C6-84-2134
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee on Rules of Civil Procedure

Recommendations of Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure

Final Report
September 26, 2005

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Chair

Hon. Sam Hanson
Liaison Justice

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ADVISORY COMMITTEE ON CIVIL RULES OF PROCEDURE

Summary of Committee Recommendations

The Court's Advisory Committee on Civil Rules of Procedure met twice in 2005 to review comments from Minnesota judges and lawyers and developments in civil procedure since the committee's last meeting.

The committee continues to believe that the rules should not be amended frequently or in the absence of a good reason for change. The committee also believes Minnesota's traditional preference for having its state rules of procedure conform to their federal counterparts makes sense and serves Minnesota litigants well. Most of the committee's recommended changes follow closely recent amendments to the federal rules, and will have the effect of bringing the state and federal rules into closer alignment. The committee has monitored these amendments, including particularly the 1991 and 2003 federal amendments to determine how well they have worked in federal court. As noted in the recommendations below, the committee believes it is appropriate to implement some of these amendments now.

Other amendments are appropriate because the rules need to be modernized. Rule 5.05, allowing filing by facsimile, was drafted in 1988, when fax machines were relatively scarce and generally used coated paper with unacceptable archival quality. In 1988 it was sensible to require the filing of an "original" to follow the document filed by fax. In 2005, faxed versions of documents are printed on the same quality paper by a process comparable to most word-processed mailed documents. There is no need for two duplicate "originals" and there is significant expense involved in processing and storing duplicate documents.

The committee's specific recommendations are briefly summarized as follows:

1. Rule 5 should be amended to eliminate the requirement that an "original" document be filed following proper facsimile transmission. The amendment also changes the facsimile transmission fee and clarifies how it should be calculated.

2. Rule 23, dealing with class actions, should be amended to adopt the extensive amendments made to Fed. R. Civ. P. 23 in 2003. It is particularly valuable to have state class action practice mirror federal practice because of the substantially larger body of federal law on class actions and because of the benefits of consistency in state and federal courts on these issues.

3. The Court should adopt two changes designed to encourage court control over discovery, both following identical changes made in their federal counterparts in Fed. R. Civ. P. 26(b) & 30(d). Specifically, Rule 26.02 should be amended to limit discovery as a matter of right to matters relating to the claims and defense of the parties, with the retention of discovery related to "the subject matter of the action" on a showing of good cause. Rule 30.04(b) should be amended to adopt a presumptive limit on depositions to one seven-hour day.

4. Rule 43.07 should be amended to clarify the mechanism for payment of interpreters and conform it to the uniform method of payment now established by statute.

5. The Court should amend Rule 45 to modernize subpoena practice, conform it to federal court practice, and remove the requirement for court issuance of subpoenas. This amendment would also expressly authorize the use of subpoenas for the production of documents, with notice to all parties but without the convening of an unneeded deposition.

6. The Court should amend Rule 50 to adopt the "judgment as a matter of law" nomenclature adopted in the federal courts in 1991 to replace "jnov" and "motion for directed verdict." This change is not intended to make a substantive change in the procedure or standards relating to these important motions.

7. The Court should amend Rule 51 to clarify practice relating to requesting and giving jury instructions and preserving the record as to instructions.

8. The Court should amend Rule 53, dealing with special masters, to adopt extensive changes in its federal counterpart adopted in 2003 after careful consideration by the federal advisory committee. The new rule will provide significant guidance to courts and litigants not found in the current rule.

Other Matters

The committee reviewed various sets of federal rule amendments, and has recommended adoption of many of them. Some are not well-suited to state court practice, while others should await further experience with them in federal court. The committee is also aware of pending proposals for further amendments to the federal rules, including an extensive "style revision project." As it has concluded in the past for earlier federal proposed amendments, the committee does not believe that these pending proposals should be taken up until they have been adopted and the federal courts have gained some experience in how well they accomplish their intended goals.

The advisory committee considered known problems with the interpretation and implementation of Rule 68, dealing with offers of judgment or settlement, and believes that rule is worthy of further attention. The committee may be in a position to offer advice relating to this rule during 2006.

The committee considered suggestions that it is appropriate now to adopt rule provisions to accommodate the filing and service of documents by electronic means. Although electronic transmission has become commonplace in federal court, until the resources are available to implement electronic filing statewide, the committee believes it better to deal with this issue by order implementing e-filing procedures in particular districts or types of actions. When it is time to adopt statewide rules to accommodate either required or permitted use of e-service and e-filing, the committee will be ready to facilitate the drafting of appropriate rules.

Effective Date

The committee believes these amendments can be adopted, after public hearing if the Court determines a hearing is appropriate, in time to take effect on January 1, 2006.

Comment on Style of Report

Because the advisory comments are entirely new, for the sake of readability no underlining is included. The balance of the specific recommendations are reprinted in traditional legislative format, with new wording underscored and deleted words ~~struck through~~.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
CIVIL PROCEDURE

Recommendation 1: **The Court should amend Rule 5 to eliminate the requirement for filing a duplicate "original" document and to change the required filing fee to reflect the significant costs incurred in handling fax filings.**

Introduction

Rule 5.05 was adopted in 1988 to allow documents to be filed by facsimile transmission. Since that time, the technology has evolved significantly and the rule should be amended. It is no longer necessary to have a duplicate "original" document filed after the facsimile transmission is received. The committee also heard from court administrators who view the $5.00 fee for fax filings to be inadequate and unrelated to the actual cost of maintaining and stocking fax equipment, especially for lengthy filings. Accordingly, the committee recommends that the filing fee be increased to $25.00 for each 50 pages filed. A number of committee members expressed the view that facsimile filing was, and still is, intended to be a process used on a limited basis in exigent or at least unusual circumstances. It is not intended to be a routine filing method.

Specific Recommendation

Rule 5 should be amended as follows:

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPER

* * *

Rule 5.05. Filing; Facsimile Transmission

Any paper may be filed with the court by facsimile transmission. Filing shall be deemed complete at the time that the facsimile transmission is received by

the court and the filed facsimile shall have the same force and effect as the original. Only facsimile transmission equipment that satisfies the published criteria of the Supreme Court shall be used for filing in accordance with this rule.

Within 5 days after the court has received the transmission, the party filing the document shall forward the following to the court:

(a) a $25 transmission fee for each 50 pages, or part thereof, of the filing; ~~and~~

(b) ~~the original signed document~~ any bulky exhibits or attachments; and

(c) the applicable filing fee or fees, if any.

If a paper is filed by facsimile, the sender's original must not be filed but must be maintained in the files of the party transmitting it for filing and made available to the court or any party to the action upon request.

