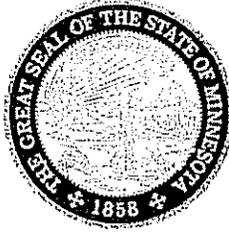


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CARVER, DAKOTA, GOODHUE, LE SUEUR
MCLEOD, SCOTT AND SIBLEY COUNTIES

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STATE OF MINNESOTA
FIRST JUDICIAL DISTRICT

OFFICE OF
APPELLATE COURTS

DEC 26 2007

FILED

December 26, 2007

Chief Justice Russell Anderson
Minnesota Supreme Court
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Justice Paul H. Anderson
Minnesota Supreme Court
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Dear Chief Justice Anderson and Associate Justice Anderson:

The Supreme Court Advisory Committee on Rules of Criminal Procedure submits the attached Report and Proposed Amendments to the Minnesota Rules of Criminal Procedure. The Committee does not believe there is a need for the Supreme Court to hold a public hearing on the proposed amendments, but does recommend that the report and proposals be published for written comment.

Sincerely,

Robert F. Carolan

Chair, Supreme Court Advisory Committee on Rules of Criminal Procedure

Encl.

**REPORT AND PROPOSED AMENDMENTS TO THE
MINNESOTA RULES OF CRIMINAL PROCEDURE**

**MINNESOTA SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CRIMINAL PROCEDURE**

CX-84-2137

December 26, 2007

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Hon. Paul H. Anderson
Supreme Court Liaison

Philip Marron
Reporter

Kelly Lyn Mitchell
Staff Attorney

INTRODUCTION

As directed by the Supreme Court, the Advisory Committee on Rules of Criminal Procedure has met regularly and continued to monitor and to hear and accept comments concerning the Rules of Criminal Procedure. The following report summarizes the issues considered by the committee and the recommended changes to the Criminal Rules of Procedure. The report narrative is organized by topic and the proposed amendments are organized by rule number.

DISCOVERY PROVISIONS

The committee addressed several issues relating to discovery.

a. Exculpatory Evidence in Misdemeanor Cases. The committee noted that the disclosure requirements for misdemeanor cases, which are currently located in Rule 7, do not include a requirement to disclose exculpatory (*Brady*) evidence. The committee proposes amending Rule 7.04 to incorporate this requirement, and has patterned its proposal on the language currently in the disclosure requirements for felony and gross misdemeanor cases in Rule 9.

b. Expert Opinions. The committee reviewed the disclosure requirements in Rule 9 for examinations and tests, and found that the language did not adequately address expert opinions that will be delivered by oral testimony in court. In those cases, the parties need to know the expert's qualifications, the type of analysis conducted, and a summary of the content of the expert's testimony. The committee proposes amending Rules 9.01, subd. 1(4), and 9.02, subd. 1(2) to address this gap.

c. Witness Statements. During the course of this reporting cycle, a member requested that the committee consider amending Rule 9 to return to reciprocal discovery obligations. In Rule 9.01, the prosecutor is required to disclose the "substance" of interviews with witnesses whereas in Rule 9.02, the defense is only required to disclose "written summaries" of interviews. The difference in how these disclosure obligations are worded allows room for argument by the defense that the substance of a particular interview need not be disclosed because it has not been summarized in written form. The committee agreed the disclosure requirement in Rule 9.02 should be amended to be more similar to the disclosure requirement in Rule 9.01. However, though there was quick agreement that the expanded disclosure requirement should be applicable to statements made by witnesses the defense intends to call at trial, the committee engaged in a lengthy debate as to whether the defense should also be required to disclose the substance of statements made by prosecution witnesses to defense counsel or a defense investigator. Proponents of the requirement argued that the defense has no right of surprise, and that fundamental fairness requires disclosure. Opponents of the requirement argued that the information obtained from such interviews could implicate the 5th and 6th Amendments and raise impeachment issues (e.g., the interview could reveal that the defendant committed another crime or that the defendant has been telling different versions of the story), and that the requirement would chill the defense's investigation such that defense counsel would not interview prosecution witnesses to prevent discovery of anything harmful to the defense's case that would then have to be disclosed. The committee proposes amending Rule 9.02, subd. 1(3)(b) relating to disclosure of statements by persons whom the defense intends to call at trial, but does not propose amending the rules to require disclosure of statements made by

prosecution witnesses the defense does not intend to call at trial. The addition of the language “or persons participating in the defense” is intended to cover statements obtained by investigators.

d. Omnibus Witnesses. Though the rules currently require disclosure for witnesses who will be called at trial, there is no similar disclosure requirement for witnesses who will be called at the omnibus hearing for pretrial evidentiary issues. The committee proposes adding a subdivision to Rule 10.04 to incorporate this requirement.

