ADM04-8001
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee on Rules of Civil Procedure

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

Final Report
March 19, 2007

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ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Summary of Committee Recommendations

The Court's Advisory Committee on Civil Rules of Procedure met twice during 2006 to consider developments affecting the civil rules, including recent amendments to the Federal Rules of Civil Procedure. The committee believes it is appropriate for the Court to amend a few of the rules to correct mistakes, clarify the rules, or, on the subject of electronic discovery, to modernize the rules by amending a number of the rules.

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

1. Rule 6 should be amended to clarify the rules for calculation of time.
2. The Court should adopt a new Rule 5A to require notice of challenges to constitutionality of statutes and abrogate the existing provision in Rule 24.04.
3. Rule 30.01 should be amended to correct a minor error.
4. Rule 45 should be amended in several ways to clarify its operation.
5. The discovery rules should be amended to provide for electronic discovery, generally adopting in Minnesota the amendments adopted for federal cases effective December 1, 2006.

Other Matters

The committee referred directly to the Court's advisory committee on the General Rules a question relating to the timing requirements for post-trial motions because the subject is presently governed directly by Minn. Gen. R. Prac. 115.01(c).

The committee is continuing to study Rule 68 and a complex set of issues relating to offers of judgment and settlement, and the effect they have in cases

where they are used. The committee intends to report to the Court as soon as it has a workable proposal ready.

Effective Date

The committee believes these amendments can be adopted, after published notice, and public hearing only if the Court determines a hearing is appropriate, in time to take effect as early as July 1, 2007.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
CIVIL PROCEDURE

Recommendation 1: Rule 6 should be amended to clarify the rules for calculation of time.

Introduction

Rule 6 should be amended in three important, although hardly dramatic, ways. First, Rule 6.01 should be amended so the rule applies unambiguously to Columbus Day and also to extend its operation to other national holidays. *See Commandeur, LLC v. Hartry*, 724 N.W.2d 508 (Minn. 2006) (Court finds service rule ambiguous as to Columbus Day in view of definitions in Minn. Stat. § 645.44, and right to serve by mail which doesn't operate on Columbus Day). This rule should also be clarified as to court closings, and the committee recommends replacing the current "court is inaccessible" test with a more precise one based on the court actually being closed. Rule 6.05 is amended to remove a potential ambiguity relating to service by mail. Rule 4.05 already limits service by mail to first-class mail; the revised Rule 6.05 makes it clear that the three additional days to respond to some documents served by mail applies only when they are served by United States Mail.

Specific Recommendation

Rule 6.01 & .05 should be amended as follows:

RULE 6. TIME

Rule 6.01. Computation

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act

to be done is the filing of a paper in court, a day on which weather or other conditions ~~have made~~ result in the closing of the office of the court administrator of the court where the action is pending ~~inaccessible~~, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

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

* * *

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

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

Advisory Committee Comment—2007 Amendment

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

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

Rule 6.05 is amended to make the rule definite as to what forms of service qualify as "service by mail." The rule as amended explicitly allows

three additional days only for service by United States Mail; the use of any other delivery or courier service does not constitute "United States Mail," and therefore does not qualify for additional time. This rule is now consistent with Minn. R. Civ. P. 5.05, which specifies "first-class mail" as the means for service by mail.

Recommendation 2: **The Court should adopt a new Rule 5A to require notice of challenges to constitutionality of statutes and abrogate the existing provision in Rule 24.04.**

Introduction

The Minnesota rules now provide for notice to the Minnesota Attorney General of actions in which the constitutionality of a state law is challenged. *See* Minn. R. Civ. P. 24.04. In 2006 the federal rules were amended to create a new Rule 5.1, which places the notice requirement into the sequence of rules dealing with threshold requirements in actions, such as service, pleading and similar steps.

The committee believes this location is a better one, as litigants often overlook the requirement of the existing rule, and the proposed amendment may serve to make that omission less likely. *See, e.g., Weston v. McWilliams & Associates, Inc.*, 716 N.W.2d 634, 640-41 (Minn. 2006) (Court reviewed issue relating to constitutionality of statute despite fact notice not given to the Attorney General as required by Minn. R. Civ. P. 24.04). The committee also believes the federal rule is a better formulation of the rule because it requires notice to the U.S. Attorney General for challenges to federal statutes. The new federal rule includes a duplicative requirement that the judge give notice as well (denominated as "certification" in the rule), sets a deadline to intervene, and also states that failure to give the required notice cannot result in a forfeiture of the litigant's right to litigate the constitutional challenge. The committee also believes that existing Rule 24 deals adequately with the process for intervention and that trial court discretion, guided by the decisions of this Court, adequately determines what consequences should fairly flow from failing to give the notice required by the rule.