Upon failure to comply with the requirements of this rule, the court in which the action is pending may make such orders as are just, including but not limited to, an order striking pleadings or parts thereof, staying further proceedings until compliance is complete, or dismissing the action, proceeding, or any part thereof.

Advisory Committee Comment—2006 Amendment

Rule 5.05 is amended to delete the requirement that an "original" document follow the filing by facsimile. The requirement of a double filing causes confusion and unnecessary burdens for court administrators, and with the dramatic improvement in quality of received faxes since this rule was adopted in 1988, it no longer serves a useful purpose. Under the amended rule, the document filed by facsimile is the original for all purposes unless an issue arises as to its authenticity, in which case the version transmitted electronically and retained by the sender can be reviewed.

The filing fee for fax filings in Rule 5.05 is changed from $5.00 to $25.00 because fax filings, even under the streamlined procedures of the amended rule, still impose significant administrative burdens on court staff, and it is therefore appropriate that this fee, unchanged since the rule's adoption in 1988, be increased. A number of committee members expressed the view that facsimile filing was, and still is, intended to be a process used on a limited basis in exigent or at least unusual circumstances. It is not intended to be a routine filing method.

The rule does not provide a specific mechanism for collecting the transmission fee required under the rule. Because prejudice may occur to a party if a filing is deemed ineffective, the court should determine the appropriate consequences of failure to pay the necessary fee.

Recommendation 2: **The Court should amend Rule 23 dealing with class actions to conform the rule to its federal counterpart, as amended in 2003.**

Introduction

Rule 23 provides detailed guidance on class action practice. Fed. R. Civ. P. 23 was amended in 2003 to modernize the rule and to conform it to class action practice as it has evolved since the rule's last substantial revision in 1966. The 1966 federal amendments were implemented in large part by amendment of the Minnesota rules in 1968, and the committee believes that it is important that state practice follow federal law in this area.

Class actions present significant case management challenges in state court, and state courts look to federal procedure for guidance on matters of class action procedure. Federal class action law is significantly more extensive than Minnesota law, and conforming Minnesota's rule to the federal rule is a practical and useful way to provide greater guidance on class action procedure to state-court litigants and judges.

The 2003 federal rule amendments were carefully considered by the federal rules advisory committee and were supported by empirical research conducted by the Federal Judicial Center. They appear to be working well in federal practice, and Minnesota litigants will be well served by their adoption in state court.

Specific Recommendation

Rule 23 of the Minnesota Rules of Civil Procedure should be amended as set forth below. The more significant changes made include:

1. New Rule 23.03(a)(1) changes the requirement that class certification be taken up "as soon as practicable" to "at an early practicable time." The former

rule's strong language occasionally has prompted courts to feel they do not have the leeway to defer ruling on certification until a later, more logical time.

2. Rule 23.03(a)(2) as amended includes an express requirement that the court define the class and appoint class counsel, necessary requirements only implicit in the current rule.

3. Rule 23.02(b) is amended to clarify that notice to the class may be given in certain cases, but is mandatory in others. The rule also provides guidance now lacking on what information these front-end notices should convey. These notions are well developed in the case law, and should be part of the rule's specified procedures.

4. Rule 23.05 is extensively revamped to provide much more guidance on what actions the court and parties should take to effect judicial review of class action settlements, including express requirements for notice to class members and for entertaining and hearing of objections. Rule 23.07 deals similarly with the appointment of class counsel and Rule 23.08 deals with the approval of attorney fee awards. These procedures, which have developed in existing state and federal practice to become standard class action procedures, are embodied in the amended rule.

5. Rule 23.06 provides expressly for interlocutory appeal to the Minnesota Court of Appeals of class certification decisions, with discretion left in the appellate court to determine whether to entertain the appeal. This provision incorporates the timing and other procedures of Rule 105 of the Minnesota Rules of Civil Appellate Procedure rather than the ten-day deadline adopted in the federal rule.

RULE 23. CLASS ACTIONS

* * *

Rule 23.03. Determin~~ation~~ing by Order Whether to Certify a Class Action ~~to be Maintained~~; Appointing Class Counsel; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses

~~(a) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order hereunder may be conditional, and may be altered or amended before the decision on the merits.~~

~~(b) In any class action maintained pursuant to Rule 23.02(c), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (1) the court will exclude from the class any person who so requests by a specified date; (2) the judgment, whether favorable or not, will include all members who do not request exclusion; and (3) any member who does not request exclusion may, but need not, enter an appearance through counsel.~~

(a) Certification Order.

(1) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(2) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23.07.

(3) An order under Rule 23.03(a)(1) may be altered or amended before final judgment.

(b) Notice.

(1) For any class certified under Rule 23.02(a) or (b), the court may direct appropriate notice to the class.

(2) For any class certified under Rule 23.02(c), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

(A) the nature of the action,

(B) the definition of the class certified,

(C) the class claims, issues, or defenses,

(D) that a class member may enter an appearance through counsel if the member so desires,

(E) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

(F) the binding effect of a class judgment on class members under Rule 23.03(c).

(c) Identification of Class Members. The judgment in an action maintained as a class action ~~pursuant to~~ under Rule 23.02(a) or (b), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action ~~pursuant to~~ under Rule 23.02(c), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Rule 23.03(b) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Issue Classes and Subclasses. When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a

class may be divided into subclasses and each subclass treated as a class; and the provisions of this rule shall then be construed and applied accordingly.

* * *

Rule 23.05. ~~Dismissal or Compromise~~ Settlement, Voluntary Dismissal, or Compromise.

~~A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~

(a) ~~Settlement~~ Court Approval.

(1) A settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class is effective only if approved by the court.

(2) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(3) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(b) Disclosure Required. The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23.05(a) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(c) Additional Opt-Out Period. In an action previously certified as a class action under Rule 23.02(c), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(d) Objection to Settlement.

(1) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23.05(a)(1).

(2) An objection made under Rule 23.05(d)(1) may be withdrawn only with the court's approval.

Rule 23.06. Appeals.

The court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule. An application to appeal must be sought within the time provided in Rule 105 of the Minnesota Rules of Civil Appellate Procedure, and shall be subject to the other provisions of that rule. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Rule 23.07. Class Counsel.

(a) Appointing Class Counsel.

(1) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(2) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(3) In appointing class counsel, the court

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action,

(ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

(iii) counsel's knowledge of the applicable law, and

(iv) the resources counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(D) may make further orders in connection with the appointment.

(b) Appointment Procedure.

(1) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(2) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23.07(a)(2) and (3). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(3) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23.08.

Rule 23.08. Attorney Fees Award.

In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(a) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion

must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(b) Right to Object. A class member, or a party from whom payment is sought, may object to the motion.

(c) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52.01.

(d) Reference to Special Master. The court may refer issues related to the amount of the award to a special master as provided in Rule 53.01(a).

