STATE OF MINNESOTA

IN SUPREME COURT

C6-84-2134

ORDER PROMULGATING AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

The Minnesota Supreme Court Advisory Committee on the Rules of Civil Procedure has recommended changes to the Rules of Civil Procedure; and

The Court held a hearing on the petition on November 17, 1999; and

The Court 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 July 1, 2000
2. The inclusion of advisory committee comments is made for convenience and does not reflect court approval of the comments made therein.

Dated: April 13, 2000

BY THE COURT:

Kathleen A. Blatz
Chief Justice

OFFICE OF
APPELLATE COURTS

APR 13 2000

FILED

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper ~~[of a party represented by an attorney]~~ shall be ~~[personally]~~ signed by at least one attorney of record in the attorney's individual name~~[and shall state the attorney's address, telephone number, and attorney registration number. A party who]~~, or, if the party is not represented by an attorney, shall ~~[personally sign]~~ be signed by the ~~[pleading, motion or other]~~ party. Each paper ~~[and]~~ shall state the ~~[pleader's]~~ signer's address and telephone number, if any, and attorney registration number if signed by an attorney. Except when otherwise specifically provided by rule or statute, pleadings need not be verified ~~[by affidavit]~~or accompanied by affidavit. ~~[The signature of an]~~ An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party ~~[constitutes a certification that the pleading, motion or other paper has been read;]~~.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the ~~[signer's]~~ person's knowledge, information, and belief, formed after ~~[reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed]~~ an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation~~[. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both,]~~;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) of this rule has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction ~~[, which may include an order to pay to the other party or parties the amount of]~~ upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses ~~[incurred because of the filing of the pleading, motion or other paper, including]~~ and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate

subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

ADVISORY COMMITTEE COMMENTS—2000 AMENDMENTS

Rule 11 is amended to conform completely to the federal rule. While Rule 11 has worked fairly well in its current form under the Supreme Court's guidance in *Uselman v. Uselman*, 464 N.W.2d 130 (Minn. 1990), the federal rules have been amended and create both procedural and substantive differences between state and federal court practices. Additionally, the Minnesota Legislature has created a statutory mechanism that follows the federal procedure, resulting in a confusing array of practice requirements and remedies. *See* MINN. STAT. § 549.211. On balance, the Committee believes that the amendment of the Rule to conform to its federal counterpart makes the most sense, given this Committee's long-standing preference for minimizing the differences between state and federal practice unless compelling local interests or long-entrenched reliance on the state procedure makes changing a rule inappropriate.

It is the intention of the Committee that the revised Rule would modify the procedure for seeking sanctions, but would not significantly change the availability of sanctions or the conduct justifying the imposition of sanctions. Courts and practitioners should be guided by the *Uselman* decision, cited above, and should continue to reserve the seeking of sanctions and their imposition for substantial departures from acceptable litigation conduct.

RULE 26 GENERAL PROVISIONS GOVERNING DISCOVERY

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26.02 Discovery, Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ~~It is not ground for objection that the information sought will be inadmissible~~ The information sought need not be admissible at the trial if ~~that~~ the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

~~The frequency or extent of use of the discovery methods set forth in Rule 26.01 shall be limited by the court if it determines that:~~

~~(1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is either more convenient, less burdensome, or less expensive;~~

~~(2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or~~

~~(3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The~~

~~court may act upon its own initiative after reasonable notice or pursuant to a Rule 26.03 motion.~~

The court may establish or alter the limits on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

* * *

(c) Trial Preparation: Materials. Subject to the provisions of Rule 26.02(d) a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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 or its subject matter previously made by that person who is not a party. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in ~~connection with~~ relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

* * *

(e) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

* * *

26.05 Supplementation of Responses

A party ~~whose response to a request for discovery was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:~~ who has responded to a request for discovery is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the court or in the following circumstances:

~~(a) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony; and~~

~~(b)~~ A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party ~~obtains information upon the basis of which (1) the party knows that the response was incorrect when made, or (2) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~ learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert, the duty extends to information contained in interrogatory responses, in any report of the expert, and to information provided through a deposition of the expert.

~~(c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

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ADVISORY COMMITTEE COMMENTS—2000 AMENDMENTS

The changes made to Rule 26 include some of the recent amendments to the federal rule made in 1993. The changes made to the Minnesota rule have been modified to reflect the fact that Minnesota practice does not include the automatic disclosure mechanisms that have been adopted in some federal courts; the resulting differences in the rules are minor, and the authorities construing the federal rule should be given full weight to the extent applicable.

The changes in Rule 26.02(a) adopt similar amendments made to FED. R. CIV. P. 26(b) in 1993. The new rule is intended to facilitate greater judicial control over the extent of discovery. The rule does not limit or curtail any form of discovery or establish numeric limits on its use, but does clarify the broad discretion courts have to limit discovery.

Rule 26.02(e) is a new rule adopted directly from its federal counterpart. The requirement of a privilege log is necessary to permit consideration, by opposing counsel and ultimately by the courts, of the validity of privilege claims. Privilege logs have been in use for years and are routinely required when a dispute arises. *See generally Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 122 & n.6 (D. Nev. 1993) (enumerating deficiencies in log);

Allendale Mutual Ins. Co. v. Bull Data Sys., Inc., 145 F.R.D. 84 (N.D. Ill. 1992) (ordering privilege log and specifying requirements); *Grossman v. Schwarz*, 125 F.R.D. 376, 386-87 (S.D.N.Y. 1989)(holding failure to provide privilege log deemed "presumptive evidence" claim of privilege not meritorious). The requirement of the log should not, however, be an invitation to require detailed identification of every privileged document within an obviously privileged category. Courts should not require a log in all circumstances, especially where a request seeks broad categories of non-discoverable information. *See, e.g., Durkin v. Shields (In re Imperial Corp. of Am.)*, 174 F.R.D. 475 (S.D. Cal. 1997)(recognizing document-by-document log would be unduly burdensome). It is the intention of the rule, however, to require the production of logs routinely to encourage the earlier resolution of privilege disputes and to discourage baseless assertions of privilege.

FED. R. CIV. P. 45(d)(2) expressly requires production of a privilege log by a non-party seeking to assert a privilege in response to a subpoena. Although the Committee does not recommend adoption of the extensive changes that have been made in federal Rule 45, this recommendation is made to minimize disruption in existing Minnesota subpoena practice. The difference in rules should not prevent a court from ordering production of a privilege log by a non-party in appropriate cases. The cost of producing a privilege log may be properly shifted to the party serving the subpoena under Rule 45.06.

Rule 26.05 is amended to adopt in Minnesota the same supplementation requirement as exists in federal court. It is a more stringent and more explicit standard, and reflects a sounder analysis of when supplementation is necessary. It states affirmatively the duty to disclose. The Committee believes it is particularly desirable to have state supplementation practice conform to federal practice in order that compliance with the requirements is more common and sanctions can more readily be imposed for failure to supplement. The rule relaxes the supplementation requirement to obviate supplementation where the information has been disclosed either in discovery (i.e., in other discovery responses or by deposition testimony) or in writing. The writing need not be a discovery response, and could be a letter to all counsel identifying a witness or correcting a prior response.