STATE OF MINNESOTA

IN SUPREME COURT

C6-84-2134

PROMULGATION OF AMENDMENTS TO THE MINNESOTA RULES OF CIVIL PROCEDURE

WHEREAS, the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure filed its final report with this Court that recommended amendments to the Rules of Civil Procedure, and

WHEREAS, this Court has reviewed the recommendations,

IT IS HEREBY ORDERED that the attached amendments be, and the same are, adopted and promulgated for the regulation of practice and procedure in the courts of the State of Minnesota. These amendments shall become effective March 1, 1994. The comments of the Advisory Committee are those of the committee and their inclusion with the amendments does not imply either agreement or adoption by this Court of the statements contained therein.

Dated: December 20, 1993

BY THE COURT:

A.M. Keith, Chief Justice

DEC 20 1993

FILED

AMENDMENTS TO RULES OF CIVIL PROCEDURE
DECEMBER 20, 1993

RULE 5 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

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Rule 5.04 Filing

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

Advisory Committee Comment--1993 Amendments

The amendment to Rule 5.04 makes it unnecessary to file notice of taking depositions in the vast majority of cases. Filing may be required as a condition precedent to issuance of a deposition subpoena pursuant to Minn. R. Civ. P. 45.04(a), though that rule only requires proof of service to be shown, not filed, and does not require filing of the notice itself in either event. The notice need not be filed because court administrators should issue subpoenas without the filing of the notice. In practice, courts have little use for deposition notices in court files, and in those rare circumstances where reference to them is necessary, they can be attached as exhibits to an affidavit, filed by leave of court, or offered in evidence just as any other discovery request or response.

RULE 10 FORM OF PLEADINGS

Rule 10.01 Names of Parties

Every pleading shall have a caption setting forth the name of the court and the county in which the action is brought, the title of the action, and a designation as in Rule 7, and, in the upper right hand corner, the appropriate case type indicator as set forth in the subject matter index included in the appendix as Form 23. In the complaint, the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the first party on each side with an appropriate indication of other parties.

Advisory Committee Comment--1993 Amendments

The only change made to this rule is to correct a typographical or grammatical error in the existing rule. No change in meaning or interpretation is intended.

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

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Rule 12.03 Motion for Judgment on the Pleadings

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Advisory Committee Comment--1993 Amendments

The only change made to this rule is to correct a typographical or grammatical error in the existing rule. No change in meaning or interpretation is intended.

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RULE 24 INTERVENTION

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Rule 24.03 Procedure

A person desiring to intervene shall serve on all parties to the action and file a notice of intervention which shall state that in the absence of objections by an existing party to the action within 30 days after service thereof upon the party, such intervention shall be deemed to have been accomplished. The notice of intervention shall be accompanied by a pleading setting forth the nature and extent of every claim or defense as to which intervention is sought and the reasons for the claim of entitlement to intervention. Within 30 days after service upon the party seeking to intervene of a notice of objection to intervention, the party shall serve a motion to intervene upon all parties as provided in Rule 5.

Upon written consent of all parties to the action, anyone interested may intervene under this rule without notice.

Advisory Committee Comment--1993 Amendments

The only change made to this rule is to correct a typographical or grammatical error in the existing rule. No change in meaning or interpretation is intended.

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RULE 30 DEPOSITIONS UPON ORAL EXAMINATION

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Rule 30.02 Notice of Examination: General Requirements: Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization; Telephone Depositions

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(d) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event 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 the party's own expense.

Any deposition pursuant to these rules may be taken by means of simultaneous audio and visual electronic recording without leave of court or stipulation of the parties if the deposition is taken in accordance with the provisions of this rule.

In addition to the specific provisions of this rule, the taking of video depositions is governed by all other rules governing the taking of depositions unless the nature of the video deposition makes compliance impossible or unnecessary.

