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April 6, 1998

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OFFICE OF
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APR - 6 1998

FILED

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

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

Dear Mr. Grittner:

I am enclosing the original and twelve (12) copies of the Report of the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure. I am hand delivering this Report because Justice Anderson was going to try to get it on to the schedule for the Court Conference on Friday, April 10, and we would appreciate it if you would see that these copies are handled expeditiously.

I am also enclosing a disk containing this Report in WordPerfect 6.1 format. If you have any questions or comments, please let me know.

As always, we appreciate your assistance with this filing.

Best personal regards.

Respectfully submitted,

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

DFH:psp
Enclosures
cc: Advisory Committee Members
180291

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Summary of Committee Recommendations

The Minnesota Supreme Court Advisory Committee on the Rules of Civil Procedure met on three occasions to review the various proposals relating to jury trial practices, initiated by the petition of the Minnesota State Bar Association ("MSBA") by petition dated November 22, 1996. This Report addresses only the issues in that petition relating to the Minnesota Rules of Civil Procedure, and does not discuss either issues outside the scope of that Report that are being considered by this Advisory Committee nor to aspects of the MSBA petition that did not directly involve the Minnesota Rules of Civil Procedure.

Advisory Committee Process

The Advisory Committee met three times to consider the MSBA petition and the submissions of various parties.

The Committee is also in the process of considering various proposals or recommendations from the Bench and Bar, will also review pertinent developments in the Federal Rules of Civil Procedure, and will revisit the various discovery and disclosure recommendations (Rule 26) which were deferred from the Committee's July 22, 1996, Report to the Court. The Committee will provide a report on those matters not later than December 31, 1998.

Summary of Advisory Committee Recommendations

MSBA Proposal	Advisory Committee Recommendation
1. A six-person jury should be considered minimum, but not maximum. (Amending Rule 48.)	The Committee agrees that a six-person jury should be considered the minimum and not the maximum. The Committee recommends a change that would largely conform the rule to its federal rule counterpart rather than the specific proposal advanced by the MSBA.
2. Alternate jurors remaining at the close of a civil trial should deliberate and vote (amending Rules 47.02 and 48).	The Committee believes that this recommendation is a good one, although it should be implemented in Minnesota by abandoning use of alternate jurors .

3.	Jurors should be able to question witnesses during trial.	This Advisory Committee takes no position on the recommendation.
4.	The judge should be required to read instructions before closing arguments.	The Advisory Committee believes the current rule allowing judicial discretion should be preserved.
5.	Civil juries should be provided with written copies of all instructions.	The Advisory Committee recommends that the language of the rule be updated and that judicial discretion on this matter be preserved.

Effective Date

The Advisory Committee recommends that these amendments be acted on and an order issued with sufficient lead time to permit the communication of the amendments to the Bench and Bar and the scheduling of appropriate educational programs. A lead time of four to six months should be sufficient to accomplish these purposes. The Committee is prepared to participate in the public education process.

The Committee believes that the amendments recommended in this Report can be applied to actions pending six months after the adoption of the Rules and to those filed thereafter.

Respectfully submitted,

MINNESOTA SUPREME COURT ADVISORY
COMMITTEE ON RULES OF CIVIL PROCEDURE

Recommendation 1: Six-person jury should be considered a minimum, but not a maximum

Introduction

The MSBA Petition asserts that a six-person jury should be considered the minimum size of a jury, and not the maximum. The Advisory Committee agrees with this conclusion, but does not believe that the language of the rule proposed by the MSBA constitutes the best way to effectuate this change.

The Advisory Committee proposes an entirely new Rule 48 that is drawn substantially from its federal counterpart, FED. R. CIV. P. 48.

Discussion

Civil juries in Minnesota historically comprised 12 persons, and were reduced in size—in Minnesota, in the federal courts, and elsewhere—largely to reduce expense. *See generally Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1468-80 (1997)(tracing history of use of smaller juries).