Rule 23.~~06~~09. Derivative Actions by Shareholders or Members

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interest of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Rule 23.~~07~~10. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23.04 and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23.05.

Advisory Committee Comment—2006 Amendment

Rule 23 is extensively revamped by these amendments. The recommended changes primarily adopt the amendments made to federal rule 23 in 2003. The reasons for these amendments are set forth in the advisory committee notes that accompanied the federal rule amendments. *See* Fed. R. Civ. P. 23, Advis. Comm. Notes—2003 Amends., *reprinted in* FED. CIV. JUD. PROC. & RULES 131-37 (West 2005 ed.). Those notes provide useful information on the purposes for these amendments and may be consulted for interpretation of these rules.

Rule 23.03(a)(1) requires class certification to be taken up "at an early practicable time" rather than "as soon as practicable." Although these standards are substantially similar, the former rule's phrasing occasionally prompted courts to feel they did not have the leeway to defer ruling on certification until a later, more logical time. In many cases, certification cannot be decided without consideration of the practicalities of trying the case, making early certification impractical. *See generally* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.133 (Fed. Jud. Ctr. 2004). Rule 23.03(a)(2) places in the rule an express requirement that the class be defined at the time of certification and that class counsel be appointed. Precise definition of the class is necessary to identify the persons entitled to relief, bound by a judgment in the case, and entitled to notice. *Id.* § 21.222. The procedures for appointment of class counsel are set forth in Rule 23.07. The rule omits reference to a "conditional" certification, reflecting the disfavor this device has earned, but preserves the ability of courts to amend a certification order any time before final judgment is entered.

Rule 23.03(b) establishes the power of the court to direct notice to the class in actions certified under Rule 23.02(a) or (b) (where notice is not generally required) and also states the requirement that notice be given to members of classes certified under Rule 23.02(c). Rule 23.03(b)(2) provides guidance on the content and form of these required notices, and requires the use of plain language. Sample plain-language class notice documents are available on the Federal Judicial Center's website, http://www.fjc.gov. These requirements are intended to improve the amount of useful information available to potential class members and to inform their decision on class participation.

Rule 23.05 is expanded to define the procedures for review and approval of class settlements. The rule adopts the changes in Fed. R. Civ. P. 23(e) with one stylistic modification. The federal rule, read literally, might appear to suggest that a trial court must approve every settlement submitted for approval; the language is reworked in the proposed rule to make it clear that although court approval is required for a settlement to be effective, the court's options are not constrained. Indeed, many proposed settlements are properly rejected

for not being in the interest of class members. Rule 23.05(a)(3) requires that a hearing be held, and Rule 23.05(b) creates an express requirement that any "side" agreements relating to the settlement must be identified in a statement filed with the court. Rule 23.05(a)(1) removes an ambiguity that existed under the old rule, and now expressly requires court approval only of claims of a certified class.

Rule 23.05(c) authorizes the court to allow a "second opt-out" right in actions certified under Rule 23.02(c). In these actions an opt-out deadline is typically established early in the period following certification. This provision allows the court to permit class members who have not opted out to do so with knowledge of the actual settlement terms.

Rule 23.06 makes it clear that decisions relating to class certification are subject to appellate review on a discretionary basis. This rule is slightly different from its federal counterpart because Minnesota has an established process for discretionary appeals of interlocutory orders, Minn. R. Civ. App. P. 105, that is not present in the federal system. This new provision does not substantially change existing Minnesota practice, as the Minnesota appellate courts have allowed discretionary appeals under Rule 105. *See, e.g., Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002). The federal rule adopts a shorter 10-day deadline for seeking appellate review of decisions relating to class certification decisions. The committee believes that consistency with the requirements for other discretionary appeals in Minnesota is more important than consistency with the federal rule on this point. The other provisions of Rule 105 and the appellate rules generally apply to appeals under Rule 23.06.

Recommendation 3: The Court should adopt changes to the rules governing discovery.

Introduction

This committee has considered discovery reform in virtually every round of meetings it has held. Recent changes to the federal rules were either too recent to have been considered or were recent enough when the committee last met that it recommended that action be deferred until there was more experience with the rules in federal court. The committee believes most of these amendments can and should now be made in the state rules.

The committee recommends that the change in the scope of discovery made in Fed. R. Civ. P. 26(b)(1) in 2000 be adopted at this time. Although a minority of the committee believes that discovery is working acceptably under the current Minnesota rule, a majority concludes that reinforcing the power of trial judges to limit the scope of discovery in many cases will serve the interests of just, speedy, and inexpensive resolution of cases. It is a change that has been implemented without problem in federal court and there are significant advantages to having state-court discovery practice conform to that in federal court, except where the special needs of state-court cases dictate different procedures.

The amendment to Rule 30 adopts in Minnesota the presumptive limit of depositions of a person to one day of seven hours of examination. This limit can be expanded by agreement of the parties or order that additional examination time is necessary to permit a fair examination or where the deposition is obstructed by conduct of the deponent or others. A minority of the committee believes this rule is not needed and may prove to be the subject of gameplaying by some attorneys.

Both these changes have been tested in federal court litigation, however, and have proven workable; they warrant adoption in Minnesota. Although the problems of discovery abuse are not as pervasive as may have once existed in

federal court, a majority of the committee believes these amendments address real problems and will both ease the problems that now exist and help prevent them from arising in state court practice.

Specific Recommendations

1. Rule 26 should be amended as follows:

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

* * *

Rule 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~~ that 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,~~ a claim or defense of any 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. ~~The~~ Relevant information sought need not be admissible at the trial if the ~~information sought~~ discovery appears reasonably calculated to lead to the discovery of admissible evidence.

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)~~ Rule 26.03.

Advisory Committee Comment—2006 Amendment

The amendment to Rule 26.02 is simple but potentially quite important. The rule is amended to conform to Fed. R. Civ. P. 26(b) as amended in 2000. Although the proposed changes were expected to create as many problems as they solved, *see, e.g.*, John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505 (2000); Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule* 26(b)(1) *in Litigation: The New Scope of Discovery, in* 19 F.R.D, 396 (2001), the change in the scope of discovery, to limit it to the actual claims and defenses raised in the pleadings, has worked well in federal court, and most feared problems have not materialized. *See generally* Thomas Rowe, *A Square Peg in a Round Hole? The 2000 Limitation the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 25 (2001); Note, *The Sound and the Fury or the Sound of Silence? Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of the Discovery-Scope Narrowing Language in the 2000 Amendments to Federal Rule of Civil Procedure 26(b)(1)*, 37 GA. L. REV. 1039 (2003). Courts have simply not found the change dramatic nor given it a draconian interpretation. *See, e.g., Sanyo Laser Products, Inc. v. Arista Records, Inc.*, 214 F.R.D. 496 (S.D. Ind. 2003).

