STATE OF MINNESOTA

IN SUPREME COURT

In re Proposed Amendments to) Rules of Civil Procedure for) District and Municipal Courts)	ORDER FOR HEARING AND ADOPTION OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR DISTRICT AND MUNICIPAL COURTS

Pursuant to the recommendation of its Advisory Committee on Rules, appointed by the Supreme Court under Minn. St. 480.052, to assist the court in considering and preparing rules and amendments thereto governing the regulation of pleading, practice, procedure and the forms thereof, in all the courts of this state, the Supreme Court is considering the adoption of amended Rule 7, Rule 26, Rule 29, Rule 30, Rule 31, Rule 32, Rule 33, Rule 34, Rule 36, Rule 37, Rule 45, Rule 69, and Form 19 of the Minnesota Rules of Civil Procedure. The recommendations are:

RULE 7.02 (1) TO BE AMENDED AS FOLLOWS:

7.02 Motion and Other Papers

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. Motions provided in these rules are motions requiring a written notice to the party and a hearing before the order can be issued unless the particular rule under which the motion is made specifically provides that the motion may be made ex parte.

Comment

This amendment is purely a clarifying amendment. No substantive change in the rule is made but an ambiguity evidenced in application of some of the rules is clarified where the rule reference to a motion did not indicate whether it was ex parte motion or a motion upon notice and hearing.

RULE 26 TO BE AMENDED AS FOLLOWS:

RULE 26. ~~DEPOSITIONS PENDING ACTION~~ GENERAL PROVISIONS GOVERNING DISCOVERY.

26.01 ~~When Deposition May be Taken~~

~~Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action, the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

26.01 Discovery Methods.

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision 26.03 of this rule, and except as provided in Rule 33.01, the frequency of use of these methods is not limited.

Comment

Existing Rule 26.01 is transferred to Rules 30.01 and 31.01. As now recommended, Rule 26.01 lists all discovery devices provided by the discovery rules and established the relationship between the general provisions of Rule 26 and the specific rules for the various discovery devices. Rule 26.01 now specifically provides that the use of the various discovery devices is not limited unless

a protective order is obtained from the court under Rule 26.03. Rule 33.01 is not specifically mentioned, but that rule contains its own specific limitations regarding the use and frequency of use of that discovery device.

26.02 Scope of ~~Examination.~~ Discovery.

~~Unless otherwise ordered by the court as provided by Rule 30.02 or 30.04, the witness may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial, or of any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert, shall not be required. In any action in which there is an insurance policy which may afford coverage, any party may require any other party to disclose the coverage and limits of such insurance and the amounts paid and payable thereunder and under Rule 34 may obtain production of the insurance policy; provided, however, that the above provision will not permit such disclosed information to be introduced into evidence unless admissible for other reasons or upon other grounds.~~

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

(1) In General. Parties may obtain discovery regarding any matter, not

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

Comment

Subdivision 1, of proposed amended Rule 26.02, is applicable to all discovery rules. It regulates the discovery obtainable through any of the various discovery procedures. This general provision regarding the scope of discovery is subject to protective orders as may be issued by the court under proposed amended Rule 26.03. Rule 26.03 gives the court broad powers to regulate or prevent discovery even though the information or material sought are within the general scope of discovery under this rule. The proposed amended Rule 26.02 does not change the existing law regarding the scope of discovery or the court's power to regulate the scope of discovery by appropriate order.

The four general limitations on the scope of discovery are:

(1) Privileged matter (evidence and constitutional privileges)

(2) Material prepared in anticipation of litigation

(3) Physical and mental examinations under Rule 35

(4) Protective orders under Rule 26.03

(2) Insurance Agreements. In any action in which there is an insurance policy which may afford coverage, any party may require any other party to disclose the coverage and limits of such insurance and the amounts paid and payable

thereunder and under Rule 34 may obtain production of the insurance policy, provided, however, that the above provision will not permit such disclosed information to be introduced into evidence unless admissible for other grounds.

Comment

Federal Rule 26 (b) (2) contains provisions permitting discovery of liability insurance coverage in a manner substantially similar to that provided in the existing Minnesota Rule 26.02. While the language difference is not substantial, the Committee believed the existing Minnesota rule was more liberal than the Federal rule and the differences were substantial enough to recommend retention of the language of the existing Minnesota rule rather than conform the rule to the Federal rule language. The Advisory Committee's recommendation restates the insurance discovery rule as provided in Rule 26.02. The primary difference between the Federal rule and the Minnesota rule is the application of the insurance discovery clause to all relevant insurance policies, including liability insurance, in the Minnesota rule while the Federal rule is limited to insurance obligating the company to satisfy all or part of the judgment or to indemnify or reimburse for payments made to satisfy a judgment. The proposed Minnesota rule does not contain a provision similar to Federal Rule 26.02 regarding applications for insurance to be treated as an insurance agreement even though there is no specific provision regarding this matter.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision 26.02(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision 26.02(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has sub-

stantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party, may obtain without the required showing a statement concerning the action or its subject matter previously made by that person who is not a party. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Comment

A party may obtain discovery of documents and tangible things within the scope of discovery under Rule 26.02 (1) which were prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking the discovery has a substantial need of the materials in the preparation of his case and he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. This work product limitation on the scope of discovery is also subject to Rule

26.02 (4). In ordering discovery of such work product materials when the required showing has been made, the court must still protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of the attorney or other representative of a party.

A party may obtain without the required showing of need and hardship any statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request for the statement is refused, the party or person seeking discovery may move for a court order. The provisions of Rule 37.01 (4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

This rule is the "work product" rule. It resolves many of the questions raised by the present rule and by the application of the work product doctrine in Taylor v. Hickman, 329 U.S. 495 (1947). The rule is applicable to documents or things prepared in anticipation of litigation or prepared for trial. Prior to these proposed amendments of the discovery rules, the requirement in Rule 34 for a showing of "good cause" for the production of documents imposed a substantial limitation on the discovery on work product material. A large body of law was developed in the Federal court regarding the relationship of Rule 26 (b) (26.02) and Rule 34. The amended Rule 26.02 (3) resolves these questions. Rule 34 has been amended to eliminate the required showing of good cause. For documents and other tangible things, prepared in anticipation of litigation or for

trial, a showing of "substantial need" is required plus an inability to obtain substantially equivalent materials by other means without "undue hardship". Rule 26.02 (3) imposes a less burdensome "good cause" type requirement upon the discovery of these documents and tangible things. The rule is not expressed in "good cause" terms since that phrase had created a substantial body of case law interpretation under the old Rule 34 that should not be applicable under the amended rule. For that reason, Rule 26.02 (3) contains its own factual statement of cause. This rule reflects existing case law protection for the work efforts of counsel and persons related to the attorney or the party in trial preparation. The rule also recognizes the fairness of requiring production in those situations where substantially equivalent materials cannot be obtained by other means without undue hardship.

The amended rule also prevents a fishing expedition by requiring a showing that the party has substantial need for the materials in preparation of his case. The last sentence of the first paragraph in Rule 26.02 (3) contains absolute protection against disclosure of documents or tangible things containing the mental impressions, conclusions, opinions, or legal theories of the attorney or other representative of the party concerning the litigation. As proposed the rule is consistent with Leininger v. Swadner, 279 Minn. 251, 156 N. W. 2d 254 (1968). If the document contains both factual and conclusive material, it would be appropriate under this rule for the court to compel disclosure of those things not involving mental impressions, conclusions, etc. of the attorney.