Legal scholars and social scientists largely agree that a twelve-person juror is superior to a six-person juror in terms of quality of deliberation and verdict. Aberrant results are less likely to occur with larger juries. The Harvard article observes:

> Refuting the claim of consistency, [noted jury scholar Professor Hans] Ziesel argues that six-person juries are more likely to return strange verdicts than are twelve-person panels. Zeisel explains that a sample of six has a much larger "margin of error" than does a sample of twelve, making a jury of six far morel likely than a jury of twelve to return a verdict that is inconsistent with community norms.

Id. at 1484-85, *citing* Hans Zeisel, *. . . And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715-20 (1971). In addition to this statistical conclusion, observation of jury deliberations has also borne out the fact that larger juries conduct a higher quality of deliberations and are more thorough.

Regardless of a substantive conclusion on jury size, the MSBA proposal presents the court with a recommendation to change an existing rule that does not currently reflect trial court practice.

MINN. R. CIV. P. 48 provides for a civil jury of "any number less than 12." While the clearly predominant practice is to use a jury of six jurors, plus one or two alternates in some cases, the upper limit is widely understood to be 12, not a number "less than 12." The rule also implies that a jury of less than 12 can be used only on the stipulation of the parties. Again, the practice is to use a standard jury of six jurors, plus alternates, and no stipulation is necessary for a jury of this size. Indeed, a stipulation to some other, larger, size jury is unlikely to be given effect. The MSBA proposal appears to give the parties the right to decide what size the jury should be. The Advisory Committee does not believe this change is appropriate.

FED. R. CIV. P. 48 provides a good model for a Minnesota rule, and provides *in toto*:

> **Rule 48. Number of jurors—Participation in Verdict**
>
> The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

The Advisory Committee believes this rule has the right balance of (1) decision by the Court as to the number of jurors; and (2) recognition that the jury size should be between 6 and 12 jurors. The Advisory Committee continues to believe Minnesota courts and litigants are well served by having the Minnesota rules and federal rules be as consistent as possible, recognizing that there are substantive and jurisdictional differences that may justify different procedures.

The practical problems of seating a larger jury also do not yield to a fixed rule on jury size. Larger juries are unquestionably more expensive, require courtroom facilities that can accommodate the larger size, and impose greater burdens on the greater number of citizens who must be summoned for jury service. Where the trial is expected to be lengthy, the issues in the case are complex, novel or unusually important, or other factors present the risks of an aberrant jury result, the trial court should be encouraged to seat a larger jury. The proposed rule will permit that to occur.

One remaining problem of using the federal rule in Minnesota arises from the use of 5/6th verdicts as allowed by MINN. CONST. art. I, § 4 and MINN. STAT. § 546.17 (1996). The federal rule is adapted to allow the application of the statute, and the Advisory Committee comment makes it

clear that the equivalent of a 5/6ths verdict for other juries will be a 6/7ths, 7/8ths, 8/9ths, 9/10ths, 10/11ths, and also 10/12ths (the equivalent of 5/6ths).

The increase in jury size should, for a jury significantly larger than six, result in a concomitant increase in the number of peremptory challenges allowed each side by the trial judge. By statute, at least two peremptory challenges are allowed each side. MINN. STAT. § 546.10 (1996). Trial judges currently adjust the number of peremptory challenges when additional jurors are seated, and that practice should continue. It may be appropriate to have the Minnesota Supreme Court Advisory Committee on General Rules of Practice consider providing guidance on this procedure in Minnesota Civil Trialbook § 6(d) if this recommended rule amendment is made. Because the Trialbook is not a compilation of mandatory rules, any changes to the Trialbook need not precede the rule amendment.

The Committee considered the mandatory language of the proposed rule and the possibility that circumstances could exist where it might be appropriate to seat a jury of more than twelve. This rule is identical to its federal counterpart, and Minnesota does not need a different provision. It does not seem necessary or desirable to provide for the remote case where seating more than twelve jurors might be considered.