The narrowing of the scope of discovery as a matter of right does not vitiate in any way the traditional rule that discovery should be liberally allowed. It should be limited to the claims and defenses raised by the pleadings, but the requests should still be liberally construed. *See, e.g., Graham v. Casey's General Stores*, 206 F.R.D. 251, 253 (S.D. Ind. 2002)("Even after the recent amendment to Federal Rule of Civil Procedure 26, courts employ a liberal discovery standard.")

2. Rule 30 should be amended as follows:

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

* * *

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

(a) Notice. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the name and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b) Notice of Method of Recording. The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by non-stenographic means.

(c) Additional Recording Method. With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

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.

(d) Role of Officer. Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(e) Production of Documents. The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(f) Deposition of Organization A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the

organization. This provision does not preclude taking a deposition by any other procedure authorized in these rules.

(g) Telephonic Depositions. The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28.01, 37.01(a), 37.02(a) and 45.04, a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

Advisory Committee Comment—2006 Amendment

Rule 30.02 is amended only to add subsection titles. This change is made for convenience and consistency with the style of other rules, and is not intended to affect the rule's interpretation

* * *

Rule 30.04. Schedule and Duration; Motion to Terminate or Limit Examination

(a) Objections. Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A ~~party~~ person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (c).

(b) Duration. ~~By order the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26.02(a) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination.~~ Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26.02(b) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(c) Sanctions. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(~~c~~d) Suspension of Examination. At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26.03. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in relation to the motion.

Advisory Committee Comment—2006 Amendment

Rule 30.04(a) is amended to remove an ambiguity in the current rule. As amended, the rule expressly extends the prohibition against improper instruction of a deponent not to answer to all persons (including counsel for a non-party witness), instead of just "parties."

Rule 30.04(b) is amended to adopt a specific time limit on depositions. Although parties may agree to a longer deposition and the court can determine that longer examination is appropriate, a deposition is made subject to a limit of one day lasting seven hours. This amendment is identical to the change in Fed. R. Civ. P. 30(d)(1) & (2) made in 2000. The purpose of this amendment is to decrease the burden of discovery on witnesses and to encouraged focused examination of all deponents. Where the examining party engages in proper and focused examination and encounters unhelpful responses or inappropriate objections, or where the issues in the case dictate that additional time is necessary to permit a fair examination, the court is required to provide it. The rule establishes a presumptive limit on the length of depositions, not the presumptive length. Most depositions will continue to be much shorter than seven hours, and the rule does not limit courts from establishing shorter time limits in particular cases.

* * *

Rule 30.06. Certification and Filing by Officer; Exhibits; Copies; Notices of Filing

(a) Certification by Officer; Exhibits. The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness, and shall certify that the deposition has been transcribed, that the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court or agreed to by the parties the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked "Deposition of (herein insert the name of witness)," and shall promptly send it to the attorney or party who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them, the person may (1) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (2) offer the originals to be marked for identification, after giving each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition pending final disposition of the case.

(b) Duties of Officer. Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another

method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(c) Notice of Receipt of Transcript. The party taking the deposition shall give prompt notice of its receipt from the officer to all other parties.

Advisory Committee Comment—2006 Amendment

Rule 30.06 is amended only to add subsection titles. This change is made for convenience and consistency with the style of other rules, and is not intended to affect the rule's interpretation

Rule 30.07. Failure to Attend or to Serve Subpoena; Expenses

(a) Failure of Party Noticing Deposition to Attend. If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by the other party and the other party's attorney in so attending, including reasonable attorney fees.

(b) Failure to Serve Subpoena on Non-Party Witness. If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon that witness, and the witness because of such failure does not attend, and if another party attends in person or by attorney on the expectation that the deposition of that witness is to be taken, the court may order the party giving notice to pay to such other party the amount of the reasonable expenses incurred by those individuals in so attending, including reasonable attorney fees.

Advisory Committee Comment—2006 Amendment

Rule 30.07 is amended only to add subsection titles. This change is made for convenience and consistency with the style of other rules, and is not intended to affect the rule's interpretation

Recommendation 4: The Court should amend Rule 43 to conform it to practice relating to payment for interpreters.

Introduction

This recommendation results from a request from the Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts (Implementation Committee). The Implementation Committee advised the advisory committee of a disparate practice around the state related to payment for court interpreters in civil cases due to conflicting language in Minn. R. Civ. P. 43.07 and Minn. Stat. § 546.44, subd. 3.

Rule 43.07 currently states that payment for interpreters "shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as a cost, in the discretion of the court." Minn. R. Civ. P. 43.07. The statute concerning interpreters in civil cases states a simpler standard: "fees and expenses of a qualified per diem interpreter must be paid by the state courts." Minn. Stat. § 546.44, subd. 3 (2004). Most courts follow the statutory mandate and pay for interpreters in civil cases, but some courts have required the parties to pay for their own interpreters for non-English speaking parties and witnesses, relying on the authority provided in the civil rule. Both the Implementation Committee and the advisory committee believe this result is undesirable, and Rule 43.07 should be amended to remove this source of confusion.

Specific Recommendation

Rule 43.07 should be amended as follows:

RULE 43. TAKING OF TESTIMONY

* * *

Rule 43.07. Interpreters

The court may appoint an interpreter of its own selection and may fix reasonable compensation. The compensation shall be paid out of funds provided by law. ~~or by one or more of the parties as the court may direct, and may be taxed ultimately as a cost, in the discretion of the court.~~

Advisory Committee Comment—2006 Amendment

Rule 43.07 is amended to conform the rule to statutory requirement that the "fees and expenses of a qualified per diem interpreter must be paid by the state courts." Minn. Stat. § 546.44, subd. 3 (2004). Language is stricken from the second sentence to eliminate the conflict between the rule and statute regarding payment of court-appointed interpreters.

This amendment is drawn from the language of Minn. R. Crim. P. 26.03, subd. 16.

Recommendation 5: **The Court should amend Rule 45 to modernize subpoena practice, conform it to federal court practice, and remove the requirement for court issuance of subpoenas.**

Introduction

Rule 45 has not been reviewed by the advisory committee since the extensive amendments of Fed. R. Civ. P. 45 in 1991. The committee has reviewed those amendments, and believes they should be adopted in Minnesota. Having a uniform subpoena practice in state and federal court will make the rules' requirements easier to know and follow. The changes to the federal rule have made the rule more protective of the rights of non-parties and more efficient in practice. Minnesota has imposed the cumbersome requirement that all subpoenas be issued by the court administrator; the committee believes issuance by attorneys is more efficient and will ease the administrative burden on court staff. Court issuance of subpoenas has also become expensive, as the legislature has quadrupled the fee for issuance (from $3.00 to $12.00). *See* Minn. Stat § 357.021, subd. 2(3) (2004).