The second paragraph of the rule is merely a restatement of the existing practice permitting a party or a non-party to obtain a copy of his own statement. If a party or a non-party desires to obtain his own statement, no showing of special circumstances as set forth in the first paragraph is required. A request should be made directly to the party having custody of the statements. Recourse to the court for a court order is provided only if the request is refused.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision 26.02 (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision 26.02(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions 26.02 (4)(A)(ii) and 26.02 (4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision 26.02 (4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision 26.02 (4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Comment

This rule relating to discovery of information from experts is a new provision and contains substantially new concepts. The subdivision distinguishes those experts whom a party expects to call as a trial witness from those experts who have been retained or consulted but who will not be called by the party. An expert who was consulted prior to the time the party could anticipate litigation or before preparation for trial is not subject to the provisions of this rule, but rather is covered by the discovery rules relating to non-expert witnesses. In view of the frequency with which expert testimony is now required for trial purposes, this rule must represent a substantial change in existing practice.

With regard to experts whom a party expects to call as a witness at trial, discovery takes the form of disclosure by the lawyer pursuant to interrogatories. The rule proceeds on the basis that a primary difficulty in cross examining opposing experts at trial is lack of general information regarding the expert and the nature and content of his opinion. Trial preparation is substantially hampered by an inability to anticipate fully the expected testimony of opposing experts. Thus Rule 26.02 (4)(A)(i) requires a party to respond to interrogatories requiring him to identify each person whom the party expects to call as an expert at trial, to state the subject matter on which the expert will testify, and to state the substance of the facts and opinions of the expert. If the interrogatory is fully answered the court normally should not order further discovery of the expert's opinion. If further discovery of the expert's findings and conclusions is to be had, it must be by a court order and subject to the restrictions set forth in Rule 26.02 (4)(C). See Rule 26.02 (4)(A)(ii). If the details required in the interrogatories relating to the expert's opinion become oppressive or unnecessarily expensive or time consuming to a party, a protective order can be obtained which could include a requirement that the expert's opinion be obtained through the use of other discovery devices.

With regard to experts who have been retained or specially consulted, but whose presence is not anticipated at trial, there is a general prohibition against discovery of the opinions held by such an expert. Rule 26.02 (4)(B) permits discovery of opinions and facts known to such an expert only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable to obtain the same facts or opinions by other means. Thus there is not a total prohibition against discovery of opinions from experts who are not anticipated to be called at trial, but the availability of such opinions will be quite limited. Obviously, the rule encourages parties to consult many experts in an effort to fully prepare their case without incurring the risk that such an expert's opinion may be used against the party at trial unless the party undertakes to call that expert as his witness. Under this portion of the rule, experts who are employed by attorneys in anticipation of trial or in preparation of trial cannot be considered as agents of the lawyer and therefore protected by the attorney-client privilege.

Rule 26.02 (4)(C)(i) provides for the party seeking discovery to the expert a reasonable fee for time spent in responding to discovery under Rule 26.02 (4)(A)(ii) and Rule 26.02 (4)(B). Paragraph (ii), of Rule 26.02 (4)(C), provides for payment of a part of the fees and expenses incurred by the other party in obtaining the expert's opinions and facts if the court orders further discovery under 26.02 (4)(A)(ii) and requires the sharing of these and expenses which have reasonably been incurred if discovery is permitted under Rule 26.02 (4)(B). There is no provision for payment of expert fees to those experts whose opinions are disclosed pursuant to interrogatories or those experts who are considered ordinary witnesses because their relationship to the case occurred prior to the time that counsel commenced preparation for trial.

~~26.03 Examination and Cross-Examination~~

~~Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43.02.~~

26.03 Protective Orders

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion.

Comment

Protective orders formally contained in Rule 30.02 have been transferred to Rule 26.03. The protective orders now are specifically applicable to all forms of discovery. Sanctions under Rule 37.01 (4) are applicable for enforcement of the discovery rules. The proposed amended rule provides that the court in which the action is pending may respond to a motion by a party or by the deponent for a protective order and in addition a protective order may be sought on matters relating to depositions by a party or a deponent in the district in which the deposition is to be taken. Expanding the authority of the district in which the deposition is to be taken to cover all depositions reflects a desire to permit quick and ready access to a court for protective orders. The scope of the protective orders is substantially the same as provided in the former Rule 30.02. As drafted, the rule will now clearly permit protective orders related to extension of time as well as to a change of the place for discovery. Protective orders may be obtained on the ground that the discovery sought would place an undue burden or expense upon the party or deponent. Trade secrets and other confidential research development or commercial information can be protected under subdivision (7).

26.04 ~~Use of Depositions.~~

~~At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:~~

~~(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness on material matters only.~~

~~(2) The deposition of a party or of any one who at the time of taking the deposition was a managing agent or employe of the party or an officer, director,~~

~~managing agent or employe of the state or any political subdivision thereof or of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.~~

~~(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e), upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally in open court, to allow the deposition to be used.~~

~~(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.~~

~~Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.~~

26.04 Sequence and Timing of Discovery

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Comment

The proposed amended rule eliminates the former provision in Rule 30 establishing a priority for discovery to the party first giving notice of discovery. Under the amended rule the court may establish priority between parties by order, otherwise discovery will take place as properly noted in the notice of discovery without regard as to who gave notice first. The pendency of one form of discovery will not operate to delay or otherwise extend the use of other forms of discovery or similar forms of discovery if the timing is not inherently inconsistent.

~~26.05 Objections to Admissibility.~~

~~Subject to the provisions of Rules 28.02 and 32.03 objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.~~

26.05 Supplementation of Responses

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

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

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

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

Comment

The obligation of a party to supplement his responses to interrogatories or depositions is not provided by the existing discovery rules. Gebhard v. Niedzwiecki, 265 Minn. 471, 122 N. W. 2d 110 (1963), and case law in other jurisdictions, impose a continuing obligation to respond upon a party under Rule 33. The proposed new Rule 26.05 clarifies the practice and makes explicit the obligation to provide new information in the specified situations. There is no duty to supplement the responses except as provided in the rule. Of particular significance is the requirement that a party when he has new information and knows that that information makes his previous response incorrect, even though it was correct when made, must correct his error by providing the new information. The court may specifically impose an obligation to supplement responses upon the party with or without a motion or order and the agreement of the parties made at the time of the deposition or interrogatories may impose such an obligation to respond. Since there is no limitation on the frequency of the use of the discovery procedures, new discovery procedures obviously may also produce supplemental material.

RULE 29 TO BE AMENDED AS FOLLOWS:

RULE 29. STIPULATIONS REGARDING ~~THE-TAKING OF DEPOSITIONS~~ DISCOVERY PROCEDURE

~~If the parties so stipulate in writing,~~ The parties may by stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like

other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

Comment

The Advisory Committee believes it is desirable for the parties to exercise as much control as possible without court intervention regarding the scheduling and mechanics of the depositions. As such, stipulations between the parties relative to discovery procedures should be encouraged. The State Bar Committee recommended that Rule 29 in Minnesota vary from the corresponding Federal rule by increasing the effect of party stipulations by eliminating the requirement for court approval to change time under Rules 33, 34 and 36. The State Bar Committee, however, preserved the provision in the Federal rule permitting the court by order to overturn a stipulation made by the parties.