FACSIMILE FILING

In 2006, the Minnesota Rules of Civil Procedure were amended to provide that when documents are filed by facsimile, the originals need not be filed, and to provide for a fax filing fee. The amendments to the Civil Rules created a conflict with the Minnesota Rules of Criminal Procedure because Rules 33.04 and 33.05, which relate to the filing of documents in criminal cases, reference the Civil Rules. Minn. R. Crim. P. 33.05 requires the original to be filed subsequent to facsimile filing of orders, warrants, and supporting documentation. Minn. R. Crim. P. 33.04(a) repeats the requirement to file warrants and supporting documentation with the court but states that the papers shall be filed as provided in the Civil Rules. Because of the liberty interests at stake in criminal cases, and in order to deter the possibility of forgery, the committee determined that in this context the rules should continue to require that the original be filed subsequent to a facsimile filing, and proposes amending Rules 33.04 and 33.05 accordingly. The committee noted, however, the rules will soon need to be amended to recognize electronic filing, but recognized in that case there will be security measures in place to address the potential for forgery.

DATA ELEMENTS FOR CRIMINAL COMPLAINT

The Minnesota Judicial Branch and CriMNet are currently engaged in eFiling and eCharging projects, respectively, that will allow for the electronic transmission of the criminal complaint and juvenile delinquency petition from the prosecutor to the court. To facilitate these projects, both entities needed to identify the required data elements of the criminal complaint and juvenile petition. This process was completed with regard to the criminal complaint in 2005, and pursuant to existing Minn. R. Crim. P. 2.03, the State Court Administrator’s Office issued Uniform Court Practice (UCP) #171, and published a list of administrative information that must be included on the complaint along with the required legal content (http://www.mncourts.gov/documents/0/Public/Justice_Agency/171_V5_Changes_to_Criminal_Complaint.doc). UCP #171 clarifies that the content rather than the form and appearance of the criminal complaint is the critical information. To conform to that result, the committee proposes amending Rules 2 and 17, and removing Criminal Forms 1, 3, and 6, and Mandatory Felony and Gross Misdemeanor Complaint and Indictment Forms A-J.

Respectfully Submitted,

ADVISORY COMMITTEE ON
RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Supreme Court Advisory Committee on Rules of Criminal Procedure recommends that the following amendments be made in the Minnesota Rules of Criminal Procedure. In the proposed amendments, except as otherwise indicated, deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

1. Amend Rule 2.01 as follows:

Rule 2.01 Contents; Before Whom Made

Subdivision 1. Contents. The complaint is a written signed statement of the essential facts constituting the offense charged. Except as provided in Rules 6.01, subd. 3, 11.06, and 15.08, the facts establishing probable cause to believe that an offense has been committed and that the defendant committed it must be set forth in writing in the complaint, and may be supplemented by supporting affidavits or by sworn testimony of witnesses taken before the issuing judge or judicial officer. The complaint must otherwise conform to the requirements of Rule 17.02.

Subd. 2. Before Whom Made. Except as provided in Rules 11.06 and 15.08, ~~it shall~~the complaint must be made upon oath before a judge or judicial officer of the district court, ~~clerk or deputy clerk of court~~ administrator, or notary public.