The committee believes one important provision of existing Minnesota subpoena practice should be retained in the new rule. Subdivision .06 of the existing rule provides explicit authority for compensating non-parties for expenses and for advising subpoenaed parties of their rights. The committee believes these provisions should be retained in Minnesota practice, and the proposed rule does so.

Specific Recommendation

Rule 45 should be amended as follows:

RULE 45. SUBPOENA

Rule 45.01. ~~For Attendance of Witnesses;~~ Form; Issuance

~~(a) Every subpoena shall be issued by the court administrator under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The court administrator shall issue a subpoena, or a subpoena for the production of documentary evidence or tangible things, signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service.~~

~~(b) Subpoenas shall be issued only in connection with a duly noted deposition as set forth in Rule 45.04 or in connection with a hearing or trial as set forth in Rule 45.05. Violation of this provision constitutes an abuse of process, and shall subject the attorney or party to appropriate sanctions or damages.~~

~~(c) Every subpoena shall contain a notice to the person to whom it is directed advising that person of the right to reimbursement for certain expenses pursuant to Rule 45.06, and the right to have the amount of those expenses determined prior to compliance with the subpoena.~~

(a) Form.

Every subpoena shall

(1) state the name of the court from which it is issued; and

(2) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(3) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(4) contain a notice to the person to whom it is directed advising that person of the right to reimbursement for certain expenses pursuant to Rule 45.03(d), and the right to have the amount of those expenses determined prior to compliance with the subpoena.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(b) Subpoenas Issued In Name of Court. A subpoena commanding attendance at a trial or hearing, for attendance at a deposition, or for production or inspection shall be issued in the name of the court where the action is pending.

(c) Issuance by Court or by Attorney. The court administrator shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of the court where the action is pending.

~~Rule 45.02. For Production of Documentary Evidence~~

~~A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.~~

Rule 45.0~~3~~2. Service

~~A subpoena may be served by the sheriff, a deputy sheriff, or any other person who is not a party. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at the person's usual place of abode with some person of suitable age and discretion then residing therein and by tendering to the person the fees for 1 day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the state of Minnesota or an officer or agency thereof, fees and mileage need not be tendered.~~

(a) Who May Serve and Method of Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at the person's usual place of abode with some person of suitable age and discretion then residing therein and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the state of Minnesota or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5.02.

(b) Statewide Service. Subject to Rule 45.03(c)(1), a subpoena may be served at any place within the state of Minnesota.

(c) Proof of Service. Proof of service when necessary shall be made by filing with the court administrator of the court on behalf of which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(d) Compensation of Subpoenaed Person. The party serving the subpoena shall make arrangements for reasonable compensation as required under

Rule 45.03(d) prior to the time of the taking of such testimony. If such reasonable arrangements are not made, the person subpoenaed may proceed under Rule 45.02 or 45.04(b). The party serving the subpoena may, if objection has been made, move upon notice to the deponent and all parties for an order directing the amount of such compensation at any time before the taking of the deposition. Any amounts paid shall be subject to the provisions of Rule 54.04.

Rule 45.03. Protection of Persons Subject to Subpoenas.

(a) Requirement to Avoid Undue Burden. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(b) Subpoena for Document Production Without Deposition.

(1) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(2) Subject to paragraph .04(b) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of

the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(c) Motion to Quash or Modify Subpoena.

(1) On timely motion, the court on behalf of which a subpoena was issued shall quash or modify the subpoena if it

(A) fails to allow reasonable time for compliance;

(B) requires a person who is not a party or an officer of a party to travel to a place outside the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of Rule 45.03(c)(2)(iii), such a person may in order to attend trial be commanded to travel from any such place within the state of Minnesota, or

(C) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(D) subjects a person to undue burden.

(2) If a subpoena

(A) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(B) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(C) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) **Compensation of Certain Non-Party Witnesses.** Subject to the provisions of Rules 26.02 and 26.03, a witness who is not a party to the action or an employee of a party [except a person appointed pursuant to Rule 30.02(f)] and who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information, or facts obtained as a result of activities in such profession, business, or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.

Rule 45.04. ~~Subpoena for Taking Depositions; Place of Examination~~ Duties in Responding to Subpoena.

~~(a) Proof of service of notice to take a deposition, as provided in Rules 30.02 and 31.01 or in the rules of a state where the action is pending, constitutes a sufficient authorization for the issuance of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26.02, but in that event the subpoena will be subject to the provisions of Rules 26.03 and 45.04(b).~~

~~(b) The person to whom the subpoena is directed may, within 10 days after service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in~~

~~the subpoena written objection to the production, inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to the production of, nor the right to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.~~

~~(c) A resident of this state may be required to attend an examination only in the county wherein the resident resides or is employed or transacts business in person, or at such other convenient place as is fixed by order of the court. A nonresident of the state may be required to attend in any county of the state.~~

(a) Form of Production. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(b) Claims of Privilege. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

~~Rule 45.05. Subpoena for a Hearing or Trial~~

~~At the request of any party, the court administrator of the district court shall issue subpoenas for witnesses in all civil cases pending before the court, or before any magistrate, arbitrator, board, committee, or other person authorized to examine witnesses. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.~~

Rule 45.05. Contempt.

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court on behalf of which the subpoena was issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by Rule 45.03(c)(1)(B).

~~**Rule 45.06. Expenses of Non-Parties**~~

~~Subject to the provisions of Rules 26.02 and 26.03, a witness who is not a party to the action or an employee of a party [except a person appointed pursuant to Rule 30.02(f)] and who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information, or facts obtained as a result of activities in such profession, business, or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.~~

~~The party serving the subpoena shall make arrangements for such reasonable compensation prior to the time of the taking of such testimony. If such reasonable arrangements are not made, the person subpoenaed may proceed under Rule 45.02 or 45.04(b). The party serving the subpoena may, if objection has been made, move upon notice to the deponent and all parties for an order directing the amount of such compensation at any time before the taking of the deposition. Any amounts paid shall be subject to the provisions of Rule 54.04.~~

~~**Rule 45.07. Contempt**~~

~~Failure to obey a subpoena without adequate excuse is a contempt of court.~~

Advisory Committee Comment—2006 Amendment

Rule 45 is replaced, virtually in its entirety, by its federal counterpart. Provisions of the federal rule that do not apply in state court practice are

deleted or replaced by comparable provisions consistent with current Minnesota practice. The new rule recognizes the scope of the subpoena power in the existing rule and does not significantly change it. Portions of the federal rule not relevant to state practice have been deleted.