The Advisory Committee agrees with the State Bar Committee that stipulation between parties is a desirable feature of the discovery procedure and should be encouraged to implement the discovery rules. The Advisory Committee, however, found the State Bar Committee's recommendation that the rule contain a provision permitting a court to overturn the stipulation of the parties to be inconsistent with encouraging the parties voluntarily to stipulate time and other conditions for the discovery procedures. As recommended by the Advisory Committee, the proposed Rule 29 does not contain the opening clause, "unless the court orders otherwise." Protective orders under Rule 26.03 should provide the parties with as extensive court ordered protection as will be required.

RULE 30 TO BE AMENDED AS FOLLOWS:

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

30.01 ~~Notice of Examination; Time and Place~~

~~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 time 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 him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause enlarge or shorten the time.~~

30.01 When Depositions May Be Taken

After commencement of the action, 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 under 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 subdivision 30.02(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided by Rule 45.

Comment

Rule 30 contains the provisions in the former Rule 26.01 which under the amendments becomes Rule 30.01, and former Rule 26.03 which under the amendments becomes Rule 30.03. Protective orders formerly contained in Rule 30.02 have been transferred to Rule 26.03.

The proposed amended Rule 30.01 liberalizes the procedure for serving notice of taking of deposition. Changes made in the proposed Rule 30.01 from the former provision in Rule 26.01 are as follows:

1. The prohibition against a plaintiff taking a deposition is extended to 30 days from 20 days.
2. The 30 day prohibition period is measured from the service of the summons and complaint rather than from the technical commencement of the action.

3. The rule no longer provides that discovery may be used for discovery or for evidence or for both purposes although this multiple and alternative use is still applicable.

4. Leave of court is not required for plaintiff to take a deposition if defendant has served notice of taking of deposition or has otherwise sought discovery.

5. Reference to taking the deposition of a person confined in prison has been eliminated from this rule.

6. Leave of court is not required if a special situation exists as provided in Rule 30.02(2).

In particular, it must be noted that the critical time under the amended Rule 30.01 is the time of the taking of the discovery deposition, not the time of giving the notice. The notice of taking a deposition can be served immediately by the plaintiff if the deposition is not to be taken until more than 30 days after service of the summons and complaint. Service of notice no longer gives that party priority for the taking of depositions under Rule 26.04.

~~30.02 Orders for the Protection of Parties and Witnesses~~

~~After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters may not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that the deposition be sealed and thereafter opened only by order of the court, or that secret processes, develop-~~

~~ments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court, or the court may make any other order which justice requires to protect the party or witness from annoyance, expense, embarrassment or oppression. The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.~~

30.02 Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization

(1) 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 time 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 him or the particular class or group to which he 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.

Comment

The provisions in existing Rule 30.02 providing protective orders have been transferred to Rule 26.03. The provisions in Rule 30.01 relating to notice of the taking of depositions have been transferred to proposed amended Rule 30.02(1). A subpoena duces tecum can be used in conjunction with the taking of the deposition notice under Rule 30.02(1). If a party desires to obtain production of documents from another party, Rule 34 should be used rather than the subpoena duces tecum. Rule 30.02(5) requires a party to use the liberalized Rule 34 for the production of documents.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined will be unavailable for examination within the state unless his deposition is taken before expiration of the 30-day period, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that after he was served with notice under this subdivision (2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition of himself or other person, the deposition may not be used against such party.

Comment

This rule is not applicable if a party has obtained an ex parte court order for an early deposition under Rule 30.01. The unnumbered second paragraph of this rule is not applicable to an early deposition obtained pursuant to court order under Rule 30.01. The amended Federal Rule 30(b)(2) followed a procedure in maritime law in which an early deposition was authorized when there was difficulty or impossibility in taking a deposition because the witness was about to part from the court's jurisdiction. The purpose for the amendment is to expedite the taking of depositions in those circumstances where leave of court may be difficult or too time consuming. It also reflects the general policy of the rules to encourage deposition practice without unnecessary court intervention. In applying the Federal provision to state practice the Advisory Committee and the State Bar Committee agreed that the Federal Court's 100 mile limitation and reference to court districts were not applicable to state practice. Subpoenas in Minnesota district courts are state-wide.

"Unavailability" should mean to all forms of unavailability for the taking of the deposition including absence from the state or a witness being beyond the jurisdiction of the subpoena power of the state. The fact that a deposition may be taken in a foreign jurisdiction at an increased expense or a later time is not deemed to be a sufficient alternative option to the taking of the deposition within the state within the 30 day prohibited period. The second paragraph protects a party if through the exercise of due diligence he is unable to obtain an attorney to represent him at the taking of the deposition. The Advisory Committee clarified the language proposed by the State Bar Committee to make clear that the unavailability for examination relates to unavailability to be examined within the state. In like measure, the second paragraph was clarified to provide that the rule applies to the deposition of both party and non-party deponents.

to the first paragraph of Rule 30.02 (2) to remove any possible ambiguity that the "unavailability" means absence from the state. Clarifying language was also added to the recommendation of the State Bar Committee in the second paragraph to clarify that the deposition relates to depositions of the party and non-party deponents.

(3) For cause shown the court upon ex parte motion may change the time at which a deposition will be taken.

Comment

Rule 30.02 (3) continues the present practice which permits a party upon motion to shorten or enlarge the time for taking a deposition. The Advisory Committee believed the rule to be ambiguous insofar as the nature of the motion required was concern. The rule clearly anticipates an ex parte motion rather than a motion following notice and hearing.

(4) Upon motion, the court, in addition to the stenographic recording, may by order designate some other method of recording or perpetuating the testimony which other method of recording shall be used at trial in lieu of the stenographic recording. The order shall specify the manner of recording, preserving and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. In the event a discrepancy is alleged to exist between the transcription of the stenographic recording of the deposition and the other method of recording or perpetuating the testimony, such conflict shall be resolved by the trier of fact.

Comment

This rule reflects a change taking place in the technology that can be used in depositions such as video tape and other electric recording mechanisms. The amended rule will now permit the recording of testimony by mechanical means, electronic means, or photographic means if it is trustworthy and accurate. A court order is required primarily to permit the judge to determine the trustworthiness and accuracy of the proposed recording device.

The proposed amended Rule 29, by eliminating the provision permitting the court to overturn the stipulation of the parties, has created another option available to the parties relative to the taking of depositions by other than stenographic means. Under Rule 29 the parties by stipulation may avoid the court order required under Rule 30.02 (4).

The Advisory Committee was concerned that provisions in Rule 30.02 (4) eliminating the stenographic transcript could create unexpected and unanticipated problems relative to trial preparation and the use of the deposition at trial. In particular, the Committee was concerned regarding the application of the last sentence in which provision is made for a party to have his own stenographic transcription made at his own expense. The Advisory Committee believes that trial practice will be aided by requiring every deposition to be stenographically

recorded even though some other method of recording or perpetuating the testimony is also used. As proposed by the Advisory Committee, the court order permitting an alternative recording device shall specify that the other method of recording or perpetuating the testimony shall be used at trial in lieu of the stenographic recording. In the event a discrepancy exists between the transcription of the stenographic recording and the other mechanical or electronic method of perpetuating the testimony, that conflict will be resolved by the trier of fact at the time of trial.