The following procedure shall be used for video depositions:

(1) The notice of the taking of a video deposition and a subpoena for the attendance of a non-party witness at the deposition shall state that the deposition is to be visually recorded and that a backup simultaneous transcript will be taken;

(2) The person ~~making the video recording must~~ taking the video deposition shall retain possession of it. The video recording must be securely sealed and marked for identification purposes by the court reporter, if present, or otherwise by the video equipment operator before delivery to the party ~~noticing~~ taking the deposition;

(3) The parties may purchase audio or video copies of the recording from the operator, who shall certify that all parties who ordered copies have been charged at the same rate for each copy; and

(4) A party who seeks to use a video deposition at trial must provide the court with either:

(A) A transcript of the deposition which shall be used for a ruling on any objections, or

(B) A stipulation by all parties that there are no objections and that the recording or the agreed upon portion of it may be played.

* * *

~~(h) Whenever a total of three depositions on oral examination have been noticed or taken in any pending action by a party, that party shall not notice additional oral deposition until a discovery conference pursuant to Rule 26.06 has been held.~~

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Advisory Committee Comment--1993 Amendments

Rule 30.02(d)(1) is amended to change slightly the arrangements for handling the videotape record of a deposition taken by that means. At the present time the rule requires the videotape operator to retain possession of the videotape, a circumstance which sometimes makes it difficult to procure the videotape for use at a trial which takes place long after the deposition was taken. The amendment directs the lawyer for the party taking the deposition to retain custody of the video recording after it has been sealed and marked for identification purposes. This procedure is consistent with the procedure for handling original typewritten deposition transcripts pursuant to Minn. R. Civ. P. 30.06(a).

When the Advisory Committee recommended the addition of Rule 30.02(h) in 1988, the members of the committee hoped that it would be a useful device for curbing discovery abuses, but it appears that the rule is almost never used. The deletion of this portion of the rule should not be taken as any support for expanded discovery. The authority to control discovery is amply set forth in other rules, *see, e.g.,* Minn. Gen. R. Prac. 111 & 112, and the committee encourages the continued vigorous exercise of this authority for the protection of all litigants and to carry out the mandate of Minn. R. Civ. P. 1, which provides that the Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action."

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RULE 35 PHYSICAL, MENTAL, AND BLOOD EXAMINATION OF PERSONS

Rule 35.01 Order of Examinations

In an action in which the physical or mental condition or the blood relationship of a party, or of an agent of a party, or of a person under control of a party, is in controversy, the court in which the action is pending may order the party to submit to, or produce such agent or person for a physical, mental or blood examination by a ~~physician~~ suitably licensed or certified examiner. The order may be made only on motion for good cause shown and upon notice to the party or person to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is made.

Rule 35.02 Report of Findings

(a) If requested by the party against whom an order is made pursuant to Rule 35.01 or by the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the ~~examining physician~~ examination setting out the ~~physician's~~ examiner's findings and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery, the party causing the examination to be made shall be entitled, upon request, to receive from the party or person examined a like report of any examination, previously or thereafter made, of the same physical, mental, or blood condition. If the party or person examined refuses to deliver such report, the court, on motion and notice, may make an order requiring delivery on such terms as are just, and, if ~~a physician~~ an examiner fails or refuses to make such a report, the court may exclude the ~~physician's~~ examiner's testimony if offered at the trial.

(b) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the adverse party waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party or the person under the party's control with respect to the same physical, mental, or blood condition.

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Advisory Committee Comment--1993 Amendments

The amendments to Rule 35 are intended to expand the power of the courts to order examinations by professionals other than physicians. This amendment is generally consistent with amendments made to Fed. R. Civ. P. 35 in 1991, though the state and federal rules have always been somewhat different.

This amendment recognizes that examination may be appropriate by, for example, a licensed psychologist, dentist, audiologist, or physical or occupational therapist. These licensed professionals are not physicians but may, and often do, provide valuable information or testimony. *See* Fed. R. Civ. P. 35, Notes of

Advisory Committee--1991 Amendment, *reprinted* in Federal Civil Judicial Procedure & Rules 126 (West pamph. 1993).

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RULE 38 JURY TRIAL OF RIGHT

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Rule 38.02 Waiver

In actions arising on contract, and by permission of the court in other actions, any party thereto may waive a jury trial by:

(a) failing to appear at the trial;
(b) written consent, by the party or the party's attorney, filed with the court administrator; or
(c) oral consent in open court, entered in the minutes.