Subd. 3. How Made. ~~Except as provided in Rules 6.01, subd. 3, 11.06 and 15.08, the facts establishing probable cause to believe that an offense has been committed and that the defendant committed it shall be set forth in writing in the complaint, and may be supplemented by supporting affidavits or by sworn testimony of witnesses taken before the issuing judge or judicial officer. If sworn testimony is taken, a note so stating shall~~must be made on the face of the complaint by the issuing officer. The testimony ~~shall~~must be recorded by a reporter or recording instrument and ~~shall~~must be transcribed and filed. ~~Upon the information presented, the judge or judicial officer shall determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it. When the offense alleged to have been committed is punishable by fine only, the determination of probable cause may be made by the clerk or deputy clerk of court if authorized by court order.~~

Any complaint, supporting affidavits, or supplementary sworn testimony made or taken upon oath before the issuing judge or judicial officer pursuant to this rule may be made or taken by telephone, facsimile transmission, video equipment, or similar device at the discretion of such judge or judicial officer.

Subd. 4. Probable Cause Determination. Upon the information presented, the judge or judicial officer must determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it. When the offense alleged to have been committed is punishable by a fine only, the determination of probable cause may be made by the court administrator if authorized by court order.

2. **Repeal Rule 2.03:**

Rule 2.03. Complaint Forms—Felony or Gross Misdemeanors

~~For all complaints charging a felony or gross misdemeanor offense the prosecuting attorney or such judge or judicial officer authorized by law to issue process pursuant to Rule 2.02 shall use an appropriate form authorized and supplied by the State Court Administrator or a word processor produced complaint form in compliance with the supplied form and approved by Information Systems Office, State Court Administration. If for any reason such form is unavailable, failure to comply with this rule shall constitute harmless error under Rule 31.01.~~

3. **Amend the second paragraph and remove the last two paragraphs of the comments to Rule 2:**

~~By Rule 2.01, the complaint shall~~must~~ consist of a written signed statement of the essential facts constituting the offense charged. This language is taken from F.R.Crim.P. 3. (Present Minnesota statutory law (Minn. Stat. §§ 629.42, 633.03 (1971)) simply provides for the complaint of an offense to be reduced to writing, but does not specify what the complaint shall contain.)—The complaint shall~~must~~ otherwise conform to the provisions of Rules 17.02, 17.03. Minn. Stat. §§ 487.25, subd. 3; 488A.10, subd. 3, and 488A.27, subd. 3 govern the procedure for the issuance of complaints in the County Courts, Hennepin County Municipal Court and St. Paul Municipal Court, respectively, but also do not specify what the complaint shall contain.~~

* * *

~~Rule 2.03 requires the use by the prosecuting attorney, judge or judicial officer of the uniform complaint forms supplied by the State Court Administrator when charging a felony or gross misdemeanor offense. All efforts shall be made to obtain and implement these forms, but in the event the form is unavailable at the time the offense is charged, failure to use the specific form is to constitute harmless error under Rule 31.01.~~

~~Exemplary copies of the mandatory forms are contained in the general form~~

~~section of these Rules.~~

4. **Amend Rule 7.04 as follows:**

Rule 7.04 Completion of Discovery

Before the date set for the Omnibus Hearing, in felonies and gross misdemeanor cases, the ~~prosecution~~prosecutor and defendant ~~shall~~must complete the discovery that is required by Rules 9.01 and ~~Rule~~-9.02 to be made without the necessity of an order of court.

In misdemeanor cases, ~~before arraignment or at any time before trial, without order of the court the prosecuting attorney~~prosecutor must, on request of the ~~defendant or defense counsel shall~~, prior to arraignment or at any time before trial, permit the defendant or defense counsel to inspect the police investigatory reports without a court order. Upon request, the prosecutor must also disclose any material or information within the prosecutor's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged. ~~Upon~~After arraignment and upon request, the defendant or defense counsel ~~also shall~~must be entitled to ~~receive~~provided a reproduction of the police investigatory reports ~~after the arraignment~~. Any other discovery must be by consent of the parties or by motion to the court.

~~This~~The obligation to provide a reproduction of the police investigatory reports discovery after arraignment may be satisfied by any method that provides to the defendant or defense counsel an exact reproduction of ~~such~~the reports, including E-mail, facsimile transmission, or similar method if that method is available to both parties. A reasonable charge may be made to cover the actual costs of reproduction, ~~unless~~No fee can be charged if:

(1) the defendant is represented by the public defender or an attorney working for a public defense corporation under Minn. Stat. § 611.216; or

(2) is determined by the a court determines the defendant to be financially unable to obtain counsel pursuant to under Rule 5.02. Any other discovery shall be by consent of the parties or by motion to the court.

