STATE OF MINNESOTA

IN SUPREME COURT

ADM04-8001

ORDER PROMULGATING AMENDMENTS TO RULES OF CIVIL PROCEDURE

The Supreme Court Advisory Committee on the Rules of Civil Procedure has recommended certain amendments to the Rules of Civil Procedure. By order filed March 21, 2007, the court invited written comments on the proposed amendments. The comment period has now expired.

The court has reviewed the proposals and is advised in the premises.

IT IS HEREBY ORDERED that:

1. The attached amendments to the Rules of Civil Procedure be, and the same are, prescribed and promulgated to be effective on July 1, 2007.

2. These amendments shall apply to all actions or proceedings pending on or commenced on or after the effective date.

3. The inclusion of advisory committee comments is made for convenience and does not reflect court approval of the statements made therein.

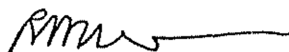
Dated: May 21, 2007

BY THE COURT:

OFFICE OF
APPELLATE COURTS

MAY 21 2007

FILED



Russell A. Anderson
Chief Justice

AMENDMENTS TO RULES OF CIVIL PROCEDURE

[Note: new material is indicated by underscoring, except committee comments, which are all new; deleted material is indicated by strikethrough.]

RULE 5A. NOTICE OF CONSTITUTIONAL CHALLENGE TO A STATUTE

A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity, or

(B) a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged, or on the Minnesota Attorney General if a state statute is challenged, by United States Mail to afford the Attorney General an opportunity to intervene.

Advisory Committee Comment—2007 Amendment

Rule 5A is a new rule, though it addresses subject matter covered by Minn. R. Civ. P. 24.04 prior to the adoption of this rule. The rule imposes an express requirement for notice to the appropriate Attorney General—the Minnesota Attorney General for challenges to Minnesota statutes and the Attorney General of the United States for challenges to federal statutes. The rule requires the giving of notice, and the purpose of the notice is to permit the Attorney General receiving it to decide whether to intervene in the action. The rule does not require any action by the Attorney General and in many instances intervention will not be sought until the litigation reaches the appellate courts. The federal rule requires service on the appropriate attorney general by certified or registered mail. The committee believes that service of this notice by U.S. Mail is sufficient for this purpose.

As part of this change, Minn. R. Civ. P. 24.04 is abrogated as it duplicates this rule's mechanism.

RULE 6. TIME

Rule 6.01. Computation

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions ~~have made~~ result in the closing of the office of the court administrator of the court where the action is pending ~~inaccessible~~, in which event the period runs until the end of the next day ~~which~~that is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

As used in this rule and in Rule 77(c), "legal holiday" includes any holiday ~~defined or~~ designated ~~by statute~~ in Minn. Stat. § 645.44, subd. 5, as a holiday for the state or any state-wide branch of government and any day that the United States Mail does not operate.

* * *

Rule 6.05. Additional Time After Service by Mail or Service Late In Day

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party, and the notice or paper is served upon the party by United States M~~m~~ail, three days shall be added to the prescribed period. If service is made by any means other than United States M~~m~~ail and accomplished after 5:00 p.m. local time on the day of service, one additional day shall be added to the prescribed period.

Advisory Committee Comment—2007 Amendment

Rule 6.01 is amended to remove potential ambiguity in the existing rule. The rule is ambiguous because of the odd definition of "holiday" in MINN. STAT. § 645.44, subd. 5, and its ambiguity over how Columbus Day is treated, Additionally, because the rules explicitly provide for service by mail, the court recognized that a "mail holiday" should be a "legal holiday" for the purpose of this rule.

The rule excuses filing on the last day of a time period if the court administrator's office is inaccessible. The amended rule replaces an indefinite concept of the court administrator's office being "inaccessible" with a more definite formulation: the office of the administrator of the court where the action is pending must actually be closed.

Rule 6.05 is amended to make the rule definite as to what forms of service qualify as "service by mail." The rule as amended explicitly allows three additional days only for service by United States Mail; the use of any other delivery or courier service does not constitute "United States Mail," and therefore does not qualify for additional time. This rule is now consistent with Minn. R. Civ. P. 4.05, which specifies "first-class mail" as the means for service by mail.

