STATE OF MINNESOTA

IN SUPREME COURT

C6-84-2134, CX-89-18 '63

ORDER AMENDING THE RULES OF CIVIL PROCEDURE

WHEREAS, by petition filed December 2, 1996, the Minnesota State Bar Association recommended changes to the Rules of Civil Procedure regarding the civil jury system; and

WHEREAS, the Court held a hearing on the petition on February 26, 1997; and

WHEREAS, the Minnesota Supreme Court Advisory Committee on the Rules of Civil Procedure reviewed the various proposals in the petition and filed a report on April 6, 1998, recommending certain changes to the Rules of Civil Procedure regarding the civil jury system; and

WHEREAS, the Court has solicited additional comments from interested parties and is fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The attached amendments to the Rules of Civil Procedure are adopted, prescribed and promulgated to be effective on January 1, 1999.
2. The attached amendments shall apply to jury trials commenced on or after the effective date.
3. The inclusion of advisory committee comments is made for convenience and does not reflect court approval of the comments made therein.

Dated: August 27, 1998

BY THE COURT

Kathleen M. Blatz
Chief Justice

OFFICE OF
APPELLATE COURTS

AUG 27 1998

FILED

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 to 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 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.

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, one or more complete copies 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

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, the Committee believes that the court should have the discretion to decide that more than one complete copy of the instructions be taken to the jury room when the jury retires to deliberate.