The most significant "new" provisions of the rule are the authorization of issuance of subpoenas by attorneys as officers of the court (Rule 45.01(c)) and the adoption of a mechanism for requiring production of documents without requiring a deposition to be conducted (Rule 45.01(a)(3)). The rule retains the provisions of former Rule 45.06, which provide for expenses of non-parties put to particular expense of complying with a subpoena. Those provisions are now bifurcated, with portions relating to notice of the right to costs in Rule 45.01 dealing with the form of subpoenas and the provision requiring payment in Rule 45.03(d). Additionally, Rule 45.03(a) places an affirmative duty on the attorney issuing or serving a subpoena to avoid imposing undue burden or expense on the person receiving it.

Recommendation 6: **The Court should amend Rule 50 to adopt the "judgment as a matter of law" nomenclature to replace jnov and motion for directed verdict.**

Introduction

Fed. R. Civ. P. 50 was amended in 1991 to abandon the archaic language "judgment notwithstanding the verdict," or its j.n.o.v. and jnov contractions, opaque to all but Latin scholars, and "motion for directed verdict," at best a misnomer given the absence of any direction to the jury to return a particular verdict. This committee has monitored these amendments since they were made in the federal courts, and believes it is appropriate now to adopt them in state court.

The federal changes were made to remove the archaic language and to have the rule state what the practice already imposed: a uniform standard of a "motion for judgment as a matter of law." The federal rule was not intended to change the actual practice under the rule. *See* Fed. R. Civ. P. 50(a), Advisory Comm. Notes—1991 Amends. The federal courts have recognized the non-substantive nature of the amendment. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2521, at 243 n.15 and accompanying text (2d ed. 1995)(collecting cases). The change also makes it clear that the motion can be brought at any time, eliminating the former trap of allowing the motion at the end of trial only if a motion were also made at the end of the plaintiff's case. The new rule also expressly applies to claims and defenses, making it a tool that can be used by any party to a case, not just defendants.

If this change is adopted, a conforming amendment should be made to Minn. R. Civ. App. P. 104.01, subd. 2(a), to reflect the revised nomenclature. The order adopting these rules should specifically provide that a timely and proper motion under Rule 50.02, whether brought under the old or new version of the rule

(or if misnamed in the motion) will have the effect intended by Rule 104.01, subd. 2.

Specific Recommendation

1. Rule 50 should be amended as follows:

RULE 50. ~~MOTION FOR A DIRECTED VERDICT; JUDGMENT NOTWITHSTANDING VERDICT; ALTERNATIVE MOTION~~ JUDGMENT AS A MATTER OF LAW IN JURY TRIALS; ALTERNATIVE MOTION FOR NEW TRIAL; CONDITIONAL RULINGS

Rule 50.01. ~~Directed Verdict; When Made; Effect~~ Judgment as a Matter of Law.

~~A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent shall, after denial of the motion, have the right to offer evidence as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. If the evidence is sufficient to sustain a verdict for the opponent, the motion shall not be granted. The order of the court granting the motion for a directed verdict is effective without any assent of the jury.~~

(a) Standard. If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may decide the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(b) Timing and Content. Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Rule 50.02. ~~Judgment Notwithstanding Verdict~~ Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

~~(a) A party may move that judgment be entered notwithstanding the verdict or notwithstanding the jury has disagreed and been discharged, whether or not the party has moved for a directed verdict, and the court shall grant the motion if the moving party would have been entitled to a directed verdict at the close of the evidence.~~

~~(b) A motion for judgment notwithstanding the verdict may include in the alternative a motion for a new trial.~~

~~(c) A motion for judgment notwithstanding the verdict or notwithstanding the jury has disagreed and been discharged shall be served and heard within the times specified in Rule 59 for the service and hearing of a motion for a new trial and may be made on the files, exhibits, and minutes of the court. On a motion for judgment notwithstanding the jury has disagreed and been discharged, the date of discharge shall be the equivalent of the date of rendition of a verdict within the meaning of that rule, but such motion must in any event be served and heard before a retrial of the action is begun.~~

~~(d) If the motion for judgment notwithstanding the verdict is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall~~

~~proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.~~

~~(c) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 except that the times for serving and hearing said motion shall be determined from the date of notice of the trial court's order granting judgment notwithstanding rather than the date the verdict is returned.~~

~~(f) If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling that party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.~~

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by serving a motion within the time specified in Rule 59 for the service of a motion for a new trial—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(a) if a verdict was returned:

(1) allow the judgment to stand,

(2) order a new trial, or

(3) direct entry of judgment as a matter of law; or

(b) if no verdict was returned:

(1) order a new trial, or

(2) direct entry of judgment as a matter of law.

Rule 50.03. Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(a) Renewed Motion. If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(b) Timing. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be served and heard within the times specified in Rule 59 for the service and hearing of a motion for a new trial.

Rule 50.04. Denial of Motion for Judgment as a Matter of Law.

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as respondent on appeal, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is

entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Advisory Committee Comment—2006 Amendment

Rule 50 is amended in toto to adopt the changes made in 1991 to Fed. R. Civ. P. 50. The 1991 amendment of the federal rule was made to remove the archaic language and procedures of directing verdicts and granting j.n.o.v. The amended rule states a standard that the former rule already recognized: a uniform standard for motions made after trial begins of a "motion for judgment as a matter of law." The purpose of the change is two-fold: to adopt names that better describe the role of the motions and, because the motions essentially apply the same standard, to give them a common name.

This change is not intended to change substantive practice relating to these motions. The federal rule amendment in 1991 was not intended to change the actual practice under that rule. *See* Fed. R. Civ. P. 50(a), Advisory Comm. Notes—1991 Amend. The federal courts have recognized the non-substantive nature of the amendment. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2521, at 243 n.15 and accompanying text (2d ed. 1995)(collecting cases).

The timing provisions of the rule have been changed slightly to accommodate Minnesota procedure relating to the service and filing of post-decision motions. Like the current rule, motions under Rule 50 must be served and filed in accordance with the timing mechanism and deadlines of Minn. R. Civ. P. 59.