5. **Amend Rule 9.01, subd. 1(4) as follows:**

(4) Reports of Examinations and Tests and Other Expert Opinions. The prosecuting attorney ~~shall~~must disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connections with the particular case. A person who will testify as an expert but who created no results or reports in connection with the

particular case must provide to the prosecutor for disclosure to defense counsel a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications. The prosecuting attorney ~~shall~~must allow the defendant to have reasonable tests made. If a scientific test or experiment of any matter, except those conducted under Minnesota Statutes, chapter 169, may preclude any further tests or experiments, the prosecuting attorney ~~shall~~must give the defendant reasonable notice and an opportunity to have a qualified expert observe the test or experiment.

6. Amend Rule 9.02, subd. 1(2) as follows:

(2) *Reports of Examinations and Tests and Other Expert Opinions.* The defendant ~~shall~~must disclose and permit the prosecuting attorney to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments and comparisons made in connections with the particular case within the possession or control of the defendant which the defendant intends to introduce into evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to testimony of the witness. A person who will testify as an expert but who created no results or reports in connection with the particular case must provide to defense counsel for disclosure to the prosecutor a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications.

7. Amend Rule 9.02, subd. 1(3)(b) as follows:

(b) *Statements of Defense and Prosecution Witnesses.* The defendant ~~shall~~must permit the prosecuting attorney to inspect and reproduce any relevant written or recorded statements of the persons whom the defendant intends to call as witnesses at the trial and also statements of prosecution witnesses obtained by the defendant, defense counsel, or persons participating in the defense, and which are within the possession or control of the defendant and ~~shall~~must permit the prosecuting attorney to inspect and reproduce any written summaries within the defendant's knowledge of the substance of any oral statements made by such witnesses to defense counsel or persons participating in the defense or obtained by the defendant at the direction of defense counsel. The defendant must provide the prosecuting attorney with the substance of any oral statements by persons whom the defendant intends to call as witnesses at the trial that relate to the case made to defense counsel or persons participating in the defense. This provision does not require disclosure of statements made by the defendant to defense counsel or agents of defense counsel that are protected by the attorney-client privilege or by state or federal constitutional guarantees.

8. **Amend paragraph 32 of the comments to Rule 9 as follows:**

Rule 9.02, subd. 1(3)(b) for disclosure of the statements of defense trial witnesses also follows the parallel prosecution disclosure Rule 9.01, subd. 1(1)(a). Rule 9.02, subd. 1(3)(b), which requires the defense to disclose statements of defense and prosecution witnesses, does not require the disclosure of a defendant's statements made to defense counsel or agents of defense counsel where such information is protected by state and federal constitutional guarantees or the attorney-client privilege. See Minn. Stat. § 595.02, subd. 1(b). The provision in this rule that defense counsel and the defendant disclose the substance of any oral statements obtained from persons whom the defendant intends to call at the trial is not intended to support a claim that if counsel or the defendant interviewed the witness without a third party present that the lawyer can be disqualified in order to testify to any discrepancy between the oral statement disclosed and trial testimony, or that if the defendant declines to testify to any such discrepancy the witness's testimony should be stricken. Other solutions should be sought, such as stipulating to what the witness said that is in dispute.

9. **Insert a new subdivision 3 in Rule 10.04 as follows:**

Subd. 3. Discovery. A party intending to call witnesses at a motion hearing must disclose them at least three days before the hearing and must comply with Rule 9 as if the witnesses were to be called at the trial.

10. **Amend Rule 17.02 as follows:**

Rule 17.02 Nature and Contents

Subd. 1. Complaint. A complaint ~~shall~~must be substantially in the form prescribed by Rule 2.

Subd. 2. Indictment. An indictment ~~shall~~must contain a written statement of the essential facts constituting the offense charged. It ~~shall~~must be signed by the foreperson of the grand jury.