Although twelve should be the maximum number seated in all but the most unusual cases, any flexibility that applies to all the rules should govern the question of a maximum number of jurors seated. Following the Supreme Court decision in *William v. Florida*, 399 U.S. 78 (1970), it is understood that a jury may constitutionally comprise more than or fewer than twelve jurors. *See generally* 9A CHARLES ALAN WRIGHT, ET AL, FEDERAL PRACTICE AND PROCEDURE § 24.91 (2d ed. 1994). The Federal Judicial Center's MANUAL FOR COMPLEX LITIGATION § 22.41 (3rd ed. 1995), suggests it is appropriate, however, to seat twelve jurors in any trial expected to last longer than four months, and it is hard to anticipate a trial that would be likely to have more than six of twelve jurors excused before verdict. The MANUAL also suggests that to avoid a mistrial judges should consider asking if the parties will stipulate to return of a verdict by fewer than six jurors if necessary. *Id.*

The Committee believes the proposed rule will function well in practice, will make jury trial practice fairer, and will conform state and federal court practice.

Specific Recommendation

The Advisory Committee's recommended amendment to Rule 48 is set forth on page 9 since it incorporates the changes under recommendations 1 and 2.

Recommendation 2: Alternates remaining at the close of a civil trial should deliberate and vote (amending Rules 47.02 and 48

Introduction

The MSBA proposal recommends that alternate jurors be allowed to participate in the deliberations if they remain at the close of the evidence, arguments. The Advisory Committee believes this recommendation should be implemented in Minnesota, although by a different mechanism than proposed by the MSBA.

Discussion

The Advisory Committee believes that the role of alternates requires a single and certain practice for all jury trials. Either alternates should be excused at the end of service or they should be seated and be part of the jury. The seating of alternates as jurors is particularly pernicious when it constitutes a change in the ground rules during the trial, proposed either by the judge or one of the parties. This practice, although not common, occurs often enough to be troublesome to the Advisory Committee.

The federal courts abolished use of alternates by amendment to the Federal Rules of Civil Procedure in 1991, and the use of alternates was recognized as a "source of dissatisfaction with the jury system" by the federal advisory committee. *See* FED. R. CIV. P. 47(b), Notes of Advisory Comm.—1991 Amends., *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 205 (West 1998). The primary purpose of alternates is to seat a jury that will withstand potential attrition and still be above the minimum size of six jurors. That end can be reached by seating a larger jury.

The Advisory Committee recommends that the use of alternates should essentially be abolished. The trial court should, in consultation with the trial counsel, seat a jury of sufficient size that the foreseeable attrition of members due to illness or other emergencies should not result in a jury of fewer than six persons. The process should be much like the sitting of alternates in the current system, with more additional jurors (over the minimum of six) seated in longer, more complex trials or in cases where any other circumstances make it likely that attrition of jurors or the excuse of jurors is likely. This procedure serves the purpose of assuring full-participation from alternates because they know they will be participating in the entire trial, will increase their

satisfaction from their participation in the process (and avoid the severe disappointment some alternates feel when released from service immediately before deliberations begin) and will establish a procedure that is clear to the parties from the beginning of the process.

The Committee believes it is appropriate to resolve the question of jury size before the particular jury panel is drawn, so that there is no opportunity to treat the jury size question as an opportunity for "gaming" after the jury panel demographics are known to the parties. In the rare case where the voir dire process reveals contingencies which might give rise to requests for excuse from service during the trial, but which do not justify excuse of the juror for cause at the beginning of the trial, it may be appropriate to increase the number of jurors based on that information. That decision is left to the trial judge.

The Committee also recommends that a new Rule 47.04 be adopted, patterned on its federal counterpart, FED. R. CIV. P. 47(c). The rule recognizes that trial judges may excuse jurors for cause, and brings the Minnesota and federal rules closer to the same language. The new rule should not modify the authority or power of judges to excuse jurors for cause, as they undoubtedly have that power inherently, and it is also codified by statute. *See* MINN. STAT. § 546.13 (1996).

Specific Recommendation

RULE 47. JURORS

* * *

Rule 47.02. Alternate Jurors

~~The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. 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, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.~~ [Abrogated.]

* * *

Rule 47.04 Excuse

The court may for good cause excuse a juror from service during trial or deliberation.

