. P. 6.03.

RULE 35. COURTS AND CLERKS

The district and county courts shall be deemed open at all times for the purpose of filing any proper paper, of issuing and returning or certifying process and of making motions and orders. Unless the court orders otherwise, the court shall be deemed open at all times, except legal holidays, for the transaction of any other business that may be presented. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, or particular legal holidays.

Comment

Rule 35 (Courts and Clerks) is adapted from F.R.Crim.P. 56 and Minn. R. Civ. P. 77.01. Legal holidays are defined by Minn. Stat. § 645.441, subd. 5 (1971). The rule supersedes Minn. Stat. §§ 484.07, 484.08 to the extent inconsistent.