Subd. 3. Indictment and Complaint. The indictment or complaint ~~shall~~must state for each count the citation of the statute, rule, regulation or other provision of law ~~which~~ the defendant is alleged to have violated. Error in the citation or its omission ~~shall~~must not be ground for dismissal or for reversal of a conviction if the error or omission did not prejudice the defendant. Each count ~~may~~can charge only one offense. Allegations made in one count may be incorporated by reference in another count. An indictment or complaint may, but need not, contain counts for the different degrees of the

same offense, or for any of such degrees, or counts for lesser or other included offenses, or for any of such offenses. The same indictment or complaint may contain counts for murder, and also for manslaughter, or different degrees of manslaughter. When the offense may have been committed by the use of different means, the indictment or complaint may allege in one count the means of committing the offense in the alternative, or that the means by which the defendant committed the offense are unknown.

Subd. 4. Administrative Information. The indictment or complaint must also contain other administrative information as authorized and published by the State Court Administrator.

Subd. 45. Bill of Particulars. The bill of particulars is abolished.

~~**Subd. 5. Indictment and Complaint Forms—Felony and Gross Misdemeanors.** For all indictments and complaints charging a felony or gross misdemeanor offense the prosecuting attorney or such judge or judicial officer authorized by law to issue process pursuant to Rule 2.02 shall use an appropriate form authorized and supplied by the State Court Administrator or a word processor produced complaint or indictment form in compliance with the supplied form and approved by Information Systems Office, State Court Administration. If for any reason such form is unavailable, failure to comply with this rule shall constitute harmless error under Rule 31.01.~~

11. Amend the comments to Rule 17 by adding a new fifth paragraph as follows:

The required legal content of the complaint and indictment is set forth in Minn. R. Crim. P. 2.01, 2.02, and 17.02, and serves the function of informing the court of the offense(s) charged and the facts establishing probable cause. In addition to this legal information, the court requires administrative information to identify the defendant and the case, as well as additional factual information about the defendant or the status of the defendant's case to fulfill the court's statutory obligations to provide such information to other agencies. There is no requirement that the complaint or indictment be submitted to the court in any particular form or format. Rule 17.02, subd. 4 requires the State Court Administrator to identify and publish the administrative content of the complaint or indictment required by the courts. A sample complaint/indictment and a listing of the administrative content approved by the State Court Administrator will be published on the Minnesota Judicial Branch website. This flexibility will allow for e-filing of the complaint or indictment.

12. **Amend Rule 33.04(a) as follows:**

Rule 33.04 Filing

(a) ~~Except as provided in Rule 9.03, subd. 9, search~~Search warrants and search warrant applications, affidavits and inventories, ~~including statements of unsuccessful execution, and papers required to be served shall~~must be filed with the court ~~administrator~~. Papers shall~~must~~ be filed as ~~provided in civil actions, but the originals of papers filed by facsimile transmission must be filed as provided in Rule 33.05.~~

13. **Amend Rule 33.05 as follows:**

Rule 33.05 Facsimile Transmission

~~Facsimile transmission may be used for the sending of all complaints~~Complaints, orders, summons, warrants, and other documents ~~including orders and warrants authorizing the interception of communications pursuant to Minn. Stat. Ch. Minnesota Statutes, Chapter 626A, and arrest and search warrants. All procedural and~~may be sent via facsimile transmission. Procedural and statutory requirements for the issuance of a warrant or order ~~must be met, including the making of a record of the proceedings, shall be met. For all procedural and statutory purposes, a~~facsimile order or warrant issued by the court shall have~~has~~ the same force and effect as the original ~~for procedural and statutory purposes. The original order or warrant, along with any other documents, including and affidavits, shall~~must be delivered to the court administrator of the county in which the request or application ~~therefor was made. Any~~The original of any facsimile transmissions received by the court ~~shall~~must be ~~promptly filed as required by Rule 33.04 for the original of the document transmitted.~~

14. **Remove forms 1-3 and 6 in the "Criminal Forms" section following the Rules of Criminal Procedure.**

15. **Remove forms A-J (all forms) in the "Mandatory Felony and Gross Misdemeanor Complaint and Indictment Forms" section following the Rules of Criminal Procedure.**