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

* * *

Rule 16.02. Scheduling and Planning

The court may, and upon written request of any party with notice to all parties, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(a) to join other parties and to amend the pleadings;

(b) to file and hear motions; and

(c) to complete discovery.

The scheduling order also may include

(d) provisions for disclosure or discovery of electronically stored information;

(e) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation materials after production;

(df) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(eg) any other matters appropriate in the circumstances of the case.

A schedule shall not be modified except by leave of court upon a showing of good cause.

* * *

Advisory Committee Comment—2007 Amendment

Rule 16 is amended to allow the court to include provision for discovery of electronically stored information. Although this discovery may not require special attention in a pretrial order, in many cases it may be helpful to address this subject separately. The rule also permits the pretrial order to memorialize the court's approval of agreements relating to claims of privilege. The rule specifically contemplates that parties may desire to permit documents to be reviewed or sampled, in order to permit the requesting parties to assess the reasonable need for further production without prejudice to any privilege claims.

RULE 24. INTERVENTION

* * *

~~Rule 24.04. Notice to Attorney General~~

~~When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford the attorney general an opportunity to intervene.~~

Advisory Committee Comment—2007 Amendment

Rule 24.04 is deleted because the subject matter is now addressed by new Rule 5A.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

* * *

Rule 26.02. Discovery, Scope and Limits

* * *

(b) Limitations.

(1) 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)~~

133 ~~the discovery sought is unreasonably cumulative or duplicative, or is obtainable from~~
134 ~~some other source that is more convenient, less burdensome, or less expensive; (ii) the~~
135 ~~party seeking discovery has had ample opportunity by discovery in the action to obtain~~
136 ~~the information sought; or (iii) the burden or expense of the proposed discovery~~
137 ~~outweighs its likely benefit, taking into account the needs of the case, the amount in~~
138 ~~controversy, the parties' resources, the importance of the issues at stake in the litigation,~~
139 ~~and the importance of the proposed discovery in resolving the issues.~~ The court may act
140 upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

141 (2) A party need not provide discovery of electronically stored information from
142 sources that the party identifies as not reasonably accessible because of undue burden or
143 cost. On motion to compel discovery or for a protective order, the party from whom
144 discovery is sought must show that the information is not reasonably accessible because
145 of undue burden or cost. If that showing is made, the court may nonetheless order
146 discovery from such sources if the requesting party shows good cause, considering the
147 limitations of Rule 26.02(b)(3). The court may specify conditions for the discovery.

148 (3) The frequency or extent of use of the discovery methods otherwise permitted
149 under these rules shall be limited by the court if it determines that: (i) the discovery
150 sought is unreasonably cumulative or duplicative, or is obtainable from some other
151 source that is more convenient, less burdensome, or less expensive; (ii) the party seeking
152 discovery has had ample opportunity by discovery in the action to obtain the information
153 sought; or (iii) the burden or expense of the proposed discovery outweighs its likely
154 benefit, taking into account the needs of the case, the amount in controversy, the parties'
155 resources, the importance of the issues at stake in the litigation, and the importance of the
156 proposed discovery in resolving the issues. The court may act upon its own initiative
157 after reasonable notice or pursuant to a motion under Rule 26.03.

158 **(~~b~~c) Insurance Agreements.** In any action in which there is an insurance policy
159 ~~which~~that may afford coverage, any party may require any other party to disclose the
160 coverage and limits of such insurance and the amounts paid and payable thereunder and,
161 pursuant to Rule 34, may obtain production of the insurance policy; provided, however,

162 that this provision will not permit such disclosed information to be introduced into
163 evidence unless admissible on other grounds.

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

175 A party may obtain without the required showing a statement concerning the
176 action or its subject matter previously made by that party. Upon request, a party or other
177 person may obtain without the required showing a statement concerning the action or its
178 subject matter previously made by that person who is not a party. If the request is
179 refused, the person may move for a court order. The provisions of Rule 37.01(d) apply to
180 the award of expenses incurred in relation to the motion. For purposes of this paragraph,
181 a statement previously made is (1) a written statement signed or otherwise adopted or
182 approved by the person making it, or (2) a stenographic, mechanical, electrical, or other
183 recording, or a transcription thereof, ~~which~~that is a substantially verbatim recital of an
184 oral statement by the person making it and contemporaneously recorded.