Specific Recommendation

1. A new Rule 5A should be adopted as follows:

RULE 5A NOTICE OF CONSTITUTIONAL CHALLENGE TO A STATUTE

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

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

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

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

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

Advisory Committee Comment—2007 Amendment

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

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

2. Rule 24 should be amended to repeal Rule 24.04:

RULE 24. INTERVENTION

*** * ***

~~**Rule 24.04. Notice to Attorney General**~~

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

Advisory Committee Comment—2007 Amendment

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

Recommendation 3: Rule 30.01 should be amended to correct a minor error.

Introduction

Former Rule 30.02(b) was removed from the rules as part of amendments adopted in 1996. A vestigial reference to that rule and its notice procedure remains in Rule 30.01, however, and should now be removed. The former notice procedure is no longer a part of Minnesota practice.

Specific Recommendation

Rule 30.01 should be amended as follows:

Rule 30.01. When Depositions May Be Taken

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

Advisory Committee Comment—2007 Amendment

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

Recommendation 4: Rule 45 should be amended in several ways to clarify its operation.

Introduction

Rule 45 was amended extensively in 2005, effective January 1, 2006. The former rule created a procedure for issuance of a subpoena from the Minnesota courts for actions pending in other jurisdictions. *See* former Rule 45.04, abrogated effective January 1, 2006. The committee believes it is appropriate to reinstate a provision in the rules permitting use of a subpoena in Minnesota to compel discovery in an action pending in another jurisdiction. Proposed Rule 45.01(d) creates an express mechanism for issuance of subpoenas in Minnesota for discovery in cases pending in other jurisdictions. The procedure is consistent with the practice generally followed now.

Rule 45.01(e) is a new rule intended to make prominent the requirement of Rule 45.02(a), limiting the use of subpoenas to discovery where prior notice has been provided to all parties in the action. The existing provision has been obscure enough that lawyers have occasionally misunderstood this important requirement of notice.

Rule 45.02 provides for compensation of non-parties who receive subpoenas in civil cases, and requires the discovering party to arrange for that compensation not later than the time the witness is required to appear. Because the rule was not amended to set a deadline for situations now allowed by Rule 45.03(b) where the production of documents can be required without producing a witness, no explicit deadline exists for arranging for compensation in that situation. The committee believes Rule 45.02 should be clarified to make the deadline "prior to the time of commanded production," essentially the same as for the appearance to testify where that is required.

Specific Recommendation

Rules 45.01 and .02 should be amended as follows:

RULE 45. SUBPOENA

Rule 45.01. Form; Issuance

(a) Form.

Every subpoena shall

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

(2) state the title of the action, the name of the court in which it is pending, and its court file number, if one has been assigned; and

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

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

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

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

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

(d) Subpoena for Taking Deposition, Action Pending in Foreign Jurisdiction. A subpoena for attendance at a deposition to be taken in Minnesota for an action pending in a foreign jurisdiction may be issued by the court administrator or by an attorney admitted to practice in Minnesota in the name of the court for the county in which the deposition will be taken, provided that the deposition is allowed and has been properly noticed under the law of the jurisdiction in which the action is pending. 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 that constitute or contain matters within the scope of the examination permitted by the law of the jurisdiction in which the action is pending, but in that event, the subpoena will be subject to the provisions of Rules 26.03 and 45.03(b)(2).

(e) Notice to Parties. Any use of a subpoena, other than to compel attendance at a trial, without prior notice to all parties to the action, is improper and may subject the party or attorney issuing it, or on whose behalf it was issued, to sanctions.

Rule 45.02. Service

* * *

(d) Compensation of Subpoenaed Person. The party serving the subpoena shall make arrangements for reasonable compensation as required under Rule 45.03(d) prior to the time of commanded production or the taking of such testimony. If such reasonable arrangements are not made, the person subpoenaed may proceed under Rule 45.03(c) or 45.03(b)(2). The party serving the subpoena may, if objection has been made, move upon notice to the deponent and all parties for an order directing the amount of such compensation at any time before the

taking of the deposition. Any amounts paid shall be subject to the provisions of Rule 54.04.

Advisory Committee Comment—2007 Amendment

Rule 45.01 is amended to add a process, in Rule 45.01(d), for issuance of a subpoena to compel attendance in Minnesota at a deposition in an action pending in another jurisdiction. The procedure in this section essentially follows that contained in former Rule 45.04(a), which was abrogated in 2005.