(5) The notice to a party deponent may be accompanied by a request 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.

The party to whom the notice is directed may, within 10 days after service thereof, or on or before the time specified in the notice for compliance if such time is less than 10 days after service, serve upon the attorney designated in the notice written objection to the production, inspection or copying of any or all of the designated materials. If objection is made, the party serving the notice shall not be entitled to the production, or the right to inspect and copy the materials except pursuant to an order of the court in which the action is pending or in which the deposition is to be taken. The party serving the notice 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.

Comment

As proposed by the State Bar Committee and as provided in the corresponding Federal rule, a subpoena duces tecum is not available to a party deponent when the person noting the taking of the deposition desires production of documents

to be used at the time of the party's deposition. A party must use the procedure of Rule 34 to secure documents of another party. In considering the application of the proposed amended Rule 34 and the amended Rule 45, it became clear that literally applied the rule would create a 30 day delay period for production of documents which does not exist under Rule 45. As recommended by the State Bar Committee and as contained in the corresponding Federal rules, the deposition of a non-party deponent may include the use of a subpoena duces tecum under Rule 45 and production of documents is not delayed beyond the time of the taking of the deposition. On the other hand, if documents are to be produced in conjunction with the taking of the deposition of a party deponent, Rule 34 provides a 30 day lag period before production is required. Such an application and difference in procedure is not desirable. As proposed by the Advisory Committee, the same time provisions as are contained in Rule 45 will become applicable to the party's depositions under the amended Rule 30.02 (5) rather than the procedure of Federal Rule 34.

In applying the provisions of Rule 45 to the production of documents in conjunction with the deposition of the parties, the Advisory Committee believed it was desirable to make the procedure for production of documents by party and non-party deponents as similar as possible. The second paragraph of the proposed Rule 30.02 (5) contains the same provisions as provided in the amended Rule 45.04 (2). If written objection to the production, inspection, or copying of any of the designated materials is made within the time specified, then the parties serving the notice is not entitled to production. The party serving the notice and still desiring production after objection by a party must initiate a court action by a motion and notice for a court order requiring production, inspection, or copying. A court in which an action is pending or in which the deposition is to be taken may issue such an order pursuant to the party's motion.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or 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 he 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 subdivision (6) does not preclude taking a deposition by any other procedure authorized in these rules.

Comment

As proposed by the Advisory Committee, this rule should be considered as a new discovery procedure. The rule permits a public or private corporation, partnership, association or governmental agency to designate one or more of its officers, directors, managing agents or other persons to testify on its behalf. This procedure eliminates problems formerly associated with taking the deposition of legal entities when the party desiring to take the deposition did not know either the name or status of proper entity officers or managing agents. This rule also is intended to eliminate the situation where depositions of numerous officers, agents or representatives would be noticed by a party and each of the deponents would indicate that he did not have the particularized knowledge of the matter under examination, but that some other representative had the desired information. Under the rule as proposed, the party in his notice can name the entity as the deponent and describe with reasonable particularity the matters on which he desires examination. Such a notice then imposes a responsibility upon the organization to designate one or more persons to testify on its behalf. The organization

may by its response limit the areas in which each person designated will testify. Persons so designated must testify as to all matters known or reasonably available to the organization.

The last sentence of the proposed rule removes any uncertainty regarding the availability of depositions specifically naming designated corporate officers or others when the party believes that the deposition of such designated corporate officer, managing agent, etc. must be taken. A further clear effect of the proposed amended rule is to permit a corporation to protect itself by designating those who can make evidentiary admissions on behalf of the corporation through the deposition procedure.

30.03 Examination and Cross-Examination; Record of Examination; Oath; Objections

~~The officer before whom the deposition is to be taken shall put the witness on oath and shall, personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise.~~

Examination of the witness may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, stenographically record the testimony of the witness. In addition, such testimony may be recorded or perpetuated by any other means ordered in accordance with Subdivision 30.02 (4) of this rule. If requested by one of the parties, the testimony shall be stenographically transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall

be taken subject to the objection. In lieu of participating in the oral examination, ~~parties served with notice of taking a deposition may transmit written interrogatories to the officer~~, a party may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

Comment

Technically there can be no cross examination of witnesses until the deposition is used at the time of trial. See Rule 32.03. Until trial time it is not possible to determine whose witness the deponent will be. Therefore, reference in Rule 30.03 to cross examination is not appropriate. The Advisory Committee determined to eliminate reference to cross examination and to provide that examination will proceed as permitted at the trial. Thus implicitly the cross examination form is preserved for those parties who do not anticipate calling the deponent as a witness or introducing the deposition on the party's behalf. Reference to the first sentence to Rule 43.02 is equally inappropriate since the form of examination hinges upon the hostility or adversity of the deponents as a witness. Often this status cannot be determined at the deposition stage either. By correction of the language the Advisory Committee did not change the use and intent of the rule. Changes were made in the second sentence to conform to changes recommended by the Advisory Committee in Rule 30.02 (4) relative to stenographic recordings of the testimony of each of the deponents whether or not the testimony is taken by other mechanical means. The last sentence of the proposed rule eliminates the requirement of party agreement in order for testimony to be transcribed and now provides for transcription at the request of any party.

If a party desires to serve written questions rather than participate in the oral deposition itself, that party may serve written questions on the party taking

the deposition. The party then transmits the questions to the officer who shall propound them to the witness and record the answers verbatim. Prior practice required the party to transmit the questions directly to the officer before whom the deposition would be taken. The proposed amended procedure should facilitate the process since often the officer is not known at the time the questions should be served.

sentence of the rule. The second sentence is modified to provide that the testimony shall be taken stenographically in accordance with the proposed amendment to Rule 30.02 (4). In the second paragraph a minor amendment modifying the word "parties" to "a party" has been made for purposes of clarification.

30.04 Motion to Terminate or Limit Examination

At any time during the taking of the deposition, on motion of ~~any~~ a party or of the ~~witness~~ 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 ~~witness~~ 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 ~~30.02~~ 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 ~~witness~~ deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. ~~In granting or refusing such order, the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.~~ The provisions of Rule 37.01 (4) apply to the award of expenses incurred in relation to the motion.

Comment

The proposed amendment to Rule 30.04 makes minor modifications in the existing Rule 30.04. A primary difference is found in the last sentence of the proposed rule where the court in granting or refusing the motion may impose expenses and costs upon the attorney as well as upon the party or witness.

30.05 Submission to Witness; Changes; Signing

When the testimony is ~~fully~~ stenographically transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32.04 (4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

Comment

A primary change in the proposed rule is the provision permitting the officer to sign the deposition if the witness does not do so in 30 days of the time it is submitted to him. If the deposition is signed by the officer it may be used as though it was signed by the party unless a motion to suppress has been made under Rule 32.04 (4).

30.06 Certification and Filing by Officer; Copies; Notice of Filing

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then place the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert the name of witness)" and shall promptly deliver or mail it to the clerk of the court in which the action is pending~~, or, if the deposition was taken under Rule 26.07, to an arbitrator~~.