185 **(~~d~~e) Trial Preparation: Experts.** Discovery of facts known and opinions held
186 by experts, otherwise discoverable pursuant to Rule 26.02(a) and acquired or developed
187 in anticipation of litigation or for trial, may be obtained only as follows:

188 (1)(A) A party may through interrogatories require any other party to identify each
189 person whom the other party expects to call as an expert witness at trial, to state the
190 subject matter on which the expert is expected to testify, and to state the substance of the

191 facts and opinions to which the expert is expected to testify and a summary of the
192 grounds for each opinion. (B) Upon motion, the court may order further discovery by
193 other means, subject to such restrictions as to scope and such provisions, pursuant to Rule
194 26.02(d)(3), concerning fees and expenses, as the court may deem appropriate.
195 (2) A party may discover facts known or opinions held by an expert who has been
196 retained or specially employed by another party in anticipation of litigation or preparation
197 for trial and who is not expected to be called as a witness at trial, only as provided in Rule
198 35.02 or upon a showing of exceptional circumstances under which it is impracticable for
199 the party seeking discovery to obtain facts or opinions on the same subject by other
200 means.
201 (3) Unless manifest injustice would result, (A) the court shall require the party
202 seeking discovery to pay the expert a reasonable fee for time spent in responding to
203 discovery pursuant to Rules 26.02(d)(1)(B) and 26.02(d)(2); and (B) with respect to
204 discovery obtained pursuant to Rule 26.02(d)(1)(B), the court may require, and with
205 respect to discovery obtained pursuant to Rule 26.02(d)(2) the court shall require, the
206 party seeking discovery to pay the other party a fair portion of the fees and expenses
207 reasonably incurred by the latter party in obtaining facts and opinions from the expert.
208 **(ef) Claims of Privilege or Protection of Trial Preparation Materials.**
209 (1) When a party withholds information otherwise discoverable under these rules
210 by claiming that it is privileged or subject to protection as trial preparation material, the
211 party shall make the claim expressly and shall describe the nature of the documents,
212 communications, or things not produced or disclosed in a manner that, without revealing
213 information itself privileged or protected, will enable other parties to assess the
214 applicability of the privilege or protection.
215 (2) If information is produced in discovery that is subject to a claim of privilege
216 or of protection as trial-preparation material, the party making the claim may notify any
217 party that received the information of the claim and the basis for it. After being notified,
218 a party must promptly return, sequester, or destroy the specified information and any
219 copies it has and may not use or disclose the information until the claim is resolved. A

220 receiving party may promptly present the information to the court under seal for a

221 determination of the claim. If the receiving party disclosed the information before being

222 notified, it must take reasonable steps to retrieve it. The producing party must preserve

223 the information until the claim is resolved.

224

225 **Advisory Committee Comment—2007 Amendment**

226 Rule 26.02(b)(2) is a new provision that establishes a two-tier standard for
227 discovery of electronically stored information. The rule makes information that is not
228 "reasonably accessible because of undue burden or cost" not normally discoverable. This
229 rule is identical to its federal counterpart, adopted in 2006. The rule requires that it be
230 identified in response to an appropriate request, but if it is identified as "not reasonably
231 accessible," it need not be produced in the absence of further order. It is not strictly
232 exempt from discovery, as the court may, upon motion that "shows good cause," order
233 disclosure of the information. The rule explicitly authorizes the court to impose
234 conditions on any order for disclosure of this information, and conditions that either ease
235 the undue burden or minimize the total cost or cost borne by the producing party would
236 be appropriate.

237 Rule 26.02(f)(2) is a new provision that creates a uniform procedure for dealing
238 with assertions of privilege that are made following production of information in
239 discovery. The rule creates a mandatory obligation to return, sequester, or destroy
240 information that is produced in discovery if the producing party asserts that it is subject to
241 a privilege or work-product protection. The information cannot be used for any purpose
242 until the privilege claim is resolved. The rule provides a mechanism for the receiving
243 party to have the validity of the privilege claim resolved by the court. The rule does not
244 create any presumption or have any impact on the validity of the claim of privilege, nor
245 does it excuse the inadvertent or regretted production. If the court determines that that
246 production waived an otherwise valid privilege, then the information should be ordered
247 for production or release from sequestration of the information.