Advisory Committee Comment—1998 Amendments

Rule 47.02 is abrogated. Under this amendment, alternate jurors are no longer part of the jury trial process. Rather than seat "alternate"jurors who will, or may, then participate in the deliberations, the rule simply does not provide for two classes of jurors. Jurors who begin the case by being sworn in as jurors continue to the discharge of the jury, unless they are excused for cause as provided for by Rule 47.04. This amendment parallels the abandonment of using alternates in federal court in 1991, and is intended to resolve an ongoing source of dissatisfaction with jury service by jurors. *See* FED. R. CIV. P. 47(b), Notes of Advisory Comm.—1991 Amends., *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 205 (West 1998).

Rule 47.04 is new and is identical to FED. R. CIV. P. 47(c). Although courts presently have the inherent power to excuse jurors even in the absence of a rule, there is no reason to have the federal rule be different from the state rule on this issue. Other than obviating confusion over whether there might be some substantive difference in intent, this amendment is not intended to change the existing practice. *See* MINN. STAT. § 546.13 (1996)(codifying authority to excuse juror).

RULE 48. ~~JURIES OF LESS THAN TWELVE; MAJORITY VERDICT~~ NUMBER OF JURORS; PARTICIPATION IN VERDICT

~~The parties may stipulate that the jury shall consist of any number less than 12, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.~~ The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47.03. Unless otherwise provided by law or the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

Advisory Committee Comment—1998 Amendments

This rule requires the court to permit all jurors participate in deliberations. Rule 47.02 is abrogated to abolish alternate jurors, and Rule 48 expressly provides that all jurors participate in the deliberations. The rule prohibits a verdict from a jury of fewer than six jurors, unless the parties agree to a lesser number.

The rule does not provide any constraints on what size jury is appropriate in any particular case. Practical considerations of cost, courtroom design, and imposition on potential jurors as well as those seated may militate toward a jury of six. Where the trial is likely to be long, or where other considerations make it likely that jurors will need to be excused from service, more than six jurors should be seated. The rule also permits a twelve-person jury as was historically used in civil trials. Juries of twelve significantly reduce the likelihood of unusual or aberrant jury verdicts, and should be considered where the issues are unusually complex or important, or present difficult fact-finding challenges to the jury. *See generally Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1468-80 (1997).

This rule expressly mandates seating a jury of from six to twelve jurors. Seating a larger jury is not provided for, and should be considered only in very unusual circumstances where

more than six jurors are likely to be excused, making it inevitable that fewer than six will remain. Rather than risk a mistrial in that situation, the court should seek a stipulation of the parties that a verdict may be taken from a jury smaller than six. *See generally* MANUAL FOR COMPLEX LITIGATION § 22.41 & n.408 (3rd ed. 1995). It may be permissible to seat a jury of larger than twelve, so long as twelve or fewer remain for deliberations, but there is no clear authority or precedent for this. If the parties stipulate to a larger jury, it should certainly not be error to seat one.

The last sentence of the rule requires a verdict to be unanimous unless there is an agreement to a less-than-unanimous verdict or a it is otherwise provided by law. Both the MINNESOTA CONSTITUTION and statutory law allow verdicts in civil cases, even without stipulation of the parties, to be returned by 5/6ths of the jurors after six hours of deliberations. *See* MINN. CONST. art. I, § 4 and MINN. STAT. § 546.17 (1996). Where jury of more than six, but fewer than twelve, jurors deliberates, a 6/7ths, 7/8ths, 8/9ths, 9/10ths or 10/11ths verdict is permitted. For a twelve-person jury, ten of the twelve jurors (the equivalent of 5/6ths) can return a verdict.

Recommendation 3: Juries should be able to question witnesses during trial.

Introduction

The MSBA has proposed a provision to the Minnesota Civil Trialbook, part of the Minnesota General Rules of Practice, to permit expressly jurors to ask questions of witnesses.

Discussion

The Advisory Committee on Rules of Civil Procedure does not believe it should comment on the appropriateness of the MSBA proposal to amend Section 10 of the Trialbook dealing with examination of witnesses, to permit jury questioning. This change does not involve the Minnesota Rules of Civil Procedure, and this Committee has not studied the proposal nor how it would function under the Minnesota General Rules of Practice.