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 and returned with the deposition, and may be inspected and copied by any party, except that (a) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (b) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

Comment

The Advisory Committee recommended modification in the first paragraph by striking the last clause "or, if the deposition was taken under Rule 26.07 (32.04) to an arbitrator". The Advisory Committee determined that the use of depositions in the arbitration proceeding as provided in Rule 32.04, as recommended by the State Bar Committee, was a reference to a procedure no longer applicable under existing state law. M.S.A. § 572.30, subd. 3, provides that the Rules of Civil

Procedure shall not apply to arbitration insofar as they may be inconsistent with the statute. Under the existing statute the Committee believed that a special rule relative to arbitrations is no longer desirable.

The second paragraph provides a more flexible procedure for the handling of exhibits produced for inspection during the examination of a witness. Upon the request of a party such documents may be marked for identification and annexed to and returned with the deposition. It may be inspected and copied thereafter by any party. A party producing the original may substitute copies to be marked for identification if he affords all parties a full opportunity to verify the accuracy of the copies by comparison with the original. Originals may be returned to party producing them under the provision of Rule 30.06 (1)(B). If the originals are to be annexed and retained with the deposition, a court order is appropriate for such purpose.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the ~~witness~~ deponent.

Comment

The rule as proposed is identical to the existing Rule 30.06 (2) except the word "witness" has been changed to "deponent".

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

Comment

The rule as proposed is identical to the existing Rule 30.06 (3).

RULE 30.07 Failure to Attend or to Serve Subpoena; Expenses

(1) 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 him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him, and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Comment

The rule as proposed is identical to the existing Rule 30.07.

RULE 31 TO BE AMENDED AS FOLLOWS:

31.01 Serving ~~Interrogatories~~ Questions; Notice

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

A party desiring to take the deposition ~~of any person~~ upon written ~~interrogatories~~ questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association

or governmental agency in accordance with the provisions of Rule 30.02 (6).

Within ~~10 days thereafter,~~ 30 days after the notice and written questions are served, a party ~~so served~~ may serve cross ~~interrogatories~~ questions upon ~~the party proposing to take the deposition~~ all other parties. Within ~~5 days thereafter,~~ ~~the latter~~ 10 days after being served with cross questions, a party may serve redirect ~~interrogatories~~ questions upon ~~a party who has served cross interrogatories~~ all other parties. Within ~~3~~ 10 days after being served with redirect ~~interrogatories~~ questions, a party may serve recross ~~interrogatories~~ questions upon ~~the party proposing to take the deposition~~ all other parties. The court may for cause shown enlarge or shorten the time.

Comment

Rule 31 has been modified to conform to the more liberal deposition policy. Rule 31.01 conforms to the changes in Rule 30.01. Rule 31.01 provides for a 30 day period after notice of deposition and service of written questions for the party so served to prepare and serve cross questions on all other parties. Thus no prohibited period following the service of the summons and complaint is required in order to permit defendant sufficient time to secure the services of an attorney and to participate in the deposition. To avoid confusion between Rule 33 interrogatories and depositions by written questions under Rule 31, Rule 31 questions are now entitled "questions" rather than "interrogatories." Time for the service of cross questions/redirect questions and recross questions has been extended.

31.02 Officers to Take Responses and Prepare Record

A copy of the notice and copies of all ~~interrogatories~~ questions served shall be delivered by the party taking the deposition to the officer designated in the

notice, who shall proceed promptly, in the manner provided by Rules 30.03, 30.05, and 30.06, to take the testimony of the witness in response to the ~~interrogatories~~ questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the ~~interrogatories~~ questions received by him.

Comment

The proposed amended rule is substantially identical to the former Rule 31.02. Interrogatories have been entitled "questions" to conform with the changes made in Rule 31.01.

RULE 31.03 Notice of Filing

When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties.

Comment

The rule as proposed is identical to the former Rule 31.03.

~~RULE 31.04 Orders for the Protection of Parties and Witnesses~~

~~After the service of interrogatories and prior to the taking of the testimony of the witnesses, the court in which the action is pending, on motion promptly made by a party or witnesses, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.~~

Comment

Protective orders have been moved to Rule 26.03 in the renumbering and rearrangement of the rules. Former Rule 31.04 has been eliminated as surplusage.

RULE 32 TO BE AMENDED AS FOLLOWS:

RULE 32. ~~EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS~~
USE OF DEPOSITIONS IN COURT PROCEEDINGS

~~32.01 As to Notice~~

~~All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.~~

32.01 Use of Depositions

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, and subject to the provisions of Rule 32.02, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director or managing agent or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance

of the witness by subpoena; or (e) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

Comment

Rule 32 has been substantially changed in the rearrangement of the discovery rules. Rules 32.01, 32.02 and 32.03 represent the transfer of former Rules 26.04, 26.05 and 26.06. The provisions of the rule are generally the same although modifications have been made to conform with other amendments made in the discovery rules.

The State Bar Committee recommended the transfer of former Rule 26.06 and its renumbering as Rule 32.04. The Advisory Committee determined that M.S.A. § 572.14 eliminates the need for a special rules relative to depositions in arbitrations and therefore has recommended that the former Rule 26.07 not be readopted as Rule 32.04.

The first paragraph of Rule 32.01 has been modified to clearly provide that a deposition may be used at the hearing on a motion or at a trial insofar as it is

admissible under the rules of evidence applied as though the witness was then present and testifying. The first paragraph was further amended by the Advisory Committee to provide that use of the deposition against a party who was present or represented at the taking is also subject to the provisions of Rule 32.02.

Amended Rule 32.01 (1) has been modified by striking the final four words from the former rule. Impeachment or contradicting on material matters will occur as a matter of course and the limitation in the rule is confusing.

Rule 32.01 (2) has been modified by the Advisory Committee to eliminate the word "employee" from the rule as recommended by the State Bar Committee. In so doing, the Advisory Committee makes the rule conform to the corresponding Federal rule in this situation. Even though the provisions of Rule 32.01 (2) permit the use of the deposition of a party or a designated representative of the organization which is a party by an adverse party, the Committee stresses the importance for trial purposes of calling witnesses to give his testimony on the witness stand rather than using the deposition as permitted under Rule 32.01 (2). It is generally desirable for trial purposes to have witnesses testify directly in the presence of the jury and thus enable the jury to determine credibility of the witness by personal observation. See Clark v. Wolkoff, 250 Minn. 504, 85 N. W. 2d 401 (1957).

No change has been made in the proposed amendment to Rule 32.01 (3) from the former Rule 26.04 (3).

Rule 32.01 (4) is modified by eliminating reference to parts of a deposition relevant to parts which the adverse party introduced and substituting a provision indicating that a part may be compelled which in fairness ought to be considered with the part introduced.

language "and subject to the provisions of Rule 32.02." The word "employee" has been eliminated from the change recommended by the State Bar Committee in Rule 32.01 (2). This elimination conforms with the corresponding language in the Federal rule.

~~32.02 As to Disqualification of Officer~~

~~Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.~~

32.02 Objections to Admissibility

Subject to the provisions of Rules 28.02 and 32.04(3), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of evidence if the witness were then present and testifying.

Comment

With the exception of change in reference to the rule numbers, the proposed Rule 32.02 is identical to the former Rule 26.05.