2. As part of the amendment to Rule 50, and only if that rule is amended, Rule 104 of the Minnesota Rules of Civil Appellate Procedure should be amended as follows:

RULE 104. TIME FOR FILING AND SERVICE OF NOTICE OF APPEAL

* * *

Rule 104.01. Time for Filing and Service

* * *

Subd. 2. Effect of Post-Decision Motions. Unless otherwise provided by law, if any party serves and files a proper and timely motion of a type specified immediately below, the time for appeal of the order or judgment that is the subject of such motion runs for all parties from the service by any party of notice of filing of the order disposing of the last such motion outstanding. This provision applies to a proper and timely motion:

(a) for judgment ~~notwithstanding the verdict~~ as a matter of law under Minn. R. Civ. P. 50.02;

* * *

Advisory Committee Comment—2006 Amendment

Rule 104.01, subd. 2(a) is amended to reflect the new name for a motion challenging the legal sufficiency of a verdict under Minn. R. Civ. P. 50.02. As a result of the amendment to Minn. R. Civ. P. 50.02, the former "motion for directed verdict" and "motion for judgment notwithstanding the verdict" are both now referred to as motions for "judgment as a matter of law." Rule 104.01, subd. 2(a) is amended to reflect this nomenclature. During the short transition period during which timely appeals might be taken from cases where either motions for judgment notwithstanding the verdict or motions for judgment as a matter of law may have been filed after the trial court decision, the court should consider the two motions fungible in determining whether an appeal is timely.

Recommendation 7: **The Court should amend Rule 51 to clarify practice relating to requesting and giving jury instructions and preserving the record as to instructions.**

Introduction

Rule 51 of the Federal Rules of Civil Procedure was amended in 2003 to expand and clarify the specification of the procedures governing jury instructions. The purpose of the amendment to the federal rules was to conform the rule to the practices actually used in and approved by a majority of the federal courts, and to provide some "anchor" in the rule to accepted practices that found no mention in the rule. *See* Fed. R. Civ. P. 51, Advis. Comm. Notes—2003 Amend., *reprinted in* FED. CIV. JUD. PROC. & RULES 227 (West 2005 ed.).

The amended rule provides separate sections dealing with requests for instructions (and confirming the authority of trial courts to require their submission by a date in advance of trial), the content of instructions, and process for objecting to instructions, and the procedure for assigning error on appeal to decisions relating to instructions.

The advisory committee believes the amended rule is more accessible and will be useful to judges and attorneys. It does not represent a significant change in Minnesota practice, but should help parties understand their obligations and rights.

Specific Recommendation

Rule 51 should be amended as set forth below.

RULE 51. INSTRUCTIONS TO THE JURY; OBJECTIONS; PRESERVING A CLAIM OF ERROR

~~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.~~

Rule 51.01. Requests.

(a) At or Before the Close of Evidence. A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(b) After the Close of Evidence. After the close of the evidence, a party may:

(1) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51.01(a), and

(2) with the court's permission file untimely requests for instructions on any issue.

Rule 51.02. Instructions.

The court:

(a) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(b) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(c) may instruct the jury at any time after trial begins and before the jury is discharged.

Rule 51.03. Objections.

(a) Form. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(b) Timeliness. An objection is timely if:

(1) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51.02(a), objects at the opportunity for objection required by Rule 51.02(b); or

(2) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51.02(b) objects promptly after learning that the instruction or request will be, or has been, given or refused.

Rule 51.04. Assigning Error; Plain Error.

(a) Assigned Error. A party may assign as error:

(1) an error in an instruction actually given if that party made a proper objection under Rule 51.03, or

(2) a failure to give an instruction if that party made a proper request under Rule 51.01, and—unless the court made a definitive ruling on the record rejecting the request—also made a proper objection under Rule 51.03.

(b) Plain Error. A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51.04(a)(1) or (2).

Advisory Committee Comment—2006 Amendment

Rule 51 is entirely new with this amendment. The new rule is modeled on its federal counterpart, Fed. R. Civ. P. 51, as it was amended in 2003. The changes are intended primarily to provide detailed procedural guidance where the existing rule is either silent or vague. *See generally* Fed. R. Civ. P. 51, Advis. Comm. Notes—2003 Amend., *reprinted in* FED. CIV. JUD. PROC. & RULES 227 (West 2005 ed.).

Rule 51.02(c) continues to recognize that the court may give instructions to the jury at any time after trial begins, including preliminary instructions before opening statements or the taking of evidence, during the trial, and at the end of trial either before or after the arguments of counsel.

Recommendation 8: The Court should amend Rule 53 to conform it to its federal counterpart.

Introduction

Rule 53, dealing with referees, is sorely out of date. In practice state courts use referees under the recently updated federal rule, including use of the nomenclature of that rule, referring to these judicial adjuncts as "masters" or "special masters." Because Fed. R. Civ. P. 53 was extensively modernized in 2003, and conformed in many ways to the actual practices in federal courts, the committee believes it is a model that should be used in state court. This is especially important for this rule given the infrequent use of masters and the desirability of having federal precedent available to guide state courts.

The federal rule was extensively revamped in 2003. These changes were guided by an empirical study conducted by the Federal Judicial Center. *See* Thomas F. Willging, *et al*., *Special Masters' Incidence and Activity* (Fed. Jud. Ctr. 2000), available at FJC website, http://www.fjc.gov/. The rules provide more comprehensive coverage of the procedural issues arising in the use of masters, including appointment, the authority of masters, the report and action on it by the court, and compensation.

The adoption of this amendment is not intended to expand the use of masters or change the presumption that the use of masters be reserved for special situations. One benefit of the rule is to remove confusion that may exist from the lack of detail in the existing rule on the question of the right to a jury trial. Rule 53.01 expressly limits the appointment of master to conduct trial proceedings only in cases to be tried to the court without a jury.

Specific Recommendation

Rule 53 should be replaced in its entirety as set forth below:

RULE 53. MASTERS~~REFEREES~~

Rule 53.01. Appointment ~~and Compensation~~

~~The court in which any action is pending may appoint a referee therein. When the court shall state in its order of appointment that the reference is made necessary by press of business, the fees of the referee, as taxed and allowed by the court, shall be paid out by the county treasury, as the salaries of county officers are paid. In other cases the compensation to be allowed to a referee shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action which is in the custody and control of the court as the court may direct. The referee's report shall not be retained as security for the referee's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the referee is entitled to a writ of execution against the delinquent party.~~

(a) Authority for Appointment. Unless a statute provides otherwise, a court may appoint a master only to:

(1) perform duties consented to by the parties;

(2) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(A) some exceptional condition, or

(B) the need to perform an accounting or resolve a difficult computation of damages; or

(3) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge.

(b) Disqualification. A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge, unless the

parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(c) Expense. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

Rule 53.02. ~~Reference~~ Order Appointing Master.

~~A reference to a referee shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.~~

(a) Notice. The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(b) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(1) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53.03;

(2) the circumstances—if any—in which the master may communicate ex parte with the court or a party;

(3) the nature of the materials to be preserved and filed as the record of the master's activities;

(4) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(5) the basis, terms, and procedure for fixing the master's compensation under Rule 53.08.