248

249 * * *

250 **Rule 26.06. Discovery Conference**

251 At any time after service of the summons, the court may direct the attorneys for

252 the parties to appear before it for a conference on the subject of discovery. The court

253 shall do so upon motion by the attorney for any party if the motion includes:

254 (a) A statement of the issues as they then appear;

255 (b) A proposed plan and schedule of discovery;

256 (c) Any issues relating to disclosure or discovery of electronically stored

257 information, including the form or forms in which it should be produced;

258 (d) Any issues relating to claims of privilege or of protection as trial-preparation
259 material, including—if the parties agree on a procedure to assert such claims after
260 production—whether to ask the court to include their agreement in an order.
261 (ee) Any limitations proposed to be placed on discovery;
262 (~~d~~f) Any other proposed orders with respect to discovery; and
263 (eg) A statement showing that the attorney making the motion has made a
264 reasonable effort to reach agreement with opposing attorneys on the matter set forth in
265 the motion. All parties and attorneys are under a duty to participate in good faith in the
266 framing of any proposed discovery plan.
267 Notice of the motion shall be served on all parties. Objections or additions to
268 matters set forth in the motion shall be served not later than 10 days after the service of
269 the motion.
270 Following the discovery conference, the court shall enter an order tentatively
271 identifying the issues for discovery purposes, establishing a plan and schedule for
272 discovery, setting limitations on discovery, if any, and determining such other matters,
273 including the allocation of expenses, as are necessary for the proper management of
274 discovery in the action. An order may be altered or amended whenever justice so
275 requires.
276 Subject to the right of a party who properly moves for a discovery conference to
277 prompt convening of the conference, the court may combine the discovery conference
278 with a pretrial conference authorized by Rule 16.
279

280 **Advisory Committee Comment—2007 Amendment**
281 Rule 26.06 is amended to add to the required provisions in a motion for a discovery
282 conference. These changes require the party seeking a discovery conference to address
283 electronic discovery issues, but do not dictate any particular resolution or conference
284 agenda for them. Many cases will not involve electronic discovery issues, and there is no
285 need to give substantial attention to them in a request for a conference under this rule.
286

287 * * *

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

Rule 30.01. When Depositions May Be Taken

After service of the summons, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made pursuant to Rule 4.04, except that leave is not required ~~(1)~~ if a defendant has served a notice of taking deposition or otherwise sought discovery~~,~~. ~~or (2) if special notice is given as provided in Rule 30.02(b).~~ The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

Advisory Committee Comment—2007 Amendment

Rule 30.01 is amended only to delete a reference to a notice procedure in former Rule 30.02(b), which was abrogated in 1996. The amendment merely conforms the rule to the current procedure

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RULE 33. INTERROGATORIES TO PARTIES

* * *

Rule 33.03. Option to Produce Business Records

Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification

318 shall be in sufficient detail as to permit the interrogating party to locate and to identify, as
319 readily as can the party served, the records from which the answer may be ascertained.

320

321 **Advisory Committee Comment—2007 Amendment**
322 The amendment to Rule 33.03 in 2007 is simple but important. The existing rule
323 allows a party to respond to an interrogatory by directing the requesting party to discover
324 the information from designated documents. The amended rule does not change this
325 procedure, but simply allows the responding party to designate electronic records from
326 which the requested information can be obtained.