~~32.03 As to Taking of Deposition~~

~~(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.~~

~~(2) Errors and irregularities occurring at the oral examination in the manner of taking deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable~~

~~objection thereto is made at the taking of deposition.~~

~~(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.~~

32.03 Effect of Taking or Using Depositions

A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision 32.01(2) of this rule. At the trial or hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Comment

The rule as recommended is substantially identical with the former Rule 26.06. A clarifying change of language has been made in the first sentence and reference to Rule 32.01 (2) has been substituted for reference to Rule 26.04 (2).

32.04 ~~As to Completion and Return of Deposition~~

~~Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.~~

Comment

This rule is no longer needed or desirable under M.S.A. § 572.14.

32.05 Effect of Errors and Irregularities in Depositions.

(1) As to Notice

All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer

Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition

(a) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(b) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition

Errors and irregularities in the manner in which the testimony is transcribed, preserved or the deposition is prepared, signed, certified, sealed,

endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Comment

The provisions in Rule 32.05 (1)(2)(3)(4) are substantially identical to the provisions in former Rules 32.01, 32.02, 32.03 and 32.04. The only change of substance recommended by the Advisory Committee is in Rule 32.05 (4), the word "preserved" was added in recognition of the use of recording methods other than the stenographic transcription as provided under the proposed amended rules.

Time for objection to the form of written interrogatories has been extended from three to five days under the proposed Rule 32.05 (3)(c).

RULE 33 TO BE AMENDED AS FOLLOWS:

RULE 33. INTERROGATORIES TO PARTIES

33.01 Availability; Procedure for Use

(1) Any party may serve upon any other party written interrogatories. Interrogatories may, without leave of court, be served upon the plaintiff after ~~the~~ commencement of ~~such~~ the action, ~~leave of court granted with or without notice must be obtained first~~ and upon any other party with or after service of the summons and complaint upon that party. No party may serve more than a total of 50 interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause. In computing the total number of interrogatories each subdivision of separate questions shall be counted as an interrogatory.

(2) The party upon whom the interrogatories have been served shall serve separate written answers or objections to each interrogatory ~~W~~ within ~~15~~ 30 days after service of the interrogatories, ~~separate written answers and objections to~~

~~each interrogatory shall be served by the responding party, unless~~ except that a defendant may serve answers or objections within 45 days after service of summons and complaint upon that defendant. The court, on motion and notice and for good cause shown, may enlarges or shortens the time.

(3) Objections shall state with particularity the grounds for the objection and may be served as a part of the document containing the answers or separately. Within 15 days after service of objections to interrogatories, the party proposing the interrogatory shall serve notice of hearing on the objections at the earliest practicable time. Failure to serve said notice shall constitute a waiver of the right to require answers to each interrogatory to which objection has been made. Answers to interrogatories to which objection has been made shall be deferred until the objections are determined.

(4) Answers to interrogatories shall be stated fully in writing and shall be signed under oath by the party served or, if the party served is the state or a corporation or a partnership or an association, by any officer or managing agent, who shall furnish such information as is available. A party shall restate the interrogatory being answered immediately preceding the party's answer to that interrogatory.

~~(5) Interrogatories may relate to any matters which can be inquired into under Rule 26.02, and the answers may be used to the same extent as provided in Rule 26.04 for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the witnesses or the party interrogated, may make such protective orders as justice may require. The provisions of Rule 30.02 are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.~~

Comment

Rule 33 has been substantially rewritten by the Advisory Committee to retain in general the provisions in the existing Minnesota Rule 33. Amendments to the Minnesota rule have been proposed which adopt desirable recommendations made by the State Bar Committee and as exist in the interrogatory practice in the amended Federal Rule 33. Rather than using the Federal rule as a base for proposing an amended Minnesota Rule 33, the Advisory Committee used the existing Minnesota rule. Amending the Federal rule to conform to existing state practice as recommended by the State Bar Committee leads to unnecessary ambiguity and confusion in the rule itself. In this instance the Committee believed that the variance between desirable Minnesota practice under Rule 33, which should be continued, and the proposed Federal Rule 33 was sufficient to warrant an exception to the general policy of adopting the Federal language wherever possible.

Major changes in Rule 33 relate to the time elements applicable to the interrogatory procedure. Under Rule 33.01 (1) interrogatories may be served without leave of court after service of the summons and complaint upon the defending party or at any time upon the plaintiff. Sufficient time for defendants to secure the services of counsel and to respond are provided in Rule 33.01 (2) by extending the answer or objection time to 30 days with a specific provision for defendants to answer or object within 45 days after service of the summons and complaint upon that defendant. Under the proposed amended rule, the plaintiff may serve interrogatories upon the defendant with the service of the summons and complaint.

Proposed Rule 33.01 (3) preserve the existing practice of requiring that objections state with particularity the ground for the objection. The procedural burden is cast upon the inquiring party to serve notice of hearing within 15 days after service of objections to the interrogatories or the inquiring party waives his right to require answers to each interrogatory that has been objected to.

A new provision has been added to Rule 33.01 (4). The proposed rule requires that the party answering the interrogatories to restate the interrogatory immediately prior to his answer. The purpose for this change is to permit more convenient use of the interrogatories at the time of trial or upon hearings by eliminating the necessity of referring back and forth between the questions and the answers. The duty to supplement answers is now contained in the proposed Rule 26.05.

33.02 Scope; Use at Trial

Interrogatories may relate to any matters which can be inquired into under Rule 26.02, and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

Comment

The first paragraph is identical to the first sentence of the existing Rule 33 (5) except the language has been changed in the final clause to provide that the answers will be used to the extent permitted under the rules of evidence rather than making specific reference to Rule 26.04 (now Rule 32.01). The second paragraph resolves a question which has involved substantial division and debate in the federal and state courts. Interrogatories relating to opinions and conclusions of the party are permitted under the proposed Rule 33.02. Pure questions of law are not proper under the proposed rule. Mixed questions of law and fact

can be the proper subject for a Rule 33 interrogatory. The rule specifically provides that the court may by order delay the answer to the interrogatory until other discovery has been completed or until the pre-trial conference or such other time. This rule implements the proposed change in Rule 26.02 (4) interrogatories to parties relating to experts expected to testify at trial.

33.03 Option to Produce Business Records

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, 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.

Comment

The proposed rule is a new provision designed to simplify the answering process when business records or documents provide the answer. If the burden of ascertaining the answer from existing records is substantially the same for the party inquiring as for the party answering, it is sufficient for the answering party to specify the records and to afford the acquiring party reasonable opportunity to examine or inspect the record.

RULE 34 TO BE AMENDED AS FOLLOWS:

~~RULE 34. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING~~

~~Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30.02, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26.02 and which are in his possession, custody or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26.02. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.~~

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

34.01 Scope

Except as provided in Rule 30.02 (5), any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devises into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters

within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served, or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02.

Comment

The proposed rule simplifies the practice under Rule 34 and conforms to the informal procedure presently adopted by many lawyers in requesting production of documents. In particular, the amendments (a) eliminate the requirement of showing "good cause;" (b) eliminate the requirement of a court order for production; and (c) specifically includes the testing and sampling of tangible property as a permissible inspection form. Documents now defined include all forms used to preserve information including electronic forms.