Recommendation 4: **The judge should be required to read instructions before closing arguments.**

Introduction

The MSBA proposal would require the trial judge to instruct the jury on the substantive law before closing arguments in all cases. The Advisory Committee believes the manner and timing of instructions to the jury should not be defined by a mandatory rule for all cases, but should be left to the sound discretion of trial judges.

Discussion

In practice, Minnesota trial judges now instruct the jury before arguments in some cases, but in many cases instruct the jury after lawyer arguments. MINN. R. CIV. P. 51 expressly permits the court to instruct the jury on substantive matters either before or after the arguments of counsel. The order of instruction is a matter both of judicial preference and judicial judgment as to how best to impart instructions on the law to juries. The Advisory Committee believes trial court discretion on the manner of instruction works well and should be continued.

The American Bar Association Section of Litigation has promulgated its CIVIL TRIAL PRACTICE STANDARDS, adopted by the ABA in February 1998. Those standards also appear to favor a flexible rule of judicial discretion, not an iron-clad rule for all cases, by stating:

> **Final Instructions.** The court should consider delivering final instructions on the law and other important matters prior to final argument. In all events, instructions concerning the appropriate procedures to be followed during deliberations—and for reporting the results of deliberations—should be given following closing arguments.

AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, CIVIL TRIAL PRACTICE STANDARDS § 5(d), at 15 (1998). The Advisory Committee concurs with the judgement that the trial judge should consider this manner of instruction, but disagrees with the MSBA proposal that would make it mandatory in all cases.

Accordingly, the Advisory Committee recommends that no rule change be adopted on this subject.

Recommendation 5: **Civil juries should be provided with written copies of all instructions.**

Introduction

The MSBA proposal would require written instructions be given to each juror in all cases. Although the Committee believes written instructions are desirable, and observes that Minnesota trial judges use written instructions in most cases, the Committee is not persuaded that a mandatory rule requiring their rule in every case is appropriate.

Discussion

As is true for the timing of instruction, the manner of instruction should be left to trial court discretion. In addition to considerations of whether or not written instructions will be helpful or necessary in a particular case, matters of logistics, expense, and the time required for their submission are also relevant. The Advisory Committee notes in its Comment, however, that written instructions have become the norm in Minnesota practice and should probably be used unless some circumstance makes their use inappropriate or unnecessary in a particular case.

The Committee does believe, however, that where written instructions are used, it is appropriate to have the rule require separate written instructions for each juror. The practice of using a single copy of the written instructions for the entire jury has largely disappeared due to the widespread availability of photocopy equipment. It is appropriate to have the rule no longer require the now-archaic practice of providing only a single copy.

Specific Recommendation

RULE 51. INSTRUCTIONS TO THE JURY; OBJECTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, and such action shall be made a part of the record. The court shall instruct the jury before or after closing arguments of counsel except, in the discretion of the court, preliminary instructions need not be repeated. The instructions may ~~be in writing and~~, in the discretion of the court, <u>be provided to each juror in written form and</u> ~~one complete copy may be~~ taken

to the jury room when the jury retires to deliberate. No party may assign as error unintentional misstatements and verbal errors or omissions in the charge, unless that party objects thereto before the jury retires to consider its verdict, stating specifically the matter to which that party objects and the ground of the objections. An error in the instructions with respect to fundamental law or controlling principle may be assigned in a motion for a new trial although it was not otherwise called to the attention of the court.

Advisory Committee Comment—1998 Amendments

This amendment clarifies the procedure for using written instructions, and requires that each juror be provided a copy of the charge if written instructions are given. The Committee does not believe a mandatory rule requiring use of written instructions in all cases is appropriate, but notes the widespread use of written instructions and the near-unanimous support for written instructions among judges, lawyers, and commentators. *See, e.g.*, AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, CIVIL TRIAL PRACTICE STANDARDS § 5(f), at 16 (1998)("Final instructions should be provided for the jurors' use during deliberation."). If written instructions are given, each juror should be given a copy.