Neither the failure to file any document requesting a jury trial nor the failure to pay a jury fee shall be deemed a waiver of the right to a jury trial.

Advisory Committee Comment--1993 Amendments

The committee is of the opinion that waiver of the right to a jury trial should not be found from inaction or failure to pay a jury fee. The amendment, coupled with the abolition of the note of issue, should obviate any confusion or inadvertent waiver of the constitutionality protected right to a jury trial. *See* ***Schweich v. Ziegler, Inc.***, 463 N.W.2d 722 (Minn. 1991).

RULE 41 DISMISSAL OF ACTIONS

Rule 41.01 Voluntary Dismissal; Effect Thereof

(a) By Plaintiff by Stipulation. Subject to the provisions of Rules 23.05, 23.06 and 66, an action may be dismissed by the plaintiff without order of court (1) by filing a notice of dismissal ~~not less than 10 days before the opening of the term of court at which the action is noted for trial or, in counties having continuous terms of court, not less than 10 days before the day on which the action is first set for trial, if a provisional remedy has not been allowed or a counterclaim made or other affirmative relief demanded in the answer~~ at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a

plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

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Advisory Committee Comment--1993 Amendments

The amendment to this rule is made to conform the rule to its counterpart in the Federal Rules of Civil Procedure, Fed. R. Civ. P. 41(a)(1). The existing rule in Minnesota seems to the committee archaic, establishing time requirements on the commencement of terms of court. Since 1977, Minnesota trial courts have had continuous terms. Minn. Stat. § 484.08 (1992).

The former rule has permitted parties to dismiss claims without prejudice even after extensive discovery or other pretrial proceedings have taken place. Dismissal without prejudice has also been possible after the trial court has issued orders on preliminary matters. The right to dismiss on the eve of trial has prejudiced defendants or has required courts to consider motions to deny a plaintiff the right to dismiss without prejudice. The committee is of the opinion that the right to dismiss without prejudice ought to be limited to a fairly short period after commencement of the action when prejudice to opponents is likely to be minimal.

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The Advisory Committee considered recommending a change to Rule 53 to make express provision for the use of referees in alternative dispute resolution and settlement proceedings, but has concluded that amendment of the rule is not necessary inasmuch as the rule now permits use of referees for this purpose in limited appropriate circumstances.

The Advisory Committee is also mindful that the Minnesota Supreme Court Alternative Dispute Resolution Implementation Committee has recently submitted its Final Report dated August 25, 1993. The Advisory Committee is of the opinion that that Report can be considered independently of the recommendations of this committee. The committee also believes that if more specific and comprehensive rules on the use of referees in alternative dispute resolution are advisable, such rules might better be incorporated in Rules for Alternative Dispute Resolution.

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RULE 56 SUMMARY JUDGMENT

Rule 56.01 For Claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the service of the summons, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

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Rule 56.03 Motion and Proceedings Thereon

Service and filing of the motion shall comply with the requirements of Rule 115.03 of the General Rules of Practice for the District Courts, provided that in no event shall the motion be served less than 10 days before the time fixed for the hearing. ~~The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits.~~ Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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Advisory Committee Comment--1993 Amendments

The amendment to Rule 56.01 is intended to correct a typographical or grammatical error in the existing rule. No change in meaning or interpretation is intended.

The amendment to Rule 56.03 is intended to make clear the relationship between this rule and Minn. Gen. R. Prac. 115. Rule 56.03 includes a strict ten-day notice requirement before a summary judgment motion may be heard. This minimum notice period is mandatory unless waived by the parties. *See* ***McAllister v. Independent School District No. 306,*** 276 Minn. 549, 149 N.W.2d 81 (1967). The rule is intended to provide protection before claims or defenses are summarily determined by requiring a minimum of ten days' notice.

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RULE 60 RELIEF FROM JUDGMENT OR ORDER

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Rule 60.02 Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc.

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment (other than a ~~divorce~~ marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

Advisory Committee Comment--1993 Amendments

The only change made to this rule is to correct the reference to marriage dissolution as that is the current name for the proceeding. This amendment is intended to be consistent with similar amendments to the rules made in 1988.