327

328

329

330 # RULE 34. PRODUCTION OF DOCUMENTS,
331 # ELECTRONICALLY STORED INFORMATION,
332 # AND THINGS AND ENTRY UPON LAND FOR
333 # INSPECTION AND OTHER PURPOSES

334 **Rule 34.01. Scope**

335 Any party may serve on any other party a request (1) to produce and permit the
336 party making the request, or someone acting on the requesting party's behalf, to inspect
337 and copy, test, or sample any designated documents or electronically stored
338 information—(including writings, drawings, graphs, charts, photographs, sound
339 recordings, images, phono records, and other data or data; compilations stored in any
340 medium from which information can be obtained—, translated, if necessary, by the
341 respondent through detection devices into reasonably usable form), or to inspect and
342 copy, test, or sample any designated tangible things whichthat constitute or contain
343 matters within the scope of Rule 26.02 and whichthat are in the possession, custody or
344 control of the party upon whom the request is served, or (2) to permit entry upon
345 designated land or other property in the possession or control of the party upon whom the
346 request is served for the purpose of inspection and measuring, surveying, photographing,
347 testing, or sampling the property or any designated object or operation thereon, within the
348 scope of Rule 26.02.

349

350 **Advisory Committee Comment—2007 Amendment**
351 Rule 34.01 is amended to make two changes. First, the rule explicitly applies to
352 "electronically stored information" ("ESI") as well as other forms. A more important
353 change is to add provisions allowing the discovering party to require production of

> information for the purposes of testing or sampling. Testing and sampling are important tools in managing discovery, particularly discovery of ESI. Testing and sampling allow a party to inspect a small subset of requested information to determine whether it is worth conducting additional or broader discovery. These tools may be useful to the court in determining whether to allow additional discovery or discovery of information that is not reasonably accessible, as defined in Rule 26.02(b)(2).

Rule 34.02. Procedure

The request may, without leave of court, be served upon any party with or after service of the summons and complaint. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating ~~in which event~~ the reasons for objection. ~~shall be stated.~~ If objection is made to part of an item or category, that part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order pursuant to Rule 37 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

384 (a) A party who produces documents for inspection shall produce them as they are
385 kept in the usual course of business at the time of the request or, at the option of the
386 producing party, shall organize them to correspond with the categories in the request;
387 (b) If a request does not specify the form or forms for producing electronically
388 stored information, a responding party must produce the information in a form or forms
389 in which it is ordinarily maintained or in a form or forms that are reasonably usable; and
390 (c) A party need not produce the same electronically stored information in more
391 than one form.
392

393 **Advisory Committee Comment—2007 Amendment**
394 Rule 34.02 is amended to establish presumptive rules for the procedural aspects of
395 discovery of electrically stored information. These include allowing the party seeking
396 discovery to specify the form or medium for response, providing a default rule that
397 applies if the request does not specify a form, and making it clear that a party does not
398 need to produce information in more than one form.
399

400 * * *

401

402 **RULE 37. FAILURE TO MAKE DISCOVERY OR COOPERATE**
403 **IN DISCOVERY: SANCTIONS**

404 * * *

405 **Rule 37.05. Electronically Stored Information**

406 Absent exceptional circumstances, a court may not impose sanctions under these
407 rules on a party for failing to provide electronically stored information lost as a result of
408 the routine, good-faith operation of an electronic information system.
409

410 **Advisory Committee Comment—2007 Amendment**
411 Rule 37.05 is a new rule; it is identical to Fed. R. Civ. P. 37(f), adopted in 2006. It
412 provides some protection against the automatic imposition of sanctions that might
413 otherwise be required under the rules. This rule applies only to discovery of
414 electronically stored information, and prevents the imposition of sanctions for spoliation
415 of evidence where the loss of information arises from the routine operation of a computer
416 system. The good-faith part of this test is important and is not met if a party fails to take
417 appropriate steps to preserve data once a duty to preserve arises.
418
419

420 **RULE 45. SUBPOENA**

421

422 **Rule 45.01. For Attendance of Witnesses; Form; Issuance**

423 **(a) Form.** Every subpoena shall

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

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

426 court file number, if one has been assigned; and

427 (3) command each person to whom it is directed to attend and give testimony or

428 to produce and permit inspection, ~~and~~ copying, testing, or sampling of designated books,

429 documents, electronically stored information, or tangible things in the possession,

430 custody or control of that person, or to permit inspection of premises, at a time and place

431 therein specified; and

432 (4) contain a notice to the person to whom it is directed advising that person of

433 the right to reimbursement for certain expenses pursuant to Rule 45.03(d), and the right to

434 have the amount of those expenses determined prior to compliance with the subpoena.

