



# MINNESOTA STATE BAR ASSOCIATION

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October 10, 1991

President-Elect  
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**Frederick K. Grittner**  
Clerk of Appellate Courts  
25 Constitution Avenue  
St. Paul MN 55155

Secretary  
**Roger V. Stageberg**  
80 S. Eighth St. #1800  
Minneapolis, MN 55402  
(612) 339-8131

Dear Mr. Grittner:

Enclosed is the original and ten copies of a petition to amend Rule 26.02(c) of the Minnesota Rules of Civil Procedure.

Treasurer  
**Michael J. Galvin Jr.**  
332 Minnesota St. #W2200  
St. Paul, MN 55101  
(612) 291-1215

We hereby request permission to appear before the Court when this matter is heard.

Vice President-Outstate  
**John N. Nys**  
230 W. Superior St. #811  
Duluth, MN 55802  
(218) 722-6331

Sincerely,

**Tim Groshens**  
Executive Director

Past President  
**Tom Tinkham**  
220 S. Sixth St. #2200  
Minneapolis, MN 55402  
(612) 340-2829

Executive Director  
**Tim Groshens**

**TG:JG**  
Enclosures

FILE NO. C6-84-2134  
STATE OF MINNESOTA  
IN THE SUPREME COURT

OFFICE OF  
APPELLATE COURTS

OCT 11 1991

**FILED**

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In Re Petition to Amend Rule  
26.02(c) of the Minnesota  
Rules of Civil Procedure

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PETITION OF THE  
MINNESOTA STATE BAR  
ASSOCIATION

Petitioner, Minnesota State Bar Association (MSBA),  
states:

WHEREAS, petitioner is a not-for-profit corporation of  
attorneys admitted to practice law before this Court, and

WHEREAS, this Court has the inherent and exclusive  
power to administer justice, protect rights guaranteed by  
the Constitution, prescribe conditions upon which persons  
may be admitted to practice in the courts of Minnesota, and  
supervise the conduct of attorneys admitted to practice in  
Minnesota, and

WHEREAS, in 1991 the MSBA Court Rules Committee  
considered and adopted a recommendation to amend Rule 26.02  
(c) of the Minnesota Rules of Civil Procedure for the  
purpose of production of statements under the Rule, to  
provide that statements of an agent or employee of a party  
shall be deemed to be trial preparation materials under the  
Rule where a party to the lawsuit is claimed to be liable  
by reason of the actions or conduct of such agent or  
employee, and

WHEREAS, the purpose of the amendment is to allow  
institutional defendants and their insurers to investigate  
incidents without fear of creating an open record in the  
event of litigation and to lead to earlier settlement of  
claims, and

WHEREAS, the MSBA Board of Governors voted to recommend to the Minnesota Supreme Court that Rule 26.02(c) of the Minnesota Rules of Civil Procedure be amended as follows:

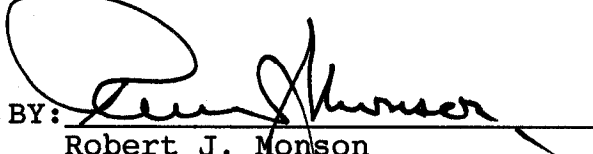
**Rule 26.02 Discovery, Scope and Limits . . . (c) Trial preparation: materials . . .**


A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a party or other person may obtain without the required showing a statement concerning the action of its subject matter previously made by that person who is not a party. For the purposes of this paragraph only, the term "party" shall include in addition to persons identified in the caption to the action, agents, employees, joint venturers or partners of persons identified in the caption where the claims made in the civil action include allegations that the conduct of such employee, agent, joint venturer or partner serves to impose a civil liability upon the person named as a party.

NOW, THEREFORE, the MSBA respectfully petitions the Minnesota Supreme Court to adopt the amendment to Rule 26.02(c) of the Minnesota Rules of Civil Procedure.

DATE: 10-9-91

MINNESOTA STATE BAR ASSOCIATION

BY:   
Robert J. Monson  
President

BY:   
Phillip A. Cole, Chair  
Court Rules Committee

Attachment: 1991 Court Rules Committee Report

DATE: May 24, 1991  
TO: MSBA Board of Governors  
FROM: Phillip A. Cole, Chair of the Court Rules  
Committee  
RE: Recommendation to amend Rule 26.02(c),  
Minnesota Rules of Civil Procedure

At its meeting on April 19, 1991, the Court Rules Committee considered and adopted a recommendation to amend Rule 26.02(a) in the following manner (underlined language indicates proposed additions by the Committee):

**Rule 26.02 Discovery, Scope and Limits . . . (c) Trial preparation: materials . . .**

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a party or other person may obtain without the required showing a statement concerning the action of its subject matter previously made by that person who is not a party. For the purposes of this paragraph only, the term "party" shall include in addition to persons identified in the caption to the action, agents, employees, joint venturers or partners of persons identified in the caption where the claims made in the civil action include allegations that the conduct of such employee, agent, joint venturer or partner serves to impose a civil liability upon the person named as a party. . . ."

**Comment:** The motion to recommend this amendment was passed on a margin of 3 to 2 with the chair not voting. Lawyers with a predominant plaintiff's personal injury practice voted against the amendment. Lawyers with either a general litigation practice or defense practice voted for the amendment.

The amendment will serve to overturn the decision of the Minnesota Supreme Court in Wiggin v. Apple Valley Medical Clinic, 459 N.W.2d 918 (Minn. 1990), where the court held that a clinic being sued for the malpractice of one of its member physicians was compelled to provide the plaintiff a statement made by the physician to the clinic (or its insurer, the decision is not clear) regarding the events in question. The physician was not himself named as a defendant in the lawsuit. The clinic defendant had sought to protect the statement as if it was the statement of a party under Rule 26.02 because the physician was an employee of the clinic whose actions were in direct contest in the case. Justice Yetka speaking for the Court, held that Rule 26.02(c) must be read literally. Since the physician was not himself named as a party to the case, his statement, absent attorney-client privilege, must be produced if a proper request was made under Rule 26.02. Justice Coyne dissented to the majority opinion.

The majority of the committee voted for the amendment on two basic arguments. First, the amendment would allow institutional defendants and their insurers to investigate incidents and events without fear of creating an open record in the event of litigation. Giving rein to a free investigation would in the final analysis provide a greater benefit because it would lead to earlier settlements of claims worthy of settlement. Also in such case, statements given by the employee or agent would remain susceptible to discovery if the required showing of "substantial need" to discover "trial preparation materials" was made. Second, the rule as interpreted by the court in Wiggin was cynical in its application. A plaintiff contemplating a routine action against a corporation and its employee or a partnership and its partner could begin the lawsuit by naming only the corporation or the partnership. Such tactic would permit the plaintiff to discover the statements of the alleged tortfeasor. After this discovery was accomplished in the initial stages of the lawsuit, the complaint would be amended to add the employee or partner himself. By this tactic, the plaintiff could define at any given point in time who the parties were and thereby broaden discovery. A majority of the committee believed that the rule should not be so easily manipulated to achieve indirect ends.

The minority argued that discovery of the statements would be an aid to the truthfinding process. It was appropriate, therefore, to allow liberal discovery in this area.

The Chair submits this recommendation to the Board of Governors with the proposal that it be adopted by the Board and submitted to the House of Delegates for approval.

Respectfully submitted,

Phillip A. Cole

PAC:JG