Rule 45.01(e) is a new rule intended to clarify the existing rule because of continuing confusion over the need to provide notice to all parties before issuance of a subpoena for pretrial discovery. Existing Rule 45.02(a) explicitly requires notice, but that provision has been overlooked in a number of instances reported to the advisory committee. Accordingly, Rule 45.01(e) is included to make the requirement of notice more prominent and to make it clearly apply to every use of a subpoena prior to trial. The rule does not specify the form of notice required, but it would normally be accomplished by providing either a copy of the subpoena at the time it is served on the non-party or by unambiguous notice in some other way that a non-party is being subpoenaed.

Rule 45.02(d) is amended to establish an explicit deadline for making arrangements for compensation by a party receiving a subpoena that requires only the production of documents without a deposition. By adding the words "commanded production or" to the first sentence, the rule applies explicitly to this situation, and establishes the same deadline as for a deposition.

Recommendation 5: **The discovery rules should be amended to provide for electronic discovery, generally adopting in Minnesota the amendments adopted for federal cases effective December 1, 2006.**

Introduction

Electronic discovery has become ubiquitous, and is involved in a wide variety of civil cases. Although the existing rules allow for discovery of information in electronic form as "documents," (and courts would recognize that term to include electronic records in most cases), the rules do not provide any guidance on the special needs of electronic discovery. Litigants and courts have become increasingly aware of issues relating to electronic discovery, and the existing rules are notably deficient in providing for it. That is not to say the courts cannot deal with electronic discovery under the existing rules—the power undoubtedly exists to do so. The recommended rules provide trial courts with guidance and "default rules" for determining some of the basic issues that frequently arise in dealing with electronic discovery.

The federal rules were amended in 2006, effective December 1, 2006. The most important of these amendments encompass a group of changes to the discovery rules to provide for electronic discovery. Specifically, the federal counterparts to Rules 16, 26, 33, 34, 37, and 45 were each amended in 2006. The federal rule amendments are described in greater detail in Wayne S. Moskowitz, *Electronic Discovery under the New Federal Rules*, 63 BENCH & BAR OF MINN., Dec. 2006, at 14.

The committee strongly recommends adoption of these rules. A significant minority of the committee has concerns about the "safe harbor" provision comprising new Rule 37.05. These members' concerns include the view that a special rule on spoliation of evidence is not needed for electronic evidence and that this rule might provide too much shelter for failing to act to preserve

evidence. The majority view is that the rule is a measured, limited "safe harbor," applying only to limit sanctions under the rules and to conduct that is both in good faith and pursuant to the routine operation of an electronic system. The majority also sees some value in having the rules adopted as a group, and in having the language follow the federal rules.

Specific Recommendation

Rules 16, 26, 30, 33, 34, 37, and 45 (as a single group) should be amended as follows:

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

* * *

Rule 16.02. Scheduling and Planning

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

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

(b) to file and hear motions; and

(c) to complete discovery.

The scheduling order also may include

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

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

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

(~~e~~g) any other matters appropriate in the circumstances of the case.

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

* * *

Advisory Committee Comment—2007 Amendment

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

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

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Rule 26.02. Discovery, Scope and Limits

* * *

(b) Limitations.

(1) The court may establish or alter the limits on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. ~~The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the~~

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

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

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

(3) The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the

proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

* * *

(e) Claims of Privilege or Protection of Trial Preparation Materials.

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

(2) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

* * *

Advisory Committee Comment—2007 Amendment

Rule 26.02(b)(2) is a new provision that establishes a two-tier standard for discovery of electronically stored information. The rule makes information that is not "readily accessible because of undue burden or cost" not normally discoverable. This rule is identical to its federal counterpart, adopted in 2006. The rule requires that it be identified in response to an appropriate request, but

if it is identified as "not reasonably accessible," it need not be produced in the absence of further order. It is not strictly exempt from discovery, as the court may, upon motion that "shows good cause," order disclosure of the information. The rule explicitly authorizes the court to impose conditions on any order for disclosure of this information, and conditions that either ease the undue burden or minimize the total cost or cost borne by the producing party would be appropriate.

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

Rule 26.06. Discovery Conference

At any time after service of the summons, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

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

(b) A proposed plan and schedule of discovery;

(c) Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(d) Any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order.

(~~c~~e) Any limitations proposed to be placed on discovery;

(~~d~~f) Any other proposed orders with respect to discovery; and

(~~e~~g) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matter set forth in the motion. All parties and attorneys are under a duty to participate in good faith in the framing of any proposed discovery plan.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after the service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

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Advisory Committee Comment—2007 Amendment

Rule 26.06 is amended to add to the required provisions in a motion for a discovery conference. These changes require the party seeking a discovery conference to address electronic discovery issues, but do not dictate any particular resolution or conference agenda for them. Many cases will not involve electronic discovery issues, and there is no need to give substantial attention to them in a request for a conference under this rule.