(c) Entry of Order. The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(d) Amendment. The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

Rule 53.03. ~~Powers~~ Master's Authority

~~The order of reference to the referee may specify or limit the referee's powers and may direct the referee to report only upon particular issues, or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before it and to do all acts and take all measures necessary or proper for the efficient performance of the referee's duties specified in the order. The referee may require the production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. Unless otherwise directed by the order of reference, the referee may rule upon the admissibility of evidence, may put witnesses on oath and examine them, and may call the parties to the action and examine them upon oath. When a party so requests, the referee shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43.03 for a court sitting without a jury.~~

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a

party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

Rule 53.04. ~~Proceedings~~ Evidentiary Hearings.

~~(a) **Meetings.** When a reference is made, the court administrator shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the referee to proceed with all reasonable diligence. Either party, on notice to the parties and referee, may apply to the court for an order requiring the referee to speed the proceedings and make the report. If a party fails to appear at the time and place appointed, the referee may proceed ex parte or, in the referee's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.~~

~~(b) **Witnesses.** The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas pursuant to Rule 45. If, without adequate excuse, a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.~~

~~(c) **Statement of Accounts.** When matters of accounting are in issue, the referee may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the~~

~~accounting parties or upon written interrogatories or in such other manner as the referee directs.~~

Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

Rule 53.05. ~~**Report**~~ **Master's Orders**.

~~(a) **Contents and Filing.** The referee shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, shall set them forth in the report. The referee shall file the report with the court administrator and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and the evidence and the original exhibits. The court administrator shall forthwith mail notice of the filing to all parties.~~

~~(b) **In Nonjury Actions.** In an action to be tried without a jury, the court shall accept the referee's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6.04. After a hearing, the court may adopt the report, modify it, reject it in whole or in part, receive further evidence, or recommit it with instructions.~~

~~(c) **In Jury Actions.** In an action to be tried by a jury, the referee shall not be directed to report the evidence. The referee's findings upon the issues submitted are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.~~

~~(d) **Stipulation as to Findings.** The effect of a referee's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.~~

~~(e) **Draft Report.** Before filing the report, a referee may submit a draft thereof to attorneys for all parties for the purpose of receiving their suggestions.~~

A master who makes an order must file the order and promptly serve a copy on each party. The court administrator must enter the order on the docket.

Rule 53.06. Master's Reports.

A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

Rule 53.07. Action on Master's Order, Report, or Recommendations.

(a) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(b) Time To Object or Move. A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(c) Fact Findings. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(1) the master's findings will be reviewed for clear error, or

(2) the findings of a master appointed under Rule 53.01(a)(1) or (3) will be final.

(d) Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(e) Procedural Matters. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

Rule 53.08. Compensation.

(a) Fixing Compensation. The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.

(b) Payment. The compensation fixed under Rule 53.08(a) must be paid either:

(1) by a party or parties; or

(2) from a fund or subject matter of the action within the court's control.

(c) Allocation. The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

Rule 53.09. Appointment of ~~Magistrate Judge~~ Statutory Referee.

A statutory referee employed in the judicial branch is subject to this rule only when the order referring a matter to the statutory referee expressly provides that the reference is made under this rule.

Advisory Committee Comment—2006 Amendment

Rule 53 is replaced by a new rule derived nearly verbatim from its federal counterpart, Fed. R. Civ. P. 53. The federal rule was extensively revised by amendment in 2003. That amendment was taken up by the federal advisory committee after it had received empirical research on the use of masters in federal court. *See* THOMAS F. WILLGING, *ET AL*., SPECIAL MASTERS' INCIDENCE AND ACTIVITY (Fed. Jud. Ctr. 2000).

The federal rule provides significantly more detailed guidance to courts and litigants on the proper use of masters than either its predecessor or the current Minnesota rule. The committee believes that the changes to the federal rule are thoughtful and are valuable to litigants, and therefore appropriate for adoption in Minnesota.

The rule is not intended to expand the use of masters, but is designed to make the use of masters more readily accomplished in the minority of cases where their use is warranted.

Rule 53.01 includes specific guidance on the circumstances justifying or permitting the appointment of a master. Most significantly, the rule clarifies that in the absence of consent a master cannot be assigned to try issues on which the parties are entitled to a jury trial; mere press of other business would not trump the jury trial right. Although the court has greater latitude under the rule for issues triable to the court, either consent or some truly exceptional circumstances must be present. Short of trying issues, however, there are many roles that masters may play in civil cases, particularly in complex cases where the parties consent to the appointment. *See generally* Lynn Jokela & David F. Herr, *State Court Judicial Masters: The View From Fifty States*, 31 WM. MITCHELL L. REV. 1299 (2005).

Rule 53.02 establishes specific requirements for the order appointing a master. These subjects reflect a form of "best practices" for the use of masters, and they define procedures to be followed upon referral to a master. The rule intentionally makes these provisions mandatory because they are matters prone to dispute if not resolved at the time of appointment.

Rule 58.03 clarifies the extent of a master's authority and defines those powers expansively within the confines of the duties assigned to the master. The rule explicitly authorizes the imposition of discovery sanctions other than contempt by a master, and allows a master to recommend imposition of contempt sanctions.

The procedures established under Rule 53.07 are intended to clarify the role of master and ensure that all parties, including the appointing judge and appointed master, understand the master's role. The standards of review of a master's decisions are particularly important to the parties and the court, and are set forth with special detail.

Compensation of masters under this rule should be established in the order of appointment. *See* Rule 53.02(b)(5). In the majority of cases, compensation will be ordered to be paid by the parties pursuant to Rule 53.08(b)(1). The provision of Rule 53.08(b)(2) provides for payment from a fund created by the litigation, as where fees are awarded under the "common fund" doctrine, or by a fund that is the subject matter of the litigation. The federal rule advisory committee has recognized that it may be appropriate to revise the allocation ordered on an interim basis once the action is concluded. *See* Fed. R. Civ. P. 53(h), Advis. Comm. Notes—2003 Amend., *reprinted in* FED. CIV. JUD. PROC. & RULES 237 (West 2005 ed.).

Rule 53.09 distinguishes between masters under this rule, and regular court employees authorized as "referees" by statute. "Statutory referees" as used in the rule refers to court employees, whether full- or part-time, who serve regularly in multiple cases or calendars. See, e.g., Minn. Stat. §§ 260.031 (2004) (juvenile court referees authorized); 484.013, subd. 3 (referees authorized for housing calendar consolidation program); 484.70 (referees generally in district court); 491A.03 (referees in conciliation court in second and fourth districts). In certain situations, a "referee" appointed pursuant to statute for a single case should be viewed as a master under Rule 53. See, e.g.,

Minn. Stat. §§ 116B.05 (2004) (referee in particular environmental action); 260.031 (2004) (referees for partition of real estate). The procedures governing statutory referees are generally found in the statutes authorizing their use.