The Advisory Committee recommends the inclusion of an opening clause in Rule 34.01 to conform to the recommendations made by the Advisory Committee to its amendment to Rule 30.02 (5). In the opinion of the Advisory Committee, this amendment is necessary to make Rule 34 available to parties to compel production of documents to be used at the time of a party's written or oral deposition.

34.02 Procedure

The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. 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 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, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under 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.

Comment

The procedure for production has been substantially changed. No longer need a party establish good cause or secure a court order prior to production. A simple request specifying the items to be inspected and describing each item with reasonable particularity is all that is required. The request must specify a reasonable time, place and manner of making the inspection testing, etc. The party responding to the request must respond within 30 days after service of the request upon him except a defendant may respond within 45 days after service of summons and complaint upon him. Time may be extended or shortened by court order. If objection is made to all or a part of the request, production is not required and the parties seeking production must move for an order under Rule 37.

34.03 Persons Not Parties

This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Comment

The proposed rule resolves the former uncertainty in the federal courts regarding the preempting nature of Rule 34. Rule 34 applies only to parties. Often it is necessary to enter land or inspect tangible property in the possession of a person not a party. In such a situation an independent action in the nature of an equity bill will lie. The proposed rule merely permits continuance of such independent procedure by providing that Rule 34 is not the exclusive remedy.

RULE 36 TO BE AMENDED AS FOLLOWS:

RULE 36. REQUESTS FOR ADMISSION ~~OF FACTS AND OF GENUINENESS OF DOCUMENTS~~

36.01 Request for Admission

~~After commencement of an action,~~ A party may serve upon any other party a written request for the admission ~~by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request~~ for purposes of the pending action, only, of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. ~~If a plaintiff desires to serve a request within 10 days after commencement of the action, leave of court, granted with or without notice, must be obtained.~~ Copies of ~~the~~ documents shall be served with the request, unless ~~copies~~ they have ~~already~~ been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each ~~of the matters~~ matter of which an admission is requested shall be ~~deemed~~ separately set forth. The matter is admitted unless within a ~~period designated in the request not less than 15 days after service thereof~~ 30 days after service of the request, or within such shorter or longer time as the court may allow ~~on motion and notice~~, the party to whom the request is directed serves upon the party requesting the admission ~~either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time~~ a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. ~~If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request.~~ If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and, when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that

ground alone, object to the request; he may, subject to the provisions of Rule 37.03, deny the matter of set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37.01 (4) apply to the award of expenses incurred in relation to the motion.

Comment

As proposed, the rule eliminates the existing provision in Rule 36 that the request for admission be limited to matters of "fact." The rule now permits inquiry into mixed questions of law and fact and matters of opinion and conclusion. As proposed, Rule 36.01 equates to the provisions of proposed amended Rule 33.02. The rule as proposed continues to impose a reasonable burden of searching out available facts upon the answering party. The rule requires the answering party to make a reasonable inquiry and to state that the information is not known or readily available to him in order to deny on the basis of lack of information or knowledge. Time for response has been extended to 30 days except defendants may answer or object within 45 days after service of the summons and complaint upon that defendant. The inquiring party has the obligation of moving the court for an order determining the sufficiency of the answers or objections. A failure to respond by answer or objection within 30 days after service of the request constitutes an admission.

36.02 Effect of Admission

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party ~~pursuant to such request~~ under this rule is for the purpose of the pending action only and does is not ~~constitute~~ an admission by him for any other purpose nor may it be used against him in any other proceeding.

Comment

The effect of an admission is clarified under this rule. In addition, provision is made for withdrawing or amending an admission. The rule now provides that an admission is a judicial admission unless the court on motion permits its withdrawal or amendment. The provisions related to amendment or withdrawal of admissions indicates the desirability to having the matter presented on the merits and not to be determined by factual or procedural errors of the party.

RULE 37 TO BE AMENDED AS FOLLOWS:

RULE 37. ~~REFUSAL~~ FAILURE TO MAKE DISCOVERY; ~~CONSEQUENCES~~ SANCTIONS

37.01 ~~Refusal to Answer~~

~~If a party or other witness refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned,~~

~~as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in which the action is pending or the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a witness to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification, the court shall require the refusing party or witness and the party or attorney advising the refusal or both of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amout of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.~~

37.01 Motion for Order Compelling Discovery

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions propounded or submitted under Rule 30 or Rule 31, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

Comment

Rule 37 contains all rules applicable to motions to compel further discovery and for sanctions involving a failure to make proper discovery. The procedure of amended Rule 33 imposes an obligation upon the inquiring party to move for an order under Rule 37 if an objection is made or if the response is not sufficient. In like measure, amended Rule 34 has eliminated the requirement of a court order before a party was required to produce documents and establishes a procedure under Rule 37.01 to compel production in the event that a party fails to make proper disclosure after a request under Rule 34.

The Advisory Committee believes that it is generally desirable for the court in which the action is pending to make all orders and impose all sanctions regarding discovery. The exception to that practice should relate to the need for immediate determination of legal issues arising during the taking of depositions. In recognition of this fact, the Advisory Committee amendments impose a limitation on recourse to courts in counties other than the court in which the action is pending by providing that courts in the county where the deposition is being taken is limited to making orders on matters relating to defendant's failure to answer questions propounded or submitted under Rule 30 or Rule 31.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a corporation or other entity fails to make a designation under Rule 30.02 (6) or Rule 31.01, or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before

he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26.03.

Comment

This rule is substantially identical to the existing Rule 37.01. The rule has been expended in scope in recognition of the amendments made in Rule 33 and Rule 34. The second paragraph of the proposed rule now provides that the court in addition to denying a motion in whole or in part may make a protective order similar to an order made on motion under Rule 26.03.

It must be noted that the rule now speaks of a "failure" to answer questions, etc. rather than a "refusal." Wilfulness has been eliminated as a controlling factor in court review of discovery motions by this change of language.

(3) Evasion or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

Comment

This new provision resolves an open question under the existing rules. An evasive warning or incomplete answer now is considered a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Comment

A change in procedure is recommended in this rule. Under the existing Minnesota Rule 37.01 the court is permitted to award reasonable expenses if the motion was made "without substantial justification." Under the proposed amendment the rule now provides that expenses are to be awarded unless the court finds that the opposition to the motion was "substantially justified" or that the making of the motion was "substantially justified." The purpose for this amendment is to encourage courts to make more frequent use of the provisions for awarding expenses. The amended rule also preserves a desirable flexibility by providing that the court may refuse to award expenses in circumstances where such an award appears unjust. In addition, the last paragraph provides that the court may apportion expenses in a situation where the motion is granted in part and denied in part.

37.02 Failure to Comply with Order

(1) ~~Contempt.~~ Sanctions by Court in County Where Deposition is Taken. If a ~~party~~ deponent ~~or other witness refuses~~ fails to be sworn or ~~refuses~~ to answer any a question after being directed to do so by the court in the county in which the deposition is being taken, the ~~refusal~~ failure may be considered a contempt of the that court ~~making the order or the court in which the action is pending.~~

Comment

The rule is substantially identical to the former Rule 37.02 (1) except the word "refuse" has been changed to "fail" to remove the concept of wilfulness as a consideration in imposing the sanctions.