435 A command to produce evidence or to permit inspection, copying, testing, or

436 sampling may be joined with a command to appear at trial or hearing or at deposition, or

437 may be issued separately. A subpoena may specify the form or forms in which

438 electronically stored information is to be produced.

439 **(b) Subpoenas Issued in Name of Court.** A subpoena commanding attendance

440 at a trial or hearing, for attendance at a deposition, or for production, or inspection,

441 copying, testing, or sampling shall be issued in the name of the court where the action is

442 pending.

443 **(c) Issuance by Court or by Attorney.** The court administrator shall issue a

444 subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it

445 before service. An attorney as officer of the court may also issue and sign a subpoena on

446 behalf of the court where the action is pending.

447 **(d) Subpoena for Taking Deposition, Action Pending in Foreign Jurisdiction.**

448 A subpoena for attendance at a deposition to be taken in Minnesota for an action pending

449 in a foreign jurisdiction may be issued by the court administrator or by an attorney
450 admitted to practice in Minnesota in the name of the court for the county in which the
451 deposition will be taken, provided that the deposition is allowed and has been properly
452 noticed under the law of the jurisdiction in which the action is pending. The subpoena
453 may command the person to whom it is directed to produce and permit inspection and
454 copying of designated books, papers, documents, electronically stored information, or
455 tangible things that constitute or contain matters within the scope of the examination
456 permitted by the law of the jurisdiction in which the action is pending, but in that event,
457 the subpoena will be subject to the provisions of Rules 26.03 and 45.03(b)(2).
458 **(e) Notice to Parties.** Any use of a subpoena, other than to compel attendance at
459 a trial, without prior notice to all parties to the action, is improper and may subject the
460 party or attorney issuing it, or on whose behalf it was issued, to sanctions.
461
462 **Rule 45.02. Service**
463 **(a) Who May Serve and Method of Service.** A subpoena may be served by any
464 person who is not a party and is not less than 18 years of age. Service of a subpoena
465 upon a person named therein shall be made by delivering a copy thereof to such person or
466 by leaving a copy at the person's usual place of abode with some person of suitable age
467 and discretion then residing therein and, if the person's attendance is commanded, by
468 tendering to that person the fees for one day's attendance and the mileage allowed by
469 law. When the subpoena is issued on behalf of the state of Minnesota or an officer or
470 agency thereof, fees and mileage need not be tendered. Prior notice of any commanded
471 production of documents and things or inspection of premises, copying, testing, or
472 sampling before trial shall be served on each party in the manner prescribed by Rule 5.02.
473 * * *
474 **(d) Compensation of Subpoenaed Person.** The party serving the subpoena shall
475 make arrangements for reasonable compensation as required under Rule 45.03(d) prior to
476 the time of commanded production or the taking of such testimony. If such reasonable
477 arrangements are not made, the person subpoenaed may proceed under Rule 45.03(c) or

478 45.03(b)(2). The party serving the subpoena may, if objection has been made, move
479 upon notice to the deponent and all parties for an order directing the amount of such
480 compensation at any time before the taking of the deposition. Any amounts paid shall be
481 subject to the provisions of Rule 54.04.
482

483 **Rule 45.03. Protection of Persons Subject to Subpoenas**

484 * * *

485 **(b) Subpoena for Document Production Without Deposition.**

486 (1) A person commanded to produce and permit inspection, ~~and~~ copying, testing,
487 or sampling of designated electronically stored information, books, papers, documents, or
488 tangible things, or inspection of premises need not appear in person at the place of
489 production or inspection unless commanded to appear for deposition, hearing, or trial.

490 (2) Subject to Rule 45.04(b), a person commanded to produce and permit
491 inspection, ~~and~~ copying, testing, or sampling may, within 14 days after service of the
492 subpoena or before the time specified for compliance if such time is less than 14 days
493 after service, serve upon the party or attorney designated in the subpoena written
494 objection to ~~inspection or copying of~~ producing any or all of the designated materials or
495 inspection of the premises—or to producing electronically stored information in the form
496 or forms requested. If objection is made, the party serving the subpoena shall not be
497 entitled to inspect, ~~and~~ copy, test, or sample the materials or inspect the premises except
498 pursuant to an order of the court by which the subpoena was issued. If objection has been
499 made, the party serving the subpoena may, upon notice to the person commanded to
500 produce, move at any time for an order to compel the production, inspection, copying,
501 testing, or sampling. Such an order to compel production shall protect any person who is
502 not a party or an officer of a party from significant expense resulting from the inspection,
503 ~~and~~ copying, testing, or sampling commanded.