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RULE 33. INTERROGATORIES TO PARTIES

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Rule 33.03. Option to Produce Business Records

Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon

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

* * *

Advisory Committee Comment—2007 Amendment

The amendment to Rule 33.03 in 2007 is simple but important. The existing rule allows a party to respond to an interrogatory by directing the requesting party to discover the information from designated documents. The amended rule does not change this procedure, but simply allows the responding party to designate electronic records from which the requested information can be obtained.

RULE 34. PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

Rule 34.01. Scope

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect and copy, test, or sample any designated documents or electronically stored information ~~(~~including writings, drawings, graphs, charts, photographs, sound recordings, images, phono records, and other data or data~~,~~ compilations

stored in any medium from which information can be obtained—, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any designated 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.

* * *

Advisory Committee Comment—2007 Amendment

Rule 34.01 is amended to make two changes. First, the rule explicitly applies to "electronically stored information" ("ESI") as well as other forms. A more important change is to add provisions allowing the discovering party to require production of information for the purposes of testing or sampling. Testing and sampling are important tools in managing discovery, particularly discovery of ESI. Testing and sampling allow a party to inspect a small subset of requested information to determine whether it is worth conducting additional or broader discovery. These tools may be useful to the court in determining whether to allow additional discovery or discovery of information that is not reasonably accessible, as defined in Rule 26.02(b)(2).

Rule 34.02. Procedure

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

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a

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

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

(a) A party who produces documents for inspection shall produce them as they are kept in the usual course of business at the time of the request or, at the option of the producing party, shall organize them to correspond with the categories in the request.

(b) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(c) A party need not produce the same electronically stored information in more than one form.

* * *

Advisory Committee Comment—2007 Amendment

Rule 34.02 is amended to establish presumptive rules for the procedural aspects of discovery of electrically stored information. These include allowing the party seeking discovery to specify the form or medium for response,

providing a default rule that applies if the request does not specify a form, and making it clear that a party does not need to produce information in more than one form.

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

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Rule 37.05. Electronically Stored Information

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

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Advisory Committee Comment—2007 Amendment

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

RULE 45. SUBPOENA

Reporter's Note: This version of Rule 45 does not include the changes recommended in Recommendation 4 above. If both Recommendation 4 and this Recommendation 5 are adopted, the amendments should be merged into a single rule and Advisory Committee Comment.

Rule 45.01. For Attendance of Witnesses; Form; Issuance

(a) Form.

Every subpoena shall

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

(2) state the title of the action, the name of the court in which it is pending, and its court file number, if one has been assigned; and

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

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

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

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

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

Reporter's Note: Rule 45.01(d) is not currently in effect: it is recommended for adoption in Recommendation 4, above, as an entirely new rule. The redlining below shows only the additional language recommended as part of these electronic discovery amendments.

(d) Subpoena for Taking Deposition, Action Pending in Foreign Jurisdiction. A subpoena for attendance at a deposition to be taken in Minnesota for an action pending in a foreign jurisdiction may be issued by the court administrator or by an attorney admitted to practice in Minnesota in the name of the court for the county in which the deposition will be taken, provided that the deposition is allowed and has been properly noticed under the law of the jurisdiction in which the action is pending. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, electronically stored information, or tangible things that constitute or contain matters within the scope of the examination permitted by the law of the jurisdiction in which the action is pending, but in that event, the subpoena will be subject to the provisions of Rules 26.03 and 45.03(b)(2).

Rule 45.02. Service

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

and things or inspection of premises, copying, testing, or sampling before trial shall be served on each party in the manner prescribed by Rule 5.02.

* * *

Rule 45.03. Protection of Persons Subject to Subpoenas

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(b) Subpoena for Document Production Without Deposition.

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

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

a party or an officer of a party from significant expense resulting from the inspection, ~~and~~ copying, testing, or sampling commanded.

* * *

Rule 45.04. Duties In Responding To Subpoena

(a) (1) Form of Production. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) Form Not Specified. If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(3) No Duty to Produce in More Than One Form. A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(4) Electronically Stored Information That Is Not Reasonably Accessible. A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26.02(b)(3). The court may specify conditions for the discovery.

(b) (1) Claims of Privilege. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a

description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(2) Privilege Claims Asserted After Production. If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

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Advisory Committee Comment—2007 Amendment

Rule 45 is amended to include provisions for use of subpoenas to obtain discovery of electronically stored information. These amendments relate to the discovery of electronically stored information, and generally just incorporate into Rule 45 for subpoena practice the procedures of Rules 26, 30, 33, 34, and 37 for discovery from parties.

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