(2) ~~Other Consequences.~~ Sanctions by Court in Which Action is Pending. If any a party or an officer, director or managing agent of a party or a person ~~refuses~~ designated under Rule 30.02 (6) or Rule 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under ~~Rule 37.01~~ subdivision 37.01 of this rule ~~requiring him to answer designated questions, or an order made under Rule 34, or an order made under~~ or Rule 35, the court in which the action is pending may make such orders in regard to the ~~refusal~~ failure as are just, and among others the following:

(a) An order that the matters regarding which the ~~questions were asked, or the character or description of the thing or land, or the contents of the paper, or the mental or physical or blood condition sought to be examined,~~ order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing ~~in evidence designated documents or things or items of testimony, or from introducing evidence of mental or physical or blood condition sought to be examined~~ designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment

by default against the disobedient party;

~~(c)~~ (d) In lieu of any of the foregoing orders or in addition thereto, an order ~~directing the arrest of any party or agent of a party for disobeying any of such orders~~ treating as a contempt of court the failure to obey any orders except an order to submit to ~~mental or physical or blood~~ a physical or mental examination.

~~(d)~~ (e) Where a party has failed to comply with an order under Rule 35.01 requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this ~~rule~~ subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Comment

The proposed amendment is substantially identical to the previous Rule 37.02 (2). The rule has been modified to provide a "failure" to make discovery rather than a "refusal" to make discovery. In the first sentence of this rule, the Advisory Committee has eliminated the word "employee" following the word "director" in order to limit the application of the sanction to those situations where a person with sufficient authority to speak on behalf of the party is involved.

Sub-paragraph (c) now permits the imposition of sanctions upon a party when a party has failed to comply with an order to produce a third person for examination under Rule 35.

37.03 Expenses on ~~Refusal~~ Failure to Admit

If a party, ~~after being served with a request under Rule 36~~ fails to admit the genuineness of any documents or the truth of any ~~matters of fact, serves a sworn denial thereof~~ matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of ~~any such~~ the document or the truth of any such matter ~~of fact~~, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. ~~Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.~~ The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

Comment

The proposed amended Rule 37.03 is substantially identical to the existing Minnesota Rule 37.03. The rule as proposed clarifies an ambiguity existing in the present rule which does not specifically provide sanctions where a party fails to admit as requested under Rule 36 on the basis of an inability to admit or deny due to lack of knowledge or information. As amended, the rule imposes the same obligation upon the party in the latter situation as in the sworn denial situation.

37.04 Failure of Party to Attend at Own Deposition or Serve Answers

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30.02 (6) or Rule 31.01 to testify on behalf of a party ~~wilfully~~ fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or fails (2) to serve answers or objections to interrogatories submitted under Rule 33, ~~the court, on motion and notice, may~~

~~strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party,~~ after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (a), (b), and (c) of subdivision 37.02 (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26.03.

Comment

The rule as amended eliminates the requirement of wilfulness found in the former Rule 37.04. The rule has also been expanded to encompass orders under Rule 34. The court is specifically given authority to make such orders as may be "just" in addition to the specified sanctions. The last paragraph is added to impose upon the answering party an obligation to seek a protective order in the event that he believes the discovery sought is objectionable or otherwise invalid. No longer can a party remain silent and take no affirmative action when properly served with a notice of discovery.

The Advisory Committee has eliminated the word "employee" following the word "director" in this rule to conform to its recommendation in Rule 37.02 (2).

RULE 45 TO BE AMENDED AS FOLLOWS:

RULE 45. SUBPOENA

45.04 Subpoena for Taking Depositions; Place of Examination

(1) Proof of service of notice to take a deposition as provided in Rules 30.01 30.02 **and 31.01 or in 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 ~~evidence relating to any of the~~ 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 ~~30.02~~ 26.03 and ~~45.02~~ 45.04 (2).**

Comment

No change of substance is made in Rule 45.04 (1). The rule has been clarified to indicate that a subpoena duces tecum requires production of the designated books, documents, etc. and also permits inspection and copying of those documents. The Advisory Committee's proposal clarifies the rule by providing that the designated documents must contain "matters" within the scope of examination rather than "evidence" within the scope of examination permitted under Rule 26.02.

(2) 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 or, 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.

Comment

This rule is a new provision and is similar to the procedure available to parties required to produce documents for inspection under amended Rule 34 and amended Rule 30.02 (5).

~~(2)~~ (3) A resident of this state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the state may be required to attend in any county of the state.

Comment

The rule as proposed is identical to the former Rule 45.04 (2).

RULE 69 TO BE AMENDED AS FOLLOWS:

RULE 69. EXECUTION

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with M.S.A. 1949 1971, c. 550. In aid of the judgment or execution, the judgment creditor, or his successor in interest when that interest appears of record, may ~~examine~~ obtain discovery from any person, including the judgment debtor, in the manner provided in these rules ~~for taking depositions~~.

Comment

The change provided in this rule is to make available to the judgment creditor all of the discovery procedures, not merely the procedure of depositions. In particular the rule will now permit application of the amended Rule 34.

FORM 19 TO BE AMENDED AS FOLLOWS:

FORM 19

~~MOTION~~ REQUEST FOR PRODUCTION OF DOCUMENTS, ETC., UNDER RULE 34

Plaintiff A.B. ~~moves the court for an order requiring~~ requests defendant C.D. to respond within ____ days to the following requests:

(1) ~~To~~ That defendant produce and ~~to~~ permit plaintiff to inspect and to copy each of the following documents:

[Here list the documents either individually or by category and describe each of them.]

[Here state the time, place, and manner of making the inspection and performance of any related acts.]

(2) ~~To~~ That defendant produce and permit plaintiff to inspect and to ~~photograph~~ copy, test, or sample each of the following objects:

[Here list the objects either individually or by category and describe each of them.]

[Here state the time, place, and manner of making the inspection and performance of any related acts.]

(3) ~~To~~ That defendant permit plaintiff to enter [here describe property to be entered] and to inspect and to photograph, test or sample [here describe the portion of the real property and the objects to be inspected ~~and photographed~~].

[Here state the time, place, and manner of making the inspection and performance of any related acts.]

~~Defendant C.D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved~~

~~in-this-action,-as-is-more-fully-shown-in-Exhibit-A-hereto-attached.~~

Signed: _____
Attorney for Plaintiff

Address: _____

Comment

The amendments conform Form 19 to changes made in Rule 34. This form may also be used under Rule 30.02 (5).

IT IS HEREBY ORDERED That a hearing be had before this court in the Circuit Court of Appeals Courtroom, Room 584, Federal Courts Building, St. Paul, Minnesota, on Friday, June 7, 1974, at 9:30 o'clock A.M., at which time the court will hear proponents or opponents of the proposed amendments.

IT IS FURTHER ORDERED That members of the bench and bar desiring to be heard shall file briefs or petitions setting forth their position and shall also notify the Clerk of the Supreme Court, in writing, on or before May 28, 1974, of their desire to be heard on the proposed amendments.

PROVIDED That if the court adopts said amendments to the rules, the same shall become effective on the date of their adoption.

Dated March 12, 1974

BY THE COURT

Robert J. Sheran
Chief Justice

SUPREME COURT
FILED
MAR 12 1974
JOHN McCARTHY
CLERK