504 * * *

505 **Rule 45.04. Duties In Responding To Subpoena**

506 **(a) Form of Production.**

507 (1) A person responding to a subpoena to produce documents shall produce them
508 as they are kept in the usual course of business or shall organize and label them to
509 correspond with the categories in the demand.
510 (2) If a subpoena does not specify the form or forms for producing electronically
511 stored information, a person responding to a subpoena must produce the information in a
512 form or forms in which the person ordinarily maintains it or in a form or forms that are
513 reasonably usable.
514 (3) A person responding to a subpoena need not produce the same electronically
515 stored information in more than one form.
516 (4) A person responding to a subpoena need not provide discovery of
517 electronically stored information from sources that the person identifies as not reasonably
518 accessible because of undue burden or cost. On motion to compel discovery or to quash,
519 the person from whom discovery is sought must show that the information sought is not
520 reasonably accessible because of undue burden or cost. If that showing is made, the court
521 may nonetheless order discovery from such sources if the requesting party shows good
522 cause, considering the limitations of Rule 26.02(b)(3). The court may specify conditions
523 for the discovery.
524 **(b) Claims of Privilege.**
525 (1) When information subject to a subpoena is withheld on a claim that it is
526 privileged or subject to protection as trial-preparation materials, the claim shall be made
527 expressly and shall be supported by a description of the nature of the documents,
528 communications, or things not produced that is sufficient to enable the demanding party
529 to contest the claim.
530 (2) If information is produced in response to a subpoena that is subject to a claim
531 of privilege or of protection as trial-preparation material, the person making the claim
532 may notify any party that received the information of the claim and the basis for it. After
533 being notified, a party must promptly return, sequester, or destroy the specified
534 information and any copies it has and may not use or disclose the information until the
535 claim is resolved. A receiving party may promptly present the information to the court

536 under seal for a determination of the claim. If the receiving party disclosed the

537 information before being notified, it must take reasonable steps to retrieve it. The person

538 who produced the information must preserve the information until the claim is resolved.

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540 **Advisory Committee Comment—2007 Amendment**

541 Rule 45 01 is amended to add a process, in Rule 45.01(d), for issuance of a
542 subpoena to compel attendance in Minnesota at a deposition in an action pending in
543 another jurisdiction. The procedure in this section essentially follows that contained in
544 former Rule 45 04(a), which was abrogated in 2005.
545 Rule 45.01(e) is a new rule intended to clarify the existing rule because of
546 continuing confusion over the need to provide notice to all parties before issuance of a
547 subpoena for pretrial discovery. Existing Rule 45 02(a) explicitly requires notice, but
548 that provision has been overlooked in a number of instances reported to the advisory
549 committee Accordingly, Rule 45 01(e) is included to make the requirement of notice
550 more prominent and to make it clearly apply to every use of a subpoena prior to trial.
551 The rule does not specify the form of notice required, but it would normally be
552 accomplished by providing either a copy of the subpoena at the time it is served on the
553 non-party or by unambiguous notice in some other way that a non-party is being
554 subpoenaed.
555 Rule 45 02(d) is amended to establish an explicit deadline for making arrangements
556 for compensation by a party receiving a subpoena that requires only the production of
557 documents without a deposition. By adding the words "commanded production or" to the
558 first sentence, the rule applies explicitly to this situation, and establishes the same
559 deadline as for a deposition.
560 Rule 45 is also amended to include provisions for use of subpoenas to obtain
561 discovery of electronically stored information. These amendments relate to the discovery
562 of electronically stored information, and generally just incorporate into Rule 45 for
563 subpoena practice the procedures of Rules 26, 30, 33, 34, and 37 for discovery